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FROM

Clarence A. Bunker



THE ENCYCLOPÆDIA
OF
PLEADING AND PRACTICE,

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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

WATERWORKS AND WATER COMPANIES.—(See also **EMINENT DOMAIN**, vol. 6, p. 526; **GAS COMPANIES**, vol. 8, p. 1268; **MUNICIPAL CORPORATIONS**, vol. 15, pp. 1115, 1128; **TAXATION**, vol. 25, p. 5; **WATERCOURSES**, vol. 28, p. 943.)

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I. MUNICIPAL OWNERSHIP AND CONTROL OF WATERWORKS—1. Power to Erect and Operate.—Unless the power is conferred by legislative authority, a municipal corporation has no right to incur expenditures for public waterworks, for, as a creature of purely statutory existence, it can exercise no powers or rights other than

those conferred by statute, either expressly or by fair implication.¹ Waterworks for the supplying of cities and towns with water, are undoubtedly for public and municipal purposes, and the legislature may confer authority upon municipalities to erect and operate such works, or to purchase works already established, and to that end incur expenditures, levy taxes, issue bonds, and exercise the right of eminent domain.² This power has been held to be implied from the grant to a municipal corporation of the power to make all contracts which may be deemed necessary for the general welfare.³

1. See **MUNICIPAL CORPORATION**, vol. 15, p. 1039.

In *Pedrick v. Ripon*, 73 Wis. 622, it was held that a court of equity would not interfere to prevent the enforcement of a resolution to contract for waterworks, although wholly unauthorized, where nothing further had been done than the adoption of the resolution.

2. *Wayland v. Middlesex County*, 4 Gray (Mass.) 500; *Grant v. Davenport*, 36 Iowa 402; *Atty. Gen'l v. Eau Claire*, 37 Wis. 400; *State v. Babcock*, 19 Neb. 230; *Reddall v. Bryan*, 14 Md. 444; 74 Am. Dec. 550.

In *State v. Newark* (N. J. 1891), 40 Am. & Eng. Corp. Cas. 33, under an act authorizing a city to purchase waterworks, it was held that the purchase might be made by the city before the completion of the work for which it provides.

The power conferred must be exercised within the limits as prescribed by the act conferring it. In *Quincy v. Boston*, 148 Mass. 389, the statute authorizing the city of Boston to procure and distribute a supply of water, was held not to confer the right upon the city to convey water to Long Island, a small island situated three miles out in Boston Harbor.

Power of Committee to Introduce New and Expensive Works.—In *Nashville v. Hagan*, 9 Baxt. (Tenn.) 495, it was held that the power to make a contract for the introduction of a new and expensive improvement in a system of waterworks, being equivalent to the power to levy, collect, and disburse taxes, must be exercised in the same manner and by the same authority, that is, by a corporate act; and, in the absence of a general law or ordinance modifying this rule, a waterworks committee has no power to bind the corporation by a contract of this character.

Contract for Construction of Works Without Ordinance.—In *National Tube-Works Co. v. Chamberlain*, 5 Dakota 54, it was held that where the city had power to construct a system of waterworks, it was not necessary that its council, before entering into a contract with reference to it, should pass an ordinance authorizing the works to be constructed, or the contract to be made, when the charter did not require it.

Limitation of Time in Which Purchase May Be Made.—In *Ziegler v. Chapin*, 126 N. Y. 342, it was held that the power of a city to purchase the franchise and property of a waterworks company was limited to the same time allowed for its acquirement by condemnation, by a statute which authorized the city to purchase it, and at such price as might be agreed upon; and, in case of disagreement, conferred the express power to proceed within two years to acquire the property by condemnation proceedings.

Municipality Operating Waterworks as a Private Company.—In *Wolverhampton v. Bilston* (1891), 1 Ch. 315, where the undertaking of a waterworks company was transferred by statute to a borough, and the profits of the waterworks were, under a subsequent statute, to be transferred to the borough improvement fund, or, at the option of the corporation, to be applied in the reducing of prices to consumers, it was held that the corporation was a water company supplying water for its own profit.

3. In *Rome v. Cabot*, 28 Ga. 50, under such a general authority to make contracts, it was held that a city had the right to make contracts for the construction of waterworks.

In *Livingston v. Pippin*, 31 Ala. 542, it was held that a city council, having power to provide for the ordinary expenses of the town, had power to procure a supply of water in a public

Under authority to provide for a supply of water, a city may contract with a company for that purpose.¹ But an act authorizing a municipal corporation to enter into a contract with a party to supply the city, does not authorize the municipal authorities to erect works to be owned by the city.² A general statute conferring the power upon "all cities and incorporated towns" to construct waterworks, has been held to apply to cities acting under special charters, as well as to those under the general incorporation law.³

The proposition, whether or not the city shall erect a system of waterworks, may be left to the voters of the community.⁴ And where the legislature delegates to a municipal corporation the power "without limitation" to supply itself with water, the power rests in the discretion of the voters in respect to the amount to be expended therefor, if exercised in good faith and for proper municipal purposes.⁵

square, and were themselves the judges of the mode best calculated to accomplish that object, on the ground that nothing was more important as a sanitary and police regulation than an abundant supply of water.

In *Hardy v. Waltham*, 3 Met. (Mass.) 163, it was held that towns having, in their corporate capacity, power to provide for the purchase and maintenance of fire engines for the extinguishment of fires, must have the incidental power to make provision by reservoirs or other means for the supply of water, without which the engines would be useless. But in *National Foundry, etc., Works v. Oconto Water Co.*, 52 Fed. Rep. 33, although the charter of the city conferred powers belonging to municipal corporations at common law and contained a general welfare clause, it was held that the city had no power to confer a franchise for owning and operating waterworks. Jenkins, J., said: "It may be that, by virtue of its duty to care for the public health and safety, a city has the power to contract for a supply of water; but it cannot, without express legislative authority, construct, maintain, or operate waterworks."

1. See MUNICIPAL CORPORATIONS, vol. 15, pp. 1115, 1128.

2. *Green v. McClintock*, 45 Cal. 11.

3. *Grant v. Davenport*, 36 Iowa 404.

4. Where it is provided that for the erection of a waterworks company by a city, the proposition must be approved "by a majority of the voters of the city," it is not necessary that the

proposition shall be approved by a majority of all the voters of the city, but only by a majority of the votes cast. *Taylor v. McFadden*, 84 Iowa 262; *Wheaton v. Wiant*, 48 Ill. 263; *People v. Warfield*, 20 Ill. 160; *Sanford v. Prentice*, 28 Wis. 358. See also TAXATION, vol. 25, p. 600.

Where, upon the approval of the voters of the city, authority was conferred upon the city to erect waterworks in order to supply the city with water, when provision should be made for raising the sum required for defraying the expenses, it was held that this latter provision was an essential prerequisite, and that the work could not be carried on merely upon the consent of the voters. *Hornby v. Beverly*, 48 N. J. L. 110.

In *Yesler v. Seattle*, 1 Wash. 308, where the charter of a city granted the power to erect and maintain waterworks, provided a majority of the voters at a general election of the city should vote upon the same, but where subsequently a general law was passed authorizing the cities to extend their indebtedness and construct, purchase, and maintain waterworks, etc., upon the approval of the majority of the voters at a special election held for that purpose, it was held that although the provision of the charter referred to was not repealed, authority could be exercised upon compliance with the general law, that is, upon the approval of the voters at a special election.

5. *Lucia v. Montpelier*, 60 Vt. 537.

In accordance with the fundamental principle that an agent employed to sell cannot himself be the purchaser, and *vice versa*, it has been held that an ordinance of a city council providing for the purchase of the plant of a water company, and the issuance of bonds in payment thereof, was illegal and void where it appeared that several members of the council were stockholders in the water company.¹

Authority given to a city to erect waterworks impliedly confers the power to levy a tax for that purpose.² A city ordinance providing for the establishment of a system of waterworks, and appropriating a specified sum of money for sinking an artesian well, is not invalid on the ground that the system adopted may prove a failure, or that the cost cannot be ascertained in advance.³

2. Taking of Private Property—*a*. IN GENERAL.—The supplying of water to a large number of the inhabitants in a city or town is as we have seen, clearly a public purpose, to accomplish which the legislature may confer upon a city, or a company organized for that purpose, the right to condemn private property.⁴ To

1. *State v. Consumers Water Co.* (N. J. 1894), 45 Am. & Eng. Corp. Cas. 655. See also *People v. Overysse Tp. Board*, 11 Mich. 222; *Smith v. Albany*, 61 N. Y. 444.

2. *Taylor v. McFadden*, 84 Iowa 262. See also *Quincy v. Jackson*, 113 U. S. 332; *Ralls County Ct. v. U. S.*, 105 U. S. 733; *Parkerburg v. Brown*, 106 U. S. 489. As was said in *U. S. v. New Orleans*, 98 U. S. 381, the general principle is that "when authority to borrow money or incur an obligation, in order to execute a public work, is conferred upon a municipal corporation, the power to levy a tax for its payment, or the discharge of the obligation, accompanies it, and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligation except by taxation."

3. *Taylor v. McFadden*, 84 Iowa 262.

4. *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Wayland v. Middlesex County*, 4 Gray (Mass.) 500; *Tyler v. Hudson*, 147 Mass. 609; *Reddall v. Bryan*, 14 Md. 444; 74 Am. Dec. 550; *Kane v. Baltimore*, 15 Md. 240; *Graff v. Baltimore*, 10 Md. 544; *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453; *Thorn v. Sweeney*, 12 Nev. 251; *Tide Water Co. v. Coster*, 18 N. J. L. 518; 90 Am. Dec. 634; *David v. Portland Water Committee*, 14 Oregon 98; *Atty.*

Gen'l v. Eau Claire, 37 Wis. 425; *State v. Newark*, 54 N. J. L. 62.

The fact that the water supply is not for the benefit of the state, does not prevent it being a public use. It is sufficient if it benefit a large portion of the inhabitants of a particular community. In *Wayland v. Middlesex*, 4 Gray (Mass.) 500, Thomas, J., said: "The petitioners seek to take the case out of the rule, contending that in this case the appropriation of property cannot be held to be for public uses; its benefits being confined to one city alone and not shared by the whole public. . . . But we think this is too narrow a view of the objects and purposes of the act. Many public works would perhaps be found to be peculiarly beneficial to the city or town in which they are located, though the benefits are not restricted and confined to such town or city. In the present case, the benefits are shared by a large portion of the public directly, and indirectly by the whole commonwealth. It would be difficult, we think, to find any class of cases in which the right of eminent domain is more justly or wisely exercised than in provisions to supply our crowded towns and cities with pure water, provisions equally necessary to the health and safety of the people."

Measure of Damages.—In *Alloway v. Nashville*, 88 Tenn. 510; 29 Am. & Eng. Corp. Cas. 372, it was held that,

subserve such a purpose, it has been held that the legislature may authorize the erection of a dam in a navigable river, provided such dam does not materially obstruct navigation therein.¹

b. WATER AND WATER RIGHTS.—Not only may a city, when authorized to exercise the power of eminent domain, condemn lands, but in order to furnish its supply of water, it may take water from public streams or ponds, provided compensation is made to the riparian owners.² The fact that the municipality authorized to take the water of a stream is a riparian owner, will

in proceedings by a city to condemn lands for a reservoir site, while the adaptability of lands for such a site must be considered by the jury, the value for such a purpose exclusively cannot be shown and made the sole basis of a recovery, especially when the property possesses other capabilities which are also shown by the evidence.

1. *State v. Eau Claire*, 40 Wis. 533; *Pumpelly v. Green Bay, etc., Canal Co.*, 13 Wall. (U. S.) 166.

2. *Santa Cruz v. Enright*, 95 Cal. 105; *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548; 134 Mass. 267; *Tileston v. Brookline*, 134 Mass. 438; *Tyler v. Hudson*, 147 Mass. 609.

In *Springville v. Fullmer*, 7 Utah 450, a statute authorizing a city to provide the city with water and so on, and providing that the city council should have power to make such ordinances as it might deem necessary, was held to give the city power to acquire all water rights necessary to supply the inhabitants of the city with water.

The rights of riparian owners cannot be interfered with without the payment of damages; but it was held that if an owner of a water power stands by, and, not objecting, permits a city, without first assessing and paying him damages, to erect works for a water supply, by drawing water from the stream and thus diminishing his power, he creates an equitable estoppel so that he will not be protected by injunction, but will be left to assert his rights at law. *Logansport v. Uhl*, 99 Ind. 531; 49 Am. Rep. 109.

In *State v. Morris Aqueduct*, 46 N. J. L. 495, it was said that the diversion of the waters of a stream or spring should not be allowed, unless clearly necessary for the public good, and the question of necessity should be con-

trolled by the court, and there should be satisfactory evidence of the need.

Where an act authorized the trustees of a village to supply the village with water by means of conduits, and, for that purpose, to enter on the lands of other persons, make reservoirs, etc., and provide compensation for the owners of such land, and also for the owner of the land on which the spring or source from which the water was to be conducted was situated, but made no provision for indemnifying the owners of lands through which the stream flowed, though such spring had run from time immemorial, for the injury suffered by diverting the course of the stream from their farms, it was held that an injunction might be granted to prevent any proceeding to divert the stream until provision was made for compensation to those injured thereby. *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; 7 Am. Dec. 526. See also *Smith v. Rochester*, 92 N. Y. 463; 44 Am. Rep. 393.

What Constitutes Taking.—Under a statute authorizing a town to take the waters of a certain pond for the purpose of supplying the inhabitants thereof with water, the town accepted the act and took land on the shore of the pond, and there dug a water gallery and pumping well and made connection by pipes between the well and pond, but did not use these pipes, all the water coming into the well, either by percolation from the pond or from underground streams; it was held that there had been a taking of the waters within the meaning of the act. *Bailey v. Woburn*, 126 Mass. 416.

Pollution of Public Supply.—After the taking of the waters of a stream for the purpose of supplying a city with pure water, a presumptive right to pollute the stream cannot be acquired. *Martin v. Gleason*, 139 Mass. 183.

not relieve it of the liability in damages to other riparian owners injured by the taking, for such use of the waters of a stream cannot be made by any riparian owner.¹

Although the water taken must be for a public purpose, the fact that, as an incident to the securing of a public supply of water by the city, more water is obtained than is needed for present public uses, and the city disposes of the surplus for an outside use, does not divest the condemnation of land for the water supply of its public character.²

3. Liability of Municipalities—*a. FOR FAILURE TO SUPPLY WATER.*—A city has undoubtedly the right to cut off the water from premises for the non-payment of charges, or for non-compliance with its reasonable rules and regulations provided for the operation of the waterworks, and may keep the supply shut off until payment or compliance with such rules.³ But it has been held that where a householder has made payment in advance for a year's supply, the water may not be cut off from his premises during the year for the reason that his predecessor in title did not pay the rent for the year preceding.⁴ And the continuance of a refusal to supply water to premises, on the ground that the tenant

1. *Aetna Mills v. Waltham*, 126 Mass. 422. See also *WATERCOURSES*, vol. 28, p. 943.

2. In *State v. Newark* (N. J. 1891), 40 Am. & Eng. Corp. Cas. 33, it was objected that because some of the water obtained by the condemnation proceedings was disposed of for other than for public purposes, the proceedings were illegal. Dixon, J., said: "It would, of course, be absurd for the city to construct waterworks adequate only for its present wants, and the prosecutor does not assert that the works now contemplated are unreasonably large, in view of the city's prospective growth, or that more land is to be taken than is necessary for their construction and maintenance. Under these circumstances it is not apparent how the prosecutor can have any legal concern with the quantity of water drawn through the aqueduct, or with the use made of so much of it as the public does not need. But, at any rate, the mere fact that, as a natural incident to the securing of public water supply, more water is obtained than is now requisite for public purposes, and that the city disposes of the surplus for an outside use, does not deprive the condemnation of its public character. The power to construct and maintain the works still rests on the municipal public use, not on the disposition of the accidental excess."

3. *Atlanta v. Burton*, 90 Ga. 486; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. St. 393; *Com. v. Philadelphia*, 132 Pa. St. 288.

In *State v. Jersey City*, 45 N. J. L. 246, it was held that a failure to comply with a regulation providing that the consumers should put on their premises expensive meters at their own cost, did not justify cutting off the water.

4. *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556.

In *Stock v. Boston*, 149 Mass. 410, the city was held liable in tort for injuries caused by the negligence of the city employees in uncovering pipes conducting water to the premises of the plaintiff, thereby causing the water to freeze in the pipes, and his supply to be cut off. But it was assumed, both by the counsel and the court, that the city, having complied with the request of an applicant to deliver water at his premises, was under a contract to continue the delivery. And this view was sustained in *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556. But in *Smith v. Philadelphia*, 81 Pa. St. 38; 22 Am. Rep. 731, where the water froze in the mains owing to the negligent laying of the same, it was held that the city was not liable for the damages resulting from the failure to obtain a water supply, but that the recovery could be for the back water rents only, on the ground that the city was under no contract, the

of the premises was in arrears for water furnished him while occupying premises owned by another landlord, has been enjoined.¹

A city authorized to furnish supply of water for the extinguishment of fires, and which has undertaken to provide such supply, is nevertheless not liable to its citizens, whose property is destroyed by fire, for failure to provide an adequate supply of water even though an annual tax is levied for that purpose. This power to provide for a supply of water is in its nature legislative and governmental, requiring the exercise of judgment and discretion, and is not merely a ministerial duty.² Nor is the city liable on the ground of contract arising from the acceptance of a statute granting the power and the building of its works thereunder, as it enters into no contract thereby with the owners of premises to furnish them with water for the extinguishment of

introduction of water by the city into private houses being but a license which was paid for.

Contract for Street Sprinkling.—In *McKnight v. New Orleans*, 24 La. Ann. 412, it was held that one who had exclusive privilege from the city, of using water from the hydrants for the purpose of sprinkling the streets, could not complain if the privilege were taken from him and given to another, who paid more for the water than he had paid, because it was within the power of the city through its administrators to withhold altogether, and from all persons, the use of the water from the hydrants for the purpose of street sprinkling.

1. *Dayton v. Quigley*, 29 N. J. Eq. 77.

2. *Wright v. Augusta*, 78 Ga. 241; *Heller v. Sedalia*, 53 Mo. 159; 14 Am. Rep. 444; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368; *Vanhorn v. Des Moines*, 63 Iowa 447; 50 Am. Rep. 750; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Grant v. Erie*, 69 Pa. St. 420; 8 Am. Rep. 272; *Mendel v. Wheeling*, 28 W. Va. 233; 57 Am. Rep. 665; *Foster v. Lookout Water Co.*, 3 Lea (Tenn.) 42.

In *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368, where the plaintiff's house was destroyed by a fire, and he sued the corporation for damages on the ground that they had failed to provide necessary cisterns, etc., for extinguishing the fire, a demurrer by the corporation was sustained. In reference to the power conferred to make provision for the extinguishment of fires, the court said: "The powers thus conferred are, in

their nature, legislative and governmental; the extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers, the corporation cannot be held liable to individuals.

The power of the city over the subject is that of a delegated quasi-sovereignty, which excludes responsibility to individuals, for the neglect or nonfeasance of an officer or agent charged with the performance of duties. The case differs from that where the corporation is charged by law with the performance of a duty purely ministerial in its character." And in *Brinkmeyer v. Evansville*, 29 Ind. 187, in speaking of the exercise of these powers, Elliott, J., said: "They are legislative or judicial in their nature, depending upon the wisdom and judgment of the common council, and cannot be the subject of legal liability to individuals."

In *Grant v. Erie*, 69 Pa. St. 420; 8 Am. Rep. 272, the owner of property destroyed by fire claimed damages against the city on the ground of negligence, the city council having suffered a reservoir near by to become so dilapidated as not to hold water. It was held that the city was not liable, the construction and maintenance of the city reservoir being merely discretionary with the city.

In *Patch v. Covington*, 17 B. Mon. (Ky.) 722; 66 Am. Dec. 186, the city was held not liable on the ground that the proximate cause of the loss was not

fires.¹ There are many cases where actions have been brought to recover damages against a city for failure to supply water in case of fire, but none have been found in which any recovery has been had.

b. FOR INJURIES FROM NEGLIGENT CONSTRUCTION AND OPERATION.—A municipal corporation operating a system of waterworks is, *quoad hoc*, to be regarded as a private corporation, and consequently is liable for injuries resulting from the negligent construction and operation of such works by its officers and agents.² But the municipality does not insure its citizens against

the insufficient supply of water, but was the fire which was communicated to the plaintiff's building from one adjoining.

1. *Tainter v. Worcester*, 123 Mass. 311; 25 Am. Rep. 90; *Vanhorn v. Des Moines*, 63 Iowa 447; 50 Am. Rep. 750.

In *State v. Columbia*, 16 S. Car. 412; 45 Am. Rep. 785, it was held that a city was not liable for the destruction of the plaintiff's property by fire, owing to an inadequate supply of water, although he was taxed for water, and there was an understanding that there should always be an adequate supply of water for the extinguishment of fires.

2. *Scott v. Manchester*, 1 H. & N. 59; *White v. Hindley Local Board*, L. R., 10 Q. B. 219; *McAvoy v. New York*, 54 How. Pr. (N. Y.) 245; *Bailey v. New York*, 3 Hill (N. Y.) 531; 38 Am. Dec. 669; 2 Den. (N. Y.) 433; *Levy v. Salt Lake City*, 3 Utah 63; *Wilson v. New Bedford*, 108 Mass. 261; 11 Am. Rep. 352; *Mendel v. Wheeling*, 28 W. Va. 233; 57 Am. Rep. 665.

In *New York v. Bailey*, 2 Den. (N. Y.) 433, a leading case on the subject of the liability of municipal corporations, and frequently cited in this connection, the city of New York was held liable for damages inflicted through the management of the Croton dam, which was, under the laws of the state, under the management of commissioners appointed by the governor and the senate of the state. In the lower court, in the case of *Bailey v. New York*, 3 Hill (N. Y.) 531, Nelson, C. J., said: "The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage

of the city, as for the public good. The state, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city as much as the lands and houses belonging to it situate within its corporate limits." In reference to the liability of the corporation, on the ground that it was operating the waterworks at a private advantage and emolument, and consequently was liable as a private corporation, the judge continued: "The distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for the purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company."

In *Stock v. Boston*, 149 Mass. 410, where the owner of a greenhouse was deprived of his water supply on account of the negligence of the employees of the city in leaving the pipe connected with the greenhouse exposed, so that the water therein froze and the owner suffered considerable damage, the city was held liable therefor.

Liability for Injury Caused by Fire Department.—The operation by a city of its waterworks in connection with a fire department, is the exercise of a governmental and discretionary power, and the liability in this connection is not the same as in the case of its ordinary operation and management. In *Fisher v. Boston*, 104 Mass. 87, it was

damage from the construction and operation of its works, and liability can only arise from a failure to exercise reasonable care and vigilance.¹

A city has been held liable for injuries to travelers resulting from its negligence in laying and maintaining its pipes in streets and highways.²

held that the city was not liable for personal injury resulting from the bursting of a hose attached to a fire engine while the department was extinguishing a fire, although in part caused by the negligence of the officers and members of the department in performing their duties, and notwithstanding the department was established under a special statute, and was accepted by the city council. And in *Edgerly v. Concord*, 62 N. H. 8; 13 Am. St. Rep. 533; a municipal corporation, owning and operating a system of waterworks for supplying water for extinguishing fires, was not liable for an injury to a person traveling upon the street, caused by his horse taking fright at a stream of water thrown from a hydrant by firemen who were testing the hydrant by request of the corporation. See *supra*, this title, *For Failure to Supply Water*.

Injury Arising from Sudden Flood.—In *Moore v. Los Angeles*, 72 Cal. 287, it was held that the city of Los Angeles, although the owner of the bed of the Los Angeles river, and having the right to divert its waters and sell them to its citizens, was not liable for damages caused to private property situated within its corporate limits, through a sudden overflow of the waters of the river.

1. *Ring v. Cohoes*, 77 N. Y. 83; 33 Am. Rep. 574; *Hunt v. New York*, 109 N. Y. 134; *Jenney v. Brooklyn*, 120 N. Y. 164.

2. In *Hand v. Brookline*, 126 Mass. 324, the town was held liable for injuries sustained by a traveler on a street which had been undermined by water escaping from the mains laid therein. The court, by Gray, C. J., said: "For neglect in the manner of constructing such works by which injury is caused to person or property, a town is just as liable as a private corporation or an individual. . . . If the water escaping from the aqueduct, by reason of its negligent and imperfect construction, had injured buildings or crops, there could be no doubt

of the right of the owner to recover damages against the town."

In *Scranton v. Catterson*, 94 Pa. St. 202, a city which was bound by its charter to keep its streets in repair was held liable for injury caused by a water plug which had projected above the street and was placed there before the incorporation of the city.

Where a village which owns an aqueduct for the supply of water to its inhabitants, permits a water-box to project beyond the surface of the highway, it is liable to a person injured thereby while driving along the highway, as for an injury caused by its failure to properly maintain its aqueduct, even though the water-box was properly constructed originally, and the obstruction was caused by the earth wearing down or washing away around it. *Wilkins v. Rutland*, 61 Vt. 336; 25 Am. & Eng. Corp. Cas. 49.

In *Kent v. Worthing Local Board*, 10 Q. B. Div. 118, where an iron cover of a valve connected with a water main was properly fixed in the highway, but in consequence of the ordinary wearing of the highway projected an inch above it, and the plaintiff's horse stumbled over the valve, and was hurt, it was held that it was the duty of the defendants to make such arrangements that their works under proper care should not become a nuisance, and that the plaintiff was entitled to recover.

If due diligence, however, is used in laying and maintaining the pipes, no one can be held liable for injuries resulting from their breaking. *Terry v. New York*, 8 Bosw. (N. Y.) 504.

In *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434, which was an action against a city for damages resulting from an unsafe highway, the damage being caused by a stream of water thrown from a city hydrant across the highway, by an employee of the water commissioner, it was held that the city was liable, the water commissioners and their employees being servants of the city.

4. Water Rents and Charges.—Water rents are not imposed or collected in the exercise of the taxing power, but the obligation to pay for the use of water rests upon an implied contract on the part of the consumer to make compensation for water which he has applied for and received on the terms and conditions made public.¹

Though resting upon an implied contract, the legislature may declare water rents to be a lien upon the premises supplied, and that such lien shall be paramount to any subsequent alienation or incumbrance thereon.²

The city may make discrimination in its rates and charges, pro-

1. *Provident Sav. Inst. v. Jersey City*, 113 U. S. 514; *Vreeland v. O'Neil*, 36 N. J. Eq. 399; 37 N. J. Eq. 574; *Wagner v. Rock Island*, 146 Ill. 139.

In *Baker v. Gartside*, 86 Pa. St. 408, under a statute authorizing a municipality to erect waterworks and lay in water pipes, the cost of which was to be borne by the property owners in front of whose property the pipes were laid, and who applied for the use of the water, it was held that the owner of a corner lot, who applied for the use of the water, and paid for the pipe laid along one front of his property, could not be compelled to pay for pipe subsequently laid along the other front of his premises, and the right to maintain an action against him depended upon the contract; and as he had only applied for the water on one front, his contract could not be made to include the other front.

In *Vreeland v. Jersey City*, 43 N. J. L. 135, a statute providing that the board of public works should regulate the distribution of water, and prices to be paid for the use of the same, required the board to fix a sum to be annually assessed upon vacant lots abutting upon streets upon which water mains were laid, and lots with buildings thereon in which water was not taken. It was held that under the statute, no liability could rest upon any property owners, except those using the water, to pay the rents imposed, as the rates imposed upon other property could not be sustained either as special assessments or general taxes, upon the ground that as special assessments, there was no limitation by which the imposition of the board was restricted to an amount representing the actual benefits to the lots; nor was it valid as a general tax, as the imposition was not uniform upon all the property within the jurisdiction of

the city. See also *In re Union College*, 129 N. Y. 308.

Secret Use of Water.—In *St. Louis v. Arnot*, 94 Mo. 275, in an action by the city for the value of water used through a secret pipe not connected with a meter, the city was entitled to ascertain the amount used, and to recover the same. Evidence of what the defendant said with reference to such pipe could be shown by anyone who had heard it.

Water for "Private Residences."—Under a schedule of rates fixing the maximum charge for a "residence occupied by one family for domestic purposes" and further specifying a tariff for a bath, etc., and water basins, and providing that special rates should be made for supplies not enumerated, it was held that the tariff fixed for private residences did not include or warrant the use of water for the other purposes enumerated, for which special charge was to be made. *Allen v. Duluth, Gas, etc., Co.*, 46 Minn. 290.

2. *Provident Sav. Inst. v. Jersey City*, 113 U. S. 506.

Such a lien for water has priority over mortgages on the premises supplied, made after the passage of the act, whether the water was introduced on the lot mortgaged before or after the giving of the mortgage. *Vreeland v. O'Neil*, 36 N. J. Eq. 399.

In *Hennessey v. Volkening* (Super. Ct.), 22 N. Y. Supp. 528, it was held that a statutory provision authorizing unpaid water rent to be carried into the tax of the following year, and its payment enforced by lien and sale like ordinary taxes and assessments, was constitutional, though no notice was required to be given to the landowner, as the water rates were published and an opportunity given to have any overcharge corrected.

vided they are not manifestly unjust or unreasonable.¹ But it cannot make unwarranted discrimination in particular cases, nor arbitrary charges with the penalty of forfeiture of the right to use the water.²

II. WATER COMPANIES OPERATED AND CONTROLLED BY PRIVATE INDIVIDUALS—1. *Organization and Character*.—Water companies differ from many other corporations, whether private or *quasi* public, in this particular; while they may be brought into existence, like other corporations, by complying with the provisions of general laws, or in whatever other legal way is prescribed for the purpose, they cannot, in general, become active, or exercise the functions contemplated by their organization in any particular locality, except after special and direct authority to that end has been conferred on them by the sovereign. The legislature may delegate the functions of supplying water for any particular locality to an individual or corporation, unless forbidden by the constitution; it may confer the right to so delegate it to the extent of its own territory upon a municipality, or it may delegate it to an individual or corporation subject to confirmatory action on the part of the municipality in which the individual or corporation proposes to operate. But a water company, however organized and whether possessed of the right of eminent domain or not, has no right to tear up the public streets or roads of a municipality to lay water pipes or mains therein, or to do business as such water company in any particular locality, except by express permission either from the legislature or from the municipality properly empowered to grant such permission.³

Water companies, when actually engaged in the performance of

1. *Wagner v. Rock Island*, 146 Ill. 139.

2. *Parker v. Boston*, 1 Allen (Mass.) 361.

So in *State v. Jersey City*, 45 N. J. L. 246, it was held that the board of public works could not charge a certain water consumer with an expensive meter, put in by them to regulate the supply and rent to be paid, without the consent of the person charged; nor impose the penalty of cutting off the water for non-payment of the price of the meter.

In *Holman v. Pleasant Grove City*, 8 Utah 78, it was held that a city could not, after it had taken charge of the water supply, and for many years had made a *pro rata* distribution, divide the inhabitants into two classes and restrict the right of one class in the supply, when the supply was not sufficient for all.

In *Young v. Boston*, 104 Mass. 95, it was held that a person occupying a suite of rooms with his family in a build-

ing also occupied by other families, who had separate water attachments connected with a pipe which supplied the whole building, and on which pipe a meter was fixed, could restrain the company, by injunction, from cutting off his supply, because he insisted upon paying for water used by himself, rather than have the owner of the building pay therefor under a regulation of the water board.

Payment Under Compulsion.—The payment of a water license under threat of turning off the water in case of continued refusal, is payment under compulsion; and if the charge is excessive, the excess may be recovered, and that without tendering the amount really due. *Westlake v. St. Louis*, 77 Mo. 47; 3 Am. & Eng. Corp. Cas. 581.

3. *Andrews v. National Foundry, etc., Works*, 61 Fed. Rep. 782; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674.

their corporate functions, are necessarily the beneficiaries of valuable privileges from the state and subserve a public purpose. They are to be classed as *quasi* public corporations, and are subject in their operation to the limitations and regulations which the law imposes upon such bodies, in order that the public interest may not suffer.¹

The field of general operation of a water company is not necessarily confined to the territorial limits of the state in which it is organized, but it may own and exercise franchises in other states, although not expressly authorized so to do by the laws of the state of its incorporation.²

2. Exclusive Franchise—*a.* POWER TO GRANT.—Unless restrained by the constitution, the legislature may grant to a private corporation the exclusive right to lay pipes and mains through the streets of a municipality, and to supply it and its inhabitants with water for general use and for fire protection.³

In one instance the constitutional inhibition against the creation of "perpetuities and monopolies" was held to forbid the grant of such an exclusive privilege, even for a term of years;⁴ in another, however, the contrary was held.⁵

A municipal corporation has no power to grant an exclusive right of this character, unless authorized to do so in express terms

The principles governing this branch of the subject have been fully treated elsewhere. See GAS COMPANIES, vol. 8, p. 1276; STREET RAILWAYS, vol. 23, p. 946; TELEGRAPH AND TELEPHONES, vol. 25, p. 752.

1. Haugen v. Albina Light, etc., Co., 21 Oregon 411; Olmsted v. Morris Aqueduct, 47 N. J. L. 333, *disapproving* Paterson Gaslight Co. v. Brady, 27 N. J. L. 245; Price v. Riverside Land, etc., Co., 56 Cal. 431. See also FRANCHISES, vol. 8, p. 614.

2. Dodge v. Council Bluffs, 57 Iowa 560. See also CORPORATIONS, vol. 4, p. 206; FOREIGN CORPORATIONS, vol. 8, p. 330.

3. New Orleans Waterworks Co. v. Rivers, 115 U. S. 674; St. Tammany Waterworks Co. v. New Orleans Waterworks Co., 120 U. S. 64; Atlantic City Waterworks Co. v. Atlantic City, 39 N. J. Eq. 367; Atlantic City Waterworks Co. v. Consumers Water Co., 44 N. J. Eq. 427. In this last case, however, the statute granting the right was declared void, as being in conflict with the provision of the constitution prohibiting the legislature from passing any local or special laws conferring exclusive corporate franchises.

4. Brenham v. Brenham Water Co.,

67 Tex. 542. Here, it was said that in order to constitute a monopoly, the right to exercise the exclusive privilege need not extend to all places; the monopoly exists if it operates in and to the hurt of one community; and that it need not continue indefinitely so as to amount to a perpetuity, the monopoly exists if the privilege is exclusive for a term of years. See also Davenport v. Kleinschmidt, 6 Mont. 502, where it was held that the grant by the common council of the exclusive right of selling to the city all the water required by it for sewerage and fire purposes for the period of twenty years, at a minimum rate fixed in the contract, was a monopoly, and this, notwithstanding the grant did not prevent other people from selling water to private citizens.

5. Memphis v. Memphis Water Co., 5 Heisk. (Tenn.) 495. Here it was held that the grant of the privilege, formerly enjoyed by a city, by legislative enactment, to a private corporation, for its exclusive use, for a term of years, of supplying the city with water by means of waterworks, was not in conflict with section 22, article 1, of the constitution of Tennessee declaring that "perpetuities and monopolies are

by the legislature.¹ But it is held that the validity of an ordinance conferring such a right may not be contested by a mere taxpayer, but only by some other company or individual afterward claiming a similar right.²

b. CONSTRUCTION AND NATURE OF GRANT.—It is a well settled principle of construction, applicable alike to direct legislative grants and to those made through the agency of municipal corporations, that exclusive rights of the character in question are not favored, and a statute which thus has the effect to impair the power of the legislature for future action should be construed most strongly in favor of the state. If there is any ambiguity or reasonable doubt arising from the terms employed by the granting body as to whether an exclusive privilege has been conferred, or authorized to be conferred, the doubt is to be resolved against the corporation or individual claiming such a grant.³ But when the right has been once granted, and accepted and acted upon by the grantee, it constitutes a contract protected by the federal constitution against impairment by state legislation.⁴

contrary to the genius of a free state and shall not be allowed."

1. *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Altgelt v. San Antonio*, 81 Tex. 436; *Long v. Duluth*, 49 Minn. 280; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167.

In *Davenport v. Kleinschmidt*, 6 Mont. 502, after holding that the grant of an exclusive privilege of the kind under consideration, constituted a monopoly, it was further held that the city council had no authority to grant to any person a monopoly, even when no express prohibition was found in the charter or other acts of the legislature.

Chapter 78, *Iowa Laws* 1872, empowering cities to construct waterworks, or to procure individuals to construct and maintain them, applies as well to cities acting under special charters as to those under the general incorporation law. *Grant v. Davenport*, 36 Iowa 396. See also *MUNICIPAL CORPORATIONS*, vol. 15, p. 1055.

2. *Grant v. Davenport*, 36 Iowa 396; *Dodge v. Council Bluffs*, 57 Iowa 560.

3. *Long v. Duluth*, 49 Minn. 280. Here it was held that legislative authority to a city to provide a system of waterworks, to grant the right to a private corporation to establish such a system, and to supply the city with water, and to contract therefor, did not give the municipality authority to grant an exclusive franchise so as to disable the municipal corporation for the period of thirty years, from itself

establishing waterworks and a system of supply.

In *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515, the facts were as follows: The company was incorporated in 1860 to supply the borough of Easton with water. In 1867, the borough was authorized to construct waterworks and to buy the works of any existing company. This authority, however, did not become effectual until 1881, when it was approved by popular vote. Meanwhile the water company, as it was authorized to do, had availed itself, by acceptance, of the benefits of an act of 1874, providing for the incorporation of water companies, and which declared that "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one, and no other company shall be incorporated for that purpose," until the corporation should have realized profits to a specified amount. It was held that the franchise was exclusive only so far as other companies were concerned, and that the borough was not prohibited from supplying water by works constructed by itself, even though that might impair the value of the franchise of the water company. *Followed* in *Freeport Water Works Co. v. Prague*, 129 Pa. St. 605. *Compare Memphis v. Memphis Water Co.*, 5 Heisk. (Tenn.) 495.

4. *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *St. Tammany*

An exclusive franchise conferred upon a corporation to supply water to the inhabitants of a city by means of pipes and mains laid through the public streets, is violated by a grant to an individual in the city of the right to supply his premises with water by means of a pipe or pipes so laid.¹ But the grant of the sole privilege of supplying the municipality with water from a designated source for a term of years, is not impaired, within the meaning of the contract clause of the constitution, by a grant to another party of a privilege to supply it with water from a different source.²

And, of course, when the state by act of incorporation grants no exclusive privileges to one company, it impairs no contract by incorporating a second company with powers and privileges which necessarily operate injuriously to the first.³

Water Works Co. v. New Orleans Water Works Co., 120 U. S. 64; *Rockland Water Co. v. Camden, etc.*, *Water Co.*, 80 Me. 544.

In *Citizens Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, the common council of the city of Bridgeport accepted the proposition of A to supply the city with water, and granted him, with the right of assignment, the sole right to lay pipes in the streets, so long as a full supply of pure water should be furnished. Subsequently, the Bridgeport Hydraulic Company was incorporated with power to acquire, and which did acquire, all the rights of A under the vote of the city, and became charged with all his duties, and the company soon after expended a large sum of money in acquiring property and establishing its plant. It was held that so long as this company supplied the city with an abundance of pure water, the legislature had no power to grant to another corporation the right to lay its pipes in the streets of the city for the purpose of supplying the city with water; that if the common council had no power to grant the exclusive use of the streets, yet, as the charter of the defendant company recognized and confirmed the grant by the city, it became as effective as if the city had the power to make it in the first instance, and as if the legislature had made it in the most direct and explicit terms. By a clause in the charter of the defendant company the legislature reserved the power to recall the franchise at its pleasure. It was held that this provision did not authorize the legislature to set aside or impair the contract which the city

had entered into for the sole use of its streets by the defendant company, so long as the latter should supply the city with water, and which the charter had recognized and confirmed.

Exclusive Franchise—Effect of Annexation of Town Upon Existing Contract.—Under *New York Laws of 1873*, ch. 737, providing that whenever a certain number of persons propose to organize a company to furnish a town or village with water, they shall present to certain officers of the town or village an application containing a request that they consider the application to supply the said town or village, or the inhabitants thereof, with water, and that if the application is granted by the said officers the persons named therein may proceed to organize the company, every company organized under such statute exists by virtue of a contract with the town or village and possesses an exclusive franchise, for which compensation must be made if it is condemned for public uses. And, further, the rights of such water company are not affected by the fact that the town to which it supplies water is annexed to an adjoining city. *In re Long Island Water Supply* (Supreme Ct.), 24 N. Y. Supp. 807. See also *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606.

1. *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; followed in *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64.

2. *Stein v. Bienville Water Supply Co.*, 141 U. S. 67.

3. *Rockland Water Co. v. Camden, etc.*, *Water Co.*, 80 Me. 544; *Syra-*

3. **Exercise of Right of Eminent Domain**—(See also EMINENT DOMAIN, vol. 6, p. 509; STREETS AND SIDEWALKS, vol. 24, p. 1)—*a.* IN GENERAL.—The supplying of a municipality and its inhabitants with water for the extinguishment of fires, and for domestic, sanitary and other purposes, is a measure of public utility, for which there may be an appropriation of private property under the power of eminent domain.¹

As the right of eminent domain is restricted to the taking of private property for public uses, it may not be exercised in favor of the owners of mining claims to enable them to obtain water for their own use in working such claims, though their intention may also be to supply water to others for mining and irrigating purposes.²

And where the company's charter authorizes it to take private waters "for the extinguishment of fires, and for domestic, sanitary and other purposes," it may not use the waters of a private stream for private manufacturing purposes against the objection of mill owners upon such stream who would be injured thereby.³

A water company having contracts to furnish a city and a railway company with water for its own profit has no greater power, as a riparian proprietor, to take water from an unnavigable stream than a private individual has.⁴

And a water company, by the mere purchase of land upon which a spring issues, creating a stream which flows in a natural channel and through the land of others, does not acquire a right to divert the water of such spring into another channel without

case *Water Co. v. Syracuse*, 116 N. Y. 167.

1. *Lowell v. Boston*, 111 Mass. 464; 15 Am. Rep. 39; *Opinion of Justices*, 150 Mass. 596; *Ingraham v. Camden, etc., Water Co.*, 82 Me. 335; *Riche v. Bar Harbor Water Co.*, 75 Me. 91; *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; *Cummings v. Peters*, 56 Cal. 593; *St. Helena Water Co. v. Forbes*, 62 Cal. 182; *Thorn v. Sweeney*, 12 Nev. 251; *Olmsted v. Morris Aqueduct*, 46 N. J. L. 495; 47 N. J. L. 311; *Stamford Water Co. v. Stanley*, 39 Hun (N. Y.) 424; *Matter of New Rochelle Water Co.*, 46 Hun (N. Y.) 525; *Witcher v. Holland Water Works Co.*, 66 Hun (N. Y.) 619.

In *Lumbard v. Stearns*, 4 Cush. (Mass.) 60, it was held that an act of the legislature by which certain persons were incorporated as an aqueduct company for the purpose of furnishing a village with pure water, with authority to take springs, lands, and rights subject to the payment of damages therefor, as provided by law in the

case of land taken for highways, was not unconstitutional, on the alleged ground that it authorized the taking of private rights of property for a use which was not public, although it contained no express provision requiring the corporation to supply, on reasonable terms, all persons applying for water.

A corporation, organized and existing under the laws of *California* for the purpose of furnishing the inhabitants of an incorporated town with pure fresh water, may exercise the right of eminent domain for the acquisition of land needed as a reservoir in connection with the purpose of its creation. *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659.

2. *Lorenz v. Jacob*, 63 Cal. 73.

3. *In re Barre Water Co.*, 62 Vt. 27. Here the court said that the words "other purposes" must be construed to mean other public purposes of the same character.

4. *Saunders v. Bluefield Water Works, etc., Co.*, 58 Fed. Rep. 133.

first paying or securing compensation to lower riparian owners. The rights of the company in such a case are those of a riparian owner; neither more nor less.¹

b. USE OF STREETS—(1) Not Additional Servitude.—The use of the streets of a city, under legislative or municipal sanction, for the purpose of laying water pipes and mains therein, does not constitute an additional burden for which the abutting owner is entitled to compensation. This use of streets stands upon the same principle as their use for gas pipes and sewers.² But it seems that the laying of pipes in a country highway, where the fee is in the adjoining proprietor, entitles him to compensation.³

The erection of a water tank in the center of the street, occupying one-half of the width thereof, and the erection and operation of a steam engine in connection therewith, even for the purpose of supplying the city and its inhabitants with water, is not a use to which the street can appropriately be put; and the owner of a lot adjoining may maintain an action to recover for any damages occasioned thereby.⁴

(2) Subject to City's Right to Repair, etc.—A water company laying its pipes in the public streets, under a contract with the municipality, does so subject to the right of the city to construct sewers and repair the streets, whenever and wherever the public interest demands, and if, by reason of the exercise of this right, the company is compelled to relay its pipes, it can maintain no claim therefor against the city, unless the latter's action is unreasonable or malicious.⁵

A water company authorized by legislative enactment to use the soil under the public roads for the purpose of constructing its works, having laid its pipes across the street of a city,

1. *Lord v. Meadville Water Co.*, 135 Pa. St. 122; 20 Am. St. Rep. 864.

2. *Wood v. National Water Works Co.*, 33 Kan. 590; *Crooke v. Flatbush Water Works Co.*, 27 Hun (N. Y.) 72; 29 Hun (N. Y.) 245; *Quincy v. Bull*, 106 Ill. 337. See also *STREETS AND SIDEWALKS*, vol. 24, p. 1; *DRAINS AND SEWERS*, vol. 6, p. 2; *GAS COMPANIES*, vol. 8, p. 1268.

3. *Johnson v. Jaqui*, 27 N. J. Eq. 552; *Lewis on Eminent Domain*, § 129.

4. *Morrison v. Hinkson*, 87 Ill. 587. In *West v. Bancroft*, 32 Vt. 366, it was held that the proper public authorities of the town or village have a right to place a reservoir in the highway for the purpose of retaining water with which to sprinkle the highway and the owner of the fee of the land may not maintain an action against such authorities for so doing.

5. *National Water Works Co. v. Kansas City*, 28 Fed. Rep. 921. Here,

it was further held that an allegation that the sewer might have occupied other space in the street, is not equivalent to an allegation that the city acted unreasonably or maliciously.

In *Rockland Water Co. v. Rockland*, 83 Me. 267, where the water company had a right under its charter to lay its pipes through the streets of the city "in such manner as not to obstruct or impede travel thereon," it was held that the city retained the right to repair its streets in the ordinary manner, although in so doing the pipes of the company might thereby become exposed and the company compelled to sink them deeper to protect them from frost and other dangers; it not appearing that the repairs of its streets by the municipality were made in an improper or unusual manner. See also *Montgomery v. Capital City Water Co.*, 92 Ala. 361; *New Haven v. New Haven Water Co.*, 44 Conn. 105.

will be compelled to lower them so as to conform to a new grade established by municipal authority.¹

Where a water company is given the right by its charter to open streets for the purpose of laying pipes, etc., therein, and the only limitation annexed thereto is that the streets after being opened shall be repaired by the company at its own expense as soon as practicable, and subject to the approval of the city authorities, the company is not bound by an ordinance of the city providing that no person shall open the streets, etc., without previous permission from the mayor, and depositing with the city treasurer such a sum as the committee on streets should deem sufficient to repair the street, under a penalty.²

4. Contracts with Municipalities.—The power of municipalities to contract for water supplies, the nature of the obligations under such contracts, and kindred topics, have already been fully treated.³

1. *Jersey City v. Hudson*, 13 N. J. Eq. 420.

2. *Wheat v. Alexandria*, 88 Va. 742. In this case, Lewis, P., delivering the opinion of the court, said: "The principles underlying the case are few and simple. It is familiar law that full and paramount authority over highways, including streets, belongs to the legislature, unless restrained by the constitution. The right, therefore, to dig up the streets of a city for the purpose of laying water or gas pipes therein, is a franchise which can be granted only by the legislature, or by the city under legislative authority. This right in the present case has been granted to the water company, and in very comprehensive terms. The seventh section of the charter grants it unconditionally—the only express limitation annexed to the right being that the streets, after being opened, shall be repaired by the company at its own expense, as soon as practicable, and subject to the approval of the city authorities. The ordinance, however, not only assumes to regulate the repair of the streets, after the pipes have been laid, but it goes further, and, in effect, makes the statutory right to open the streets dependent upon the will of the mayor and street committee. This is *ultra vires*. It conflicts with the seventh section of the company's charter, and is, therefore, not a valid exercise of the general power conferred by the charter of the city to keep its streets in order; for there is no conflict between the two charters. The provisions of both can easily stand to-

gether. It is not doubted that the city council may prescribe regulations, touching as well the opening as the repair of the streets by the water company, which are not inconsistent with the essential rights granted by the company's charter. Thus it may require the company, in opening streets, to take due precautions against accidents to persons and property, as by providing suitable safeguards for that purpose, including lights, when necessary, at night; that it give reasonable notice to the proper city authorities before digging up the streets, etc. But the ordinance complained of goes beyond this. It is not a reasonable regulation, but is rather an illegal restraint, and therefore void. Indeed, if sustained, it might amount to an absolute prohibition; for should the mayor in any case arbitrarily refuse permission to the company to prosecute its work in the streets, such refusal would not only impair the unconditional right conferred by the legislature, but would virtually destroy it. We cannot think that an ordinance which is capable of leading to such results can be sustained consistently with any fair construction of the company's charter. If rights and privileges have been conferred upon the water company which are, or may become, injurious to the public health or the public safety, it is competent for the legislature to alter the charter. We can only construe it as it is."

3. See MUNICIPAL CORPORATIONS, vol. 15, pp. 1115, 1128. See also the following cases, wherein particular con-

5. Power to Make Rules and Regulations.—Water companies may make reasonable rules for the government of their customers in the use of the water supply, and enforce the same by stopping their supply as a penalty for violation thereof. In such cases, the company is not limited to an action for damages.¹ A water company has also the right to stop the consumers' supply for non-payment of charges for the water consumed.²

A regulation that bills shall be paid quarterly, and in case of default in payment for ten days a penalty of five per cent. shall be added, and that the water shall be shut off from the premises after a default for fifteen days, is reasonable and valid.³ But a regulation that consumers shall be liable to pay rent for the whole year, whether they actually use the water for that length of time or not, and shall make payment yearly in advance, without special agreement, is unreasonable.⁴

tracts are construed: *National Water Works Co. v. School Dist. No. 7*, 4 McCrary (U. S.) 108; *U. S. v. American Water Works Co.*, 37 Fed. Rep. 747; *Los Angeles Water Co. v. Los Angeles*, 55 Cal. 178; *Spring Valley Water Works v. San Francisco*, 52 Cal. 112; *Montgomery v. Capital City Water Co.*, 92 Ala. 361; *Stillwater Water Co. v. Stillwater*, 50 Minn. 498.

1. *Shiras v. Ewing*, 48 Kan. 170; *Sheward v. Citizens Water Co.*, 90 Cal. 635; *Thomas v. Peterson* (Tex. Civ. App. 1894), 24 S. W. Rep. 1125.

2. *Sheward v. Citizens Water Co.*, 90 Cal. 635; *Brumm's Appeal* (Pa. 1888), 12 Atl. Rep. 855.

Where a water company makes a legal extra charge for water wasted, it is not restricted to an action at law for the non-payment thereof, but may shut off the water. *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273.

3. *Tacoma Hotel Co. v. Tacoma Light, etc., Co.*, 3 Wash. 316.

4. *Rockland Water Co. v. Adams*, 84 Me. 472. In this case, it was further adjudged that one could not be held to have made a special contract to pay according to such regulation merely by showing that he had knowledge of the regulation, but the company must show that he expressly assented to it and agreed to be bound by it.

Unreasonable Rules.—By a local waterworks act, passed in 1858, it was provided that, for the purpose of preventing waste of the water, all persons supplied with water by the waterworks company should provide "proper ball or stop-cocks or other necessary ap-

paratus for regulating such supply," and that in case any such person neglected to provide such apparatus after being required to do so, the company might cut off the water from his premises. At the date of that act the supply of water provided by the company was intermittent. By another act, passed in 1888, the company were required to provide a constant supply of water. It then, for the first time, became necessary, for the prevention of waste, that a system should be adopted of inserting in each communication pipe an apparatus, called a screw-down valve, whereby the water could be shut off from any premises in which there were indications of the water being permitted to run to waste. It was held that such a screw-down valve was not an apparatus for regulating the supply within the meaning of the former act, and that the company could not justify cutting off the water from the premises of a person who neglected to comply with the notice requiring him to insert such a valve in his communication pipe. *Ward v. Folkestone Waterworks Co.*, 24 Q. B. Div. 334. In *Franke v. Paducah Water Supply*, 88 Ky. 467, the water company had a contract with the municipality by which it was authorized to maintain waterworks and to lay down pipes and mains through all the streets and alleys of the city, for the purpose of furnishing water for domestic and other purposes; but those taking water for private use were required to construct and keep in repair, at their own expense, the pipes and fixtures on their premises connecting with the pipes in the street.

6. Duties—*a*. MUST NOT DISCRIMINATE—WATER RATES.—

The acceptance by a water company of its franchises carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish.¹ All persons are entitled to have the same service on equal terms and at uniform rates.²

To undertake capriciously and oppressively to enhance the value of certain estates by furnishing them with a supply of water, and to depreciate that of others by refusing it to them, would be a plain abuse of its franchise.³ Nor does it make any difference that the pipe from which a supply is refused was laid for a particular individual who paid for it himself.⁴

Mandamus is the proper remedy for enforcing the duty of supplying water to all those who come within the class or community for whose alleged benefit the company was created.⁵

In general, in the absence of any provision of the company's charter vesting in it authority over these matters, the price at which water may be sold is a thing within the power of the proper authorities to determine.⁶ But a company may be protected by the terms of its franchise against legislative control in the matter of its rates.⁷

And where this is not so, or even where the statutes give the municipality the absolute right to readjust the rates to be charged by a water company from time to time, this power is not a power of confiscation, nor a power to be exercised arbitrarily, and where rates are fixed so low that the water cannot be furnished without loss, the courts will interfere and declare such action void.⁸

It was held that the water company had no power to prevent a plumber from laying connecting pipes on private premises at the instance of the owners, nor to require a bond for the payment of any damages occasioned by the negligence of the plumber in his work.

1. *Haugen v. Albina Light, etc., Co.*, 21 Oregon 411; *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347.

2. *Price v. Riverside Land, etc., Co.*, 56 Cal. 431; *McCrary v. Beaudry*, 67 Cal. 120.

3. *Lumbard v. Stearns*, 4 Cush. (Mass.) 61.

4. *Haugen v. Albina Light, etc., Co.*, 21 Oregon 411.

5. *Haugen v. Albina Light, etc., Co.*, 21 Oregon 411; *Price v. Riverside Land, etc., Co.*, 56 Cal. 431.

6. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286; 16 Am. St. Rep. 116; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347.

7. *Santa Ana Water Co. v. San Buen-*

aventura, 56 Fed. Rep. 339. In this case it was held that art. 14, § 1, *California Const.* (1879), providing that thereafter the rates for water should be fixed annually by the governing board of the city or town in which it was furnished, and the legislation enacted for the purpose of carrying it into operation, was null and void as to a contract, made before the adoption of the constitution, which conferred on the water company the sole right to fix the rates and charges, as they impair the obligation of the contract. In *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, it was held that laws requiring gas companies, water companies, and other corporations of like character, to furnish their customers at prices fixed by the municipal authorities of the locality, are within the scope of legislative power, unless prohibited by constitutional limitations or valid contract obligation.

8. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286; 16 Am. St. Rep. 116; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347. See also *Dow*

b. AS TO QUALITY AND QUANTITY OF WATER.—Where a water company contracts to supply a city and its inhabitants with "well settled and wholesome water," the city is not bound to accept and pay for the water furnished for public purposes, unless it is of the quality called for by the contract. And the mere fact of occasional use by the city of the water actually furnished, does not necessarily constitute an acceptance; there must be a fair opportunity for examination and rejection before an acceptance can be inferred.¹

And when such a contract exists, it is not only the right of the municipality in its corporate capacity, but it is its duty, to enforce the terms of the contract as to the quality of the water to

v. Beidelman, 125 U. S. 680; *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418.

1. *Winfield Water Co. v. Winfield*, 51 Kan. 104. Here it was further held that where a water company agrees with a municipality to supply it and its inhabitants with well settled and wholesome water for domestic purposes, and, also, for the extinguishment of fires and for other public purposes, and the city, in consideration thereof, engages to pay rentals for the use of certain hydrants for the extinguishment of fires, flushing of gutters, and other city purposes, in an action brought to recover the contract price for furnishing water to the city at the hydrants, where no claim to recover as upon a *quantum meruit* is made by the plaintiff, he must prove substantial compliance with the contract, not only with reference to the quantity of water furnished, but the quality as well, before he can recover at all. See also *Adrian Water Works v. Adrian*, 64 Mich. 584.

Effect of Resolution of Common Council as Estoppel.—In *Galesburg v. Galesburg Water Co.*, 34 Fed. Rep. 675; *affirmed* in *Farmers L. & T. Co. v. Galesburg*, 133 U. S. 156, it was held that a municipality that has granted a party the privilege, for a specified time, to construct waterworks and furnish it with water for public and private purposes, is not estopped, by a resolution of the common council reciting that the waterworks stood the test required by the ordinance, from maintaining an action to rescind the contract, the works proving inadequate and the water supplied deficient, both in quality and quantity, against a corporation, to whom the contract had been as-

signed, and holders of bonds issued by such corporation who had purchased after the passage of the resolution; but the bondholders are entitled to a fair return for the water actually furnished and used.

When Defense Comes too Late.—In *Burlington Water Works Co. v. Burlington*, 43 Kan. 725, it was held that where a water company, under a contract with a city, furnishes water to the city and its inhabitants, and to the city the use of certain hydrants, and the water appears to be good, and is believed to be good, and is received by the city and its inhabitants without objection for nearly a year, when the city is sued for the rent of the hydrants, it cannot then set up, as a full, complete, and absolute defense to the plaintiff's entire action, and refuse to pay anything, that the water furnished by the company was not good.

Filtered Water—Specific Performance.—In *Burlington v. Burlington Water Co.*, 86 Iowa 266, a contract between the plaintiff and the defendant stipulated that all the water admitted into the company's mains should be properly filtered, except when used for the purpose of extinguishing fires. Under the contract, the defendant held an exclusive franchise, had established its works, had laid its pipes in the streets of the city of the plaintiff, and private consumers had, at considerable expense, conducted the water into their dwellings for domestic purposes. The company having failed to furnish the city with filtered water according to the terms of the contract, it was held that equity could decree the specific performance of the contract, as an action for damages would not afford adequate relief, and a degree of forfeiture of the franchise would also be futile, as it

be supplied, not only to the municipality for public purposes, but, also, to private consumers.¹

It has been held that the word "pure," in a statute requiring water companies to supply "pure water," should be construed to mean wholesome or ordinarily pure, and not pure in a chemical or abstract sense.²

A stipulation for artesian well water is not satisfied by supplying water from other sources, although equally good, or better.³

7. Liabilities—*a*. FOR FIRE LOSSES RESULTING FROM INADEQUATE WATER SUPPLY.—The owner of property which is destroyed by fire may not maintain an action for damages, for its loss, against a water company, on the ground that the loss was occasioned by the failure of the company to supply water as required by the terms of its contract with the city, as there is no privity of contract between the parties to the action.⁴

would involve the erection of new works.

1. *Winfield v. Winfield Water Co.*, 51 Kan. 70. The action in this case was brought by the city to have canceled the contract between the city and the water company. It was not shown that any notice or demand was ever served by the municipal authorities, on the defendant, requiring it to so perfect its system as to be able to afford a supply of well settled and wholesome water, as provided by the contract, within a reasonable time, or informing it of any purpose on the part of the city to amend the contract. It was held that before a court of equity will cancel such a contract after the erection and use, for a long time, of a system of waterworks, it must appear that the defendant has been fairly notified of the defects in the system and the demands of the city for the improvement thereof, and a reasonable time must have been given the company to comply with its contract. See also *Kankakee v. Kankakee Water Co.*, 38 Ill. App. 620; *Wilson v. Charlotte*, 110 N. Car. 449.

2. *Com. v. Towanda Water Works Co.* (Pa. 1888), 15 Atl. Rep. 440.

3. *Foster v. Joliet*, 27 Fed. Rep. 899.

4. *Davis v. Clinton Water Works Co.*, 54 Iowa 59; *Britton v. Green Bay, etc., Water Works Co.*, 81 Wis. 48; *Ferris v. Carson Water Co.*, 16 Nev. 44; *Beck v. Kittanning Water Co.* (Pa. 1887), 11 Atl. Rep. 300; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; *Fowler v. Athens City Water Works Co.*, 83 Ga. 219. See also *At-*

kinson v. Newcastle, etc., Water Works Co., 2 Exch. Div. 441.

In *Foster v. Lookout Water Co.*, 3 Lea (Tenn.) 42, the plaintiff sued the city and the water company for the loss of his house by fire, averring in his declaration that the company owned the waterworks, pipes, etc., and the city controlled a fire department, and was in duty bound to use all means at command to put out fires; that by contract with the city the company engaged to furnish water to put out fires; that a fire occurred near the plaintiff's house and extended to and consumed it; that the defendants at the time had allowed the pipes to get out of repair and become full of mud and gravel, whereby the plaintiff's house was destroyed by fire. It was held, upon demurrer, that the declaration showed no cause of action against either the municipality or the water company.

In *Eaton v. Fairbury Water Works Co.*, 37 Neb. 546, the ordinance granting a franchise to supply water to the city, provided, among other things, that "the grantee shall constantly, day and night (except in case of an unavoidable accident), keep all fire hydrants supplied with water for instant service, and shall keep them in good order and efficiency." It was held that this did not confer upon the owner of property destroyed by fire a right of action against the company, by reason of its failure to supply water as stipulated, although thereby the loss by such fire would have been obviated; under such circumstances the company was not liable by reason of assuming the func-

And this is true, even though a special fund has been raised by the city by taxation to pay for a sufficient water supply for use in case of fire, and the owner has contributed thereto. The fact that the city levies and collects a tax to be paid to the company creates no privity of interest between the latter and the taxpayer.¹

An insurance company that has been compelled to pay a fire loss on a policy issued on the property destroyed, has no greater rights against the water company than the assured.² Nor has the municipality any cause of action in such cases. The right of taxation vested in it does not create an interest in the property, but only an expectation depending upon contingencies, which is altogether too remote to be the foundation of a right of action.³

In several instances it has been held that the statutes authorizing municipalities to contract for the erection and operation of waterworks by private corporations, conferred no power upon the municipality to contract with them to indemnify citizens and taxpayers for loss by fire, sustained by reason of the failure to supply

tions which might properly belong to the municipality, for the reason that under the facts stated the municipality in performing the same functions would not be liable.

A similar conclusion upon a similar state of facts was arrived at in *Fitch v. Seymour Water Co.* (Ind. 1894), 37 N. E. Rep. 982.

In *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, a contrary view was taken of the liability of water companies. There it was held that where a water company has contracted with a city to furnish, at all times, a supply of water sufficient for the protection of the inhabitants and property of the city against fire, the company must answer in damages for loss by fire resulting from its failure or refusal to perform its contract. In an action to recover for such loss, the inquiry is whether, considering the purpose, character, and capacity of the waterworks, and all the attending circumstances and agencies, the fire which destroyed the plaintiff's property could and would have been prevented or extinguished before doing damage, if the defendant had performed its contract. Referring to this decision, the court, in *Howsmen v. Trenton Water Co.*, 119 Mo. 315, said: "Authority for this proposition is not therein cited, and the reasoning upon which the position is rested does not seem to us entirely sat-

isfactory." And in *Fitch v. Seymour Water Co.* (Ind. 1894), 37 N. E. Rep. 982, Howard, J., for the court, said, in referring to the same decision: "While the opinion of the court is a very well-considered one, yet we do not feel that its reasonings are sufficient to overcome the strong current of reason and authority in favor of the view which we have taken."

1. *Becker v. Keokuk Waterworks*, 79 Iowa 419; *Mott v. Cherryvale Water, etc., Co.*, 48 Kan. 12; *Howsmen v. Trenton Water Co.*, 119 Mo. 304.

2. *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 119.

3. The above was held where the owner of the property destroyed, upon an assignment of the supposed demand and right of action of the city, sought to recover damages upon the ground that the municipality had such an interest in the property as to give it a right of action. *Ferris v. Carson Water Co.*, 16 Nev. 45.

In *Montgomery v. Montgomery Water Works Co.*, 79 Ala. 233, it was held, in a suit against a municipality by a water company for water furnished at an agreed price, that the defendant could not set off or recoup damages sustained by private persons, citizens, and property owners, on account of property destroyed by fires, by reason of the insufficiency of the water supplied by the plaintiff to extinguish fires.

water as provided in the contract, so as to enable a citizen to maintain an action therefor in his own name.¹

Where the plaintiff had a contract with a water company for a supply of water for use about his brewery, and the property was destroyed by fire, due, as the plaintiff claimed, to a deficiency of water, it was held that the company was not liable for the loss, as under the contract it owed him no duty in the case of fires.²

6. FOR DEATH RESULTING FROM IMPURE WATER.—A water company is not liable for death resulting from contaminated water supplied to its patrons, in the absence of negligence on its part.³

8. Taxation.—The subject of taxation of water companies has been treated elsewhere in this work.⁴

9. Mechanics' Liens.—(See also MECHANICS' LIENS, vol. 15, p. 1).—In some of the states, on account of the *quasi* public character of the enterprise and its intimate connection with the public convenience and welfare, the property of water companies necessary for carrying on their operations, is held to be exempt from the general lien laws.⁵ In other states, a contrary policy

1. Becker v. Keokuk Waterworks, 79 Iowa 419; Howsmon v. Trenton Water Co., 119 Mo. 304.

In Mott v. Cherryvale Water, etc., Co., 48 Kan. 12, by the terms of the city ordinance, which the water company accepted, the company agreed "that it will pay all damages that may accrue to any citizen of the city, by reason of a failure on the part of the company to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence of the water company." It was held that this did not create such privity of contract between a citizen or resident and the water company as would entitle him to maintain an action against it for injury or destruction of his property by fire, caused by the failure of the company to fulfill its contract.

2. Beck v. Kittanning Water Co. (Pa. 1887), 11 Atl. Rep. 300.

3. Buckingham v. Plymouth Water Co., 142 Pa. St. 221. And here it was held further, that an offer to show that prior to the sickness of the plaintiff's children there were cases of typhoid fever near the banks of small streams flowing into a river some distance above the point from which the company drew a part of its water supply, did not tend to establish negligence on the part of the defendant.

4. See TAXATION, vol. 25, p. 157 (as

to presumption of liability to taxation); p. 104 (as to the character of the property of water companies for purposes of taxation); p. 156 (as to the power of the legislature to grant exemptions); p. 606 (as to the power of municipalities to grant exemptions); pp. 157 and 162 (as to the construction of exemption statutes and ordinances). See also TAXATION (CORPORATE), vol. 25, p. 624; CORPORATIONS, vol. 4, p. 272a.

5. Foster v. Fowler, 60 Pa. St. 27; Guest v. Merion Water Co., 142 Pa. St. 610. In the latter case it was further held that the rule in *Pennsylvania* was not affected by the provisions of section 1, Act of April 7th, 1870, Pamphlet Laws 58, of that state, authorizing the personal, mixed, or real property, franchise and rights of any corporation to be sold on a *fieri facias*, such process being in lieu of, and on the footing of, a sequestration for the benefit of all the corporate creditors. McNeil Pipe, etc., Co. v. Bullock, 38 Fed. Rep. 565 (construing the Alabama statute).

A water company incorporated under 1 Revised Statutes of Indiana (1876), p. 329, is not a manufacturing company under 1 Revised Statutes (1876), p. 619, of that state, and its buildings, etc., are not subject to the enforcement of a mechanic's lien for materials furnished in constructing its pipes, mains, etc. Kentucky Lead, etc., Co. v. New Albany Water Works, 62 Ind. 63.

prevails, and the lien laws are held to comprehend water companies.¹

10. **Forfeiture of Franchises.**—As in the case of other corporations, the rights and privileges conferred upon water companies are dependent upon their continued compliance with the duties and obligations imposed, and are subject to forfeiture for nonuser or misuser.²

The principles governing the subject of forfeiture of corporate franchises,³ as well as the modes of enforcing the same, have been fully treated in other parts of this work.⁴

WATER MARK.—The term “water mark” means the place where the water ordinarily flows to at high or low tide.⁵

1. *National Foundry, etc., Works v. Oconto Water Co.*, 52 Fed. Rep. 43 (*construing the Wisconsin statute*); *McNeal Pipe, etc., Co. v. Howland*, 111 N. Car. 615.

2. See *Farmers L. & T. Co. v. Galesburg*, 133 U. S. 156, *affirming Galesburg v. Galesburg Water Works Co.*, 34 Fed. Rep. 675; *Winfield v. Winfield Water Co.*, 51 Kan. 70; *Foster v. Joliet*, 27 Fed. Rep. 899. In this last case, it was held that a contract by which A agreed with a city to construct and operate waterworks, and which contained the provision that “in case of failure of the party of the first part to construct or maintain said waterworks as herein agreed, the rights and franchises hereby granted to him shall cease and determine,” was not rescinded by *ex parte* action of the city; for example, by a resolution of the common council, without judicial proceedings. And, further, that where A and his assignees erected and put into operation waterworks, not complying with the contract, and the non-performance of the contract was due largely to the acts of both parties, and in part to unsuccessful experiments authorized by the city, under the forfeiture clause above stated, A and his assignees were entitled, before being liable to a forfeiture of their rights, to a reasonable time in which to perform the contract; and that an injunction would lie to restrain the city from interfering with the pipes laid, or to be laid, during the extension of time granted them.

3. See *CORPORATIONS (PRIVATE)*, vol. 4, p. 184; *FORFEITURE*, vol. 8, p. 443; *FRANCHISES*, vol. 8, p. 584; *INFORMATION (CRIMINAL)*, vol. 10, p. 702; *QUO WARRANTO*, vol. 19, p. 660; *ULTRA VIRES*, vol. 27, p. 413.

4. See *CORPORATIONS (PRIVATE)*, vol. 4, pp. 291, 302; *FORFEITURE*, vol. 8, p. 445; *INFORMATION (CRIMINAL)*, vol. 10, p. 709 *et seq.*; *QUO WARRANTO*, vol. 19, p. 660; *SCIRE FACIAS*, vol. 21, p. 879, *et seq.*

5. *Gerrish v. Union Wharf Co.*, 26 Me. 395; 46 Am. Dec. 568. In this case the court, by Shepley, J., said: “The counsel for the plaintiffs further contend that the jury were erroneously instructed, if they ‘should find the part of the wharf, where the plaintiffs’ western line struck it, to be below the ordinary line of low water, they should find their verdict for the defendants.’ These instructions in effect declared, that the plaintiffs’ title to the flats extended by the ordinance only to the ordinary low water mark, and not to the place to which the tide ebbed, when from natural causes it ebbed the lowest. The ordinance declares that the proprietors of lands ‘shall have propriety to the low water mark.’ It evidently contemplates and refers to a mark which could be readily ascertained and established; and that to which the tide on its ebb usually flows out, would be of that description. That place, to which the tide might ebb under an extraordinary combination of influences and of favoring winds, a few times during one generation, could not form such a known boundary as would enable the owner of flats to ascertain satisfactorily the extent, to which he could build upon them. Much less would other persons, employed in the business of commerce and navigation, be able to ascertain, with ease and accuracy, whether they were encroaching upon private rights or not, by sinking a pier or placing a monument. It would seem to be reasonable that high and low water marks should be ascer-

tained by the same rule. The place to which tides ordinarily flow at high water, becomes thereby a well defined line or mark, which at all times can be ascertained without difficulty. If the title of the owner of the adjoining land were to be regarded as extending, without the aid of the ordinance, to the place to which the lowest neap tides flowed, there would be found no certain mark or boundary by which its extent could be determined. The result would be the same, if his title were to be limited to the place to which the highest spring tides might be found to flow. It is still necessary to ascertain his boundary at high water mark, in all those places where the tide ebbs and flows more than one hundred rods, for the purpose of ascertaining the extent of his title toward low water mark. It is only by considering the ordinance as having reference to the ordinary high and low water marks, that a line of boundary at low water mark becomes known, which can be satisfactorily proved, and which, having been once ascertained, will remain permanently established. Sir Matthew Hale, in his treatise *de Jure Maris*, ch. 4, says: 'The shore is that ground that is between the ordinary high and low water mark.' He remarks also: 'It is certain that, that which the sea overflows, either at high spring tides or extraordinary low tides, comes not as to this purpose, under the denomination of *litus Maris* and consequently the king's title is not of that large extent, but only to land that is usually overflowed at ordinary tides.' This treatise has been received by judicial tribunals and by distinguished jurists, both during the earlier and later days of law, with unqualified approbation and commendation. *Vide* the note to the case of *Ex p. Jennings*, 6 Cow. (N. Y.) 536. The rule as therein stated, appears to have been received with approbation in the cases of *Storer v. Freeman*, 6 Mass. 435, and *Com. v. Charlestown*, 1 Pick. (Mass.) 180; 11 Am. Dec. 161. In the case of *Sparhawk v. Bullard*, 1 Met. (Mass.) 95, low water mark was considered to be at that place to which the tide ebbed, when from natural causes it ebbed the lowest. No authority is there cited, or reason stated, for this difference of opinion. The former conclusions appear to be more in accordance with reason and authority. The instructions on this point must be regarded as correct; but if they could be otherwise regarded, the plaintiffs do not appear to

have been aggrieved by them; for the jury found that the defendants did not occupy the flats 'which were above low water mark, when the tide ebbs the lowest by natural causes.'

High Water Mark.—The conveyance of a mill and mill privilege, "the high-water mark of the dam or pond" being designated, "with the right of flowing" the grantor's "meadows above," does not convey the right to raise the dam to the designated mark; and the dam must be so maintained that the water will not rise above the mark in an ordinary state of the stream, though that state is a swollen one, caused by the letting down of water from a reservoir above; but the conveyance does not abridge the grantee's right under *Massachusetts Gen. Stat.*, ch. 149, to raise the dam, and the grantor's remedy in such case is under the statute, and not at common law. *Brady v. Blackinton*, 113 Mass. 245. In this case, the court, by Morton, J., said: "The 'high water mark' means the highest point to which the dam will raise the water in the ordinary state of the stream. *Winkley v. Salisbury Mfg. Co.*, 14 Gray (Mass.) 443."

In *Howard v. Ingersoll*, 13 How. (U. S.) 423, the court, by Nelson, J., said: "The term high water, when applied to the sea, or to a river where the tide ebbs and flows, has a definite meaning. The line is marked by the periodical flow of the tide, excluding the advance of waters above this line, in the one case by winds and storms, and in the other by freshets or floods. But in respect to freshwater rivers, the term is altogether indefinite, and the line marked uncertain. It has no fixed meaning in the sense of high-water mark when applied to a river where the tide ebbs and flows, and should never be adopted as a boundary in the case of freshwater rivers, by intendment or construction, whether between states or individuals. It may mean any stage of the water above its ordinary height, and the line will fluctuate with every varying freshet or flood that may happen."

High-water mark, as the line between the riparian proprietor and the public, is coordinate with the limit of the river bed, and that only is to be regarded as river bed which the river occupies long enough to wrest it from vegetation, so as to destroy its value for agricultural purposes. *Houghton v. Chicago, etc., R. Co.*, 47 Iowa 370. The court, in this case, said: "The

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court instructed the jury in these words: 'The Mississippi river periodically rises and falls, and these rises, as shown by the undisputed evidence, occur usually in June, September, and sometimes October. These rises are characterized as high water, and you are instructed that the highest point to which the river ordinarily rises at these times of high water is high-water-mark.' The giving of this instruction is assigned as error. It is insisted that it does not contain the true definition of high-water mark, within the meaning of the law which makes that line the boundary between the property which belongs to the riparian proprietor and that which belongs to the public. No definition of high water mark has, we think, ever been given by this court. In *Musser v. Hershey*, 42 Iowa 361, Day, J., said: 'It is the settled doctrine of this court that a riparian proprietor upon a navigable stream owns only to high water mark, that is, only to the edge of the bank.' This is undoubtedly correct, and there only remains to be determined what, precisely, is the bank. The ordinary idea of a river bank is that portion of the earth which confines the water in its channel. It adjoins the bed of the river, and belongs to the riparian proprietor. The bed, if the stream is navigable, belongs to the public. While the banks are supposed to confine the water in its channel, they are sometimes in freshets overflowed. But they are not the less defined because they are sometimes overflowed. In determining the boundary line between the bank and bed of a stream, freshets are not accounted. Upon this point there has been an express adjudication. In *Howard v. Ingersoll*, 13 How. (U. S.) 381, a question arose as to where the boundary line was between *Alabama* and *Georgia*. It had been established upon the western bank of the Chattahoochee river, but the parties were not agreed as to what constituted the bank. It was held that *Georgia* did not include land on the *Alabama* side of the river which was covered with water only in time of freshets. The correctness of the decision is entirely obvious."

Low Water Mark.—The definition of "low water mark" in *Pennsylvania* is to be decided by the law of that state, and not by that of *Great Britain* or of the sister states. *Stover v. Jack*, 60 Pa. St. 339; 100 Am. Dec. 566. In this

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case the court, by Agnew, J., said: "The deed is not before us, but it seems the title of the plaintiff extended to low water mark, and on this ground he claimed the ownership of the *locus in quo* of the alleged trespass. The defendant alleged it to be an island surrounded by water, except at very low stages. The court held that low water, as contradistinguished from high water, does not mean the lowest water the stream may exhibit under special and extraordinary circumstances; and that the *locus in quo* is an island if the water of the river flows around it at its ordinary stage, unaffected by floods or drought. This is assigned for error, and it brings up for decision what is meant by low water mark as a terminus or boundary. I have found no case defining low water mark, though many refer to it as fixing boundary of the title on navigable streams. Its definition, however, seems to grow out of the principles recognized as establishing the character of these streams, and the rights of riparian owners. The question is one to be decided by the law of this state, and not by that of *Great Britain*, or even some of the sister states. At the common law those streams only are considered navigable in which the tide ebbs and flows. High or low water mark was, therefore, easily determined, the ocean maintaining a common level, and the ordinary flow and ebb of tide being regular in their extent, and marking the limits of high and low water with great uniformity. But in this state its large navigable streams rise and flow hundreds of miles above tide, and are affected by floods and droughts to extremes that surprise the unaccustomed eye, sometimes filling the valleys far beyond the banks of the stream, and at others shrinking within the pebbly bed until a thin thread only marks the flow. The common law being inapplicable to the circumstances, has, therefore, not been adopted. For this reason neither the control of the waters of navigable rivers, nor of the soil beneath, has been parted with by the commonwealth; and the far-seeing wisdom of our ancestors has been, in this respect, amply vindicated by the results. This was soon perceived when the state began to improve the navigation of her rivers by artificial means. Had it been otherwise, many noble works designed to enrich and benefit her citizens must have failed in an encounter with private

WAYBILL—(See also *BILL OF LADING*, vol. 2, p. 223; *CARRIERS OF GOODS*, vol. 2, p. 770; *CARRIERS OF PASSENGERS*, vol. 2, p. 738; *EXPRESS COMPANIES*, vol. 7, p. 539; *FREIGHT*, vol. 8, p. 900; *RAILROADS*, vol. 19, p. 775).—A waybill is a list of the names of passengers who are carried in a public conveyance, or the description of goods sent with a common carrier by land.¹ When the goods are transported by water route, such list is usually called a bill of lading.²

interests. The importance of the rights thus reserved will be seen in the following cases—others might be added: *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. (Pa.) 79; *Com. v. Fisher*, 1 P. & W. (Pa.) 462; *Zimmerman v. Union Canal Co.*, 1 W. & S. (Pa.) 346; *McKeen v. Delaware Div. Canal Co.*, 49 Pa. St. 424. Owing to this right of control and title to the soil itself it has always been held that the grants of the state, of lands bordering on navigable streams, even when calling for the river as a boundary, do not extend beyond low water mark. *Hart v. Hill*, 1 Whart. (Pa.) 137; *Ball v. Slack*, 2 Whart. (Pa.) 508; 30 Am. Dec. 278; *Lehigh Valley R. Co. v. Trone*, 28 Pa. St. 206; *Jones v. Janney*, 8 W. & S. (Pa.) 436; 13 Am. Dec. 309. And even to this extent the grant of title is not absolute, except to high water mark. As to the intervening space between high and low water mark, the title of the private owner is qualified. The right of passage over it in high water remains in the public. The state may use it for purposes connected with the navigation of the stream without compensation, and may protect it also from an unauthorized use of it even by the owner of the land to low water mark. *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. (Pa.) 79; *Com. v. Fisher*, 1 P. & W. (Pa.) 462; *Zimmerman v. Union Canal Co.*, 1 W. & S. (Pa.) 346, *ubi supra*; *Bailey v. Miltenberger*, 31 Pa. St. 43; *Flanagan v. Philadelphia*, 42 Pa. St. 219. Another consequence of the *Pennsylvania* doctrine as to navigable streams is that the islands in them belong to the state, and have always been considered as excepted from the general laws for the sale and settlement of the vacant lands of the commonwealth. They have always been granted under laws of special application to islands. It is also a well-known fact that in the seasons of extreme low water many of the islands of the principal rivers are not entirely surrounded with water, but may be reached from the shore dry-shod. All

these considerations show that to adopt any other rule than ordinary low water mark, unaffected by drought, as the limit of title, would carry the rights of riparian owners far beyond boundaries consistent with the interests and policy of the state, and would confer title where heretofore none has been supposed to exist. No one has ever thought that an island cut off from the mainland by the stream in ordinary stages of low water could be added to the land of an adjacent proprietor, merely because in the very dry season of the year the stream had almost disappeared, and no water flowed over the intervening dry and sandy, or pebbly bed. The doctrine that low water mark is the extremest verge to which a long drought may reduce the stream would lead to such results. Ordinary high water and ordinary low water each has its reasonably well defined marks, so nearly certain that there is not much difficulty in ascertaining it. The ordinary rise and fall of the stream usually finds nearly the same limits. But to bound title by a mark which is set by an extraordinary flood, or an extreme drought, would do injustice and contravene the common understanding of the people. We are of opinion, therefore, that the plaintiff's title was bounded by ordinary low water mark, where that was properly submitted to the jury."

1. Century Dict.

2. Webster's Dict.

Waybill as Evidence.—In *Coupland v. Housatonic R. Co.*, 61 Conn. 531, the plaintiff shipped a mare and colt over the defendant's line from B. to D. During the course of transportation the plaintiff's agent informed the conductor that the mare was becoming frightened and in danger of being killed by further transportation, and requested him to have the car set on a side track at the next stopping place. The defendant offered in evidence a waybill, in the ordinary form, describing the property carried, its destination and value, the names of the shipper

WAY-GOING CROPS—(See also CROPS, vol. 4, p. 887; LANDLORD AND TENANT, vol. 12, p. 658).—A phrase formed by elision from “away-going crop,” and meaning such crops as the tenant has the right to cut and carry away with him, after the end of his term.¹

WAYS.—(See also the following titles—each title indicates the

and consignee, and the rate of charge. It was for the convenience of the company only, and had not been brought to the plaintiff's knowledge. This was held to be admissible as containing matter to be considered by the conductor in determining whether to interrupt the transportation as requested, as it showed the value of the freight, and how much further it was to be carried, and was, so far as appeared, his only source of information concerning the property.

A carrier, who acts as the forwarding agent of the owner of goods in giving directions by waybills or otherwise to the successive lines of transportation over which they are to be carried beyond the termination of his own route, is responsible, as such forwarding agent, only for the want of reasonable care and diligence. *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen (Mass.) 254. In this case a waybill of iron rails, to be transported over several successive lines of railroad, was made out by the agents of the first line in this form: “Waybill of merchandise transported by the F. R. R. from C. to B. November 27, 1852. (Consignees) Ogdensburg R. R. (Description of article) Rails part lot.” This was held to be sufficient to show to the intermediate carriers that the rails were to be carried and delivered to the Ogdensburg Railroad at B., and to exonerate the first carrier from liability, although the rails were detained and used by one of the intermediate companies which at the same time was receiving other similar rails over the same route for its own use.

In *Barter v. Wheeler*, 49 N. H. 9, flour was brought to Ogdensburg by the N. T. Company, consigned to the plaintiffs at Concord, and to go over the road of the N. R. R. Co., and was deposited in a storehouse under the control of the N. T. Company, and, according to the course of business for six or seven years, a clerk of that company forwarded to the plaintiffs a waybill marked “duplicate” and headed

“N. R. R. Co.,” and dated “Ogdensburg Depot,” but not signed by any one, reciting that the said company had received the flour and promising to deliver it to the consignees, subject to the charges as specified; and, at the same time, sent a duplicated waybill to the N. R. R. Co., which was entered by that company in its books. The N. T. Company also drew upon the consignees for freight to Ogdensburg, after which communications were had between the agents of the N. R. R. Co. and the consignees, without reference being had to the N. T. Co. After this the flour was destroyed by fire, and the defendants, who were trustees of the railroad company, did not deny the receipt of the flour until after the suit had been brought. It was held: 1. That if the waybills were sent to the consignees with the knowledge of the defendants and with the intention on their part that they should be received and acted upon by the plaintiffs, as the representations and undertakings of the defendants, and they were so received and acted upon by the plaintiffs, who were induced thereby to make the claim and bring the suit, the defendants would be estopped to deny that they had so received the flour. 2. That upon this evidence it was competent for the jury to find all the facts necessary to constitute such estoppel. 3. That while the flour was held at Ogdensburg, awaiting the means to forward it, the defendants held it as common carriers and not as warehousemen.

See *Livingston v. New York Cent., etc., R. Co.*, 76 N. Y. 631, where, upon the facts in the case, the sending of waybills from one railway company to another was held to raise a question for the jury as to whether the second carrier had become charged with the duty of a common carrier in relation to the goods described in the waybills, and the responsibility of taking charge of the goods and of seeing that they were forwarded, and whether there had been unreasonable delay in the matter.

1. Abbott's L. Dict.

standpoint from which the subject of Ways is treated therein: ABANDONMENT, vol. 1, p. 1; ADVERSE POSSESSION, vol. 1, p. 297; BOUNDARIES, vol. 2, p. 507; BRIDGES, vol. 2, p. 540; COUNTIES, vol. 4, p. 365; COUNTY COMMISSIONERS, vol. 4, p. 385 *et seq.*; CROSSINGS, vol. 4, p. 906; DEDICATION, vol. 5, p. 395; EASEMENTS, vol. 6, p. 139; EMINENT DOMAIN, vol. 6, p. 509; EVIDENCE, vol. 7, p. 98; FERRIES, vol. 7, p. 941; GRADE, vol. 8, p. 1410; GRANTS, vol. 9, p. 48 *et seq.*; HEREDITAMENTS, vol. 9, p. 359; HIGHWAY, vol. 9, p. 362; IMPROVEMENTS, vol. 10, p. 242; INGRESS, vol. 10, p. 770; LAKES AND PONDS, vol. 12, p. 610; LANDLORD AND TENANT, vol. 12, p. 658; LAW OF THE ROAD, vol. 12, p. 957; LEASE, vol. 12, p. 974; MILLS, vol. 15, p. 492 *et seq.*; MUNICIPAL CORPORATIONS, vol. 15, p. 949; NAVIGABLE WATERS, vol. 16, p. 259 *et seq.*; NONUSER, vol. 16, p. 750; NUISANCES, vol. 16, p. 922; PARKS AND PUBLIC SQUARES, vol. 17, p. 407; PRESCRIPTION, vol. 19, p. 25 *et seq.*; PRESUMPTIONS, vol. 19, p. 41 *et seq.*; PRIVATE WAYS, vol. 19, p. 95; PROPERTY, vol. 19, p. 283; RAILROADS, vol. 19, p. 841 *et seq.*; REAL COVENANTS, vol. 19, pp. 1001, 1004; RIGHT OF WAY, vol. 21, p. 405; ROAD, vol. 21, p. 412; STREET RAILWAYS, vol. 23, p. 940; STREETS AND SIDEWALKS, vol. 24, p. 1; SURVEYS, vol. 24, p. 1017 *et seq.*; TAXATION, vol. 25, p. 507 *et seq.*; TELEGRAPHS AND TELEPHONES, vol. 25, p. 752 *et seq.*; TOWNS AND TOWNSHIPS, vol. 26, p. 98; TURNPIKES, vol. 27, p. 324; USER, vol. 27, p. 908.)

The term way, in its popular sense, signifies a passage, path, road, or street; in a technical sense, a right of passing through or over land belonging to another.¹ This sense of the word, importing a right to use a road or path, instead of the road or path itself, is derived from the civil law.

1. 2 Bl. Com. 35; 3 Kent's Com. (13th ed.) 419.

A right of way means a right to pass over another's land more or less frequently, according to the nature of the use to be made of the easement. *Bodfish v. Bodfish*, 105 Mass. 319. The privilege which one person or particular description of persons may have of passing over the land of another in some particular line. It denotes an interest or right possessed by certain persons only, as distinguished from the public generally. *Kripp v. Curtis*, 71 Cal. 63.

Mr. Angell says: "The word 'way' is derived from the Saxon, and means a right of use for passengers. It may be private or public. By the term 'right of way' is generally meant a private way which is an incorporeal hereditament of that class of easements in which a particular person, or particular description of persons, have

an interest and a right, though another person is the owner of the fee of the land in which it is claimed." Angell on Highways 1, 2. *Adopted* by the court in *Wild v. Deig*, 43 Ind. 458; 13 Am. Rep. 399.

Ways have been divided as follows: foot-ways; foot- and horse-ways; foot-, horse-, and carriage-ways; and drift-ways. Co. Litt. 56a; Woolrych on Ways 1.

Way—Road.—In *Wood v. Truckee Turnpike Co.*, 24 Cal. 474, the terms "road" and "way" were declared to be synonymous, it being held that ejectment would not lie to try the right to a road or right of way—a road or right of way is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments. The court said: "Road is a legal term, and strictly synonymous with the term 'way,' and in the complaint, and throughout all the title papers of the

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A way, *ex vi termini*, imports a right of passing in a particular line.¹

A way, in the most general sense, includes public ways as well as private ways.²

A right of way, public or private, is an incorporeal hereditament.³

plaintiffs, their identity is fully recognized. A way is an easement, and consists in the right of passing over another man's ground. Washburn on Easements 161. It is an incorporeal hereditament, a servitude imposed upon corporeal property, and not a part of it. . . . The authoritative definition which we have given of the term 'way' shows that neither land, nor rents of land, nor profits of land, nor any possessory rights in land, are included in its meaning. If the plaintiffs then took anything by force of the term 'road,' they took nothing but a right of way."

But in Chollar-Potosi Min. Co. v. Kennedy, 3 Nev. 361; 93 Am. Dec. 409, the court, after quoting from the case just cited, and referring thereto, said: "The main point here is that the word 'road' is exactly synonymous with 'way.' This proposition we conceive to be utterly untenable. It is true that the term 'way' is sometimes used in the same sense as road. Sometimes we call a road, a street, a lane, etc., a way—though this is, perhaps, an improper use of the term 'way.' But Mr. Washburn, when defining 'way' as an easement, uses the word in its strictly legal sense. 'Way,' in its legal, technical sense, means nearly the same thing as 'right of way.' Or, in other words, the right of one person, or of several persons, or of the community at large, to pass over the land of another. Webster, among other definitions of a road, says it is the 'ground appropriated for travel, forming a communication,' etc. Bouvier defines a road as 'passage through the country for the use of the people.' He also says: 'The public have the use of roads; but the owners of the land through which they are made, or which bounds upon the roads, have *prima facie* a fee in such highway.' Or, in plain English, the public does not usually own the soil over which the roads are constructed, but only a perpetual right to use that soil for some particular purpose. We cannot find that the word 'road' is any-

where used or defined, save in the opinion just quoted, as being synonymous with right of way. In fact, we feel certain that it is never so used in common conversation, in ordinary writing, nor in legal works. Road means any piece of land used or appropriated for travel. It may be so appropriated by an individual, a corporation, or the public. Where roads are constructed by turnpike and railroad companies, sometimes they acquire a complete title to the land over which their road is built, and sometimes only the right of way. So the public may, if it chooses, buy the land over which the public way is to be established if the individual owner is willing to sell it, or may, which is more usual, only purchase, or procure by the proper proceedings the right of way for such road. The road, however, is one thing, the right of way is another, and very different."

1. Jones v. Percival, 5 Pick. (Mass.) 485; 16 Am. Dec. 415; Nichols v. Luce, 24 Pick. (Mass.) 104; 35 Am. Dec. 302; Chase v. Perry, 132 Mass. 582; Starkie v. Richmond, 155 Mass. 196; Jennison v. Walker, 11 Gray (Mass.) 426.

2. Co. Litt. 56a.

Public ways, as applied to ways by land, are usually termed highways or public roads, and are such ways as every citizen has a right to use. Kripp v. Curtis, 71 Cal. 64.

3. Gidney v. Earl, 12 Wend. (N. Y.) 98; Kripp v. Curtis, 71 Cal. 62.

A way, whether public or private, whether styled a road or a street, leading through a town or country, is an incorporeal hereditament. Conner v. New Albany, 1 Blackf. (Ind.) 45.

In Willoughby v. Jenks, 20 Wend. (N. Y.) 99, the court, by Cowen, J., said: "Whether a public way be an hereditament in every sense or not, it is certainly a *quasi* hereditament: it is an incumbrance on land which seriously affects the title to the soil; it is in itself real estate, a right to occupy land subject to a control in the owner very much reduced, and, indeed, destroyed for all purposes of cultivation."

The grantee of a way is restricted to the route and to the specific use set forth in his grant.¹

But the grant or reservation of a way, without limitation or restriction, is understood to mean a general way for any purpose to which the land may reasonably and naturally be devoted.²

What is a reasonable use of a way, where the purposes are not defined in the grant or reservation, is a question of fact to be determined upon the evidence.³

The obstruction of a private way is a disturbance; the obstruction of a public way is a nuisance.⁴

In the notes will be found cases construing the term "ways," as used in the "Employers' Liability Acts," extending and regulating the liability of employers to make compensation for personal injuries suffered by employees, "by reason of any defect in

1. *French v. Marstin*, 24 N. H. 440; 57 Am. Dec. 294; *Abbott v. Butler*, 59 N. H. 317. See also *Noyes v. Hemp-hill*, 58 N. H. 537.

But while the terms of the grant cannot be enlarged beyond their natural meaning, they will not be so narrowed as to prevent the beneficial use by the grantee of what is granted, in the manner and for the purposes fairly indicated by the grant. *Abbott v. Butler*, 59 N. H. 317; *Senhouse v. Christian*, 1 T. R. 560; *Russell v. Jackson*, 2 Pick. (Mass.) 577; *Walker v. Pierce*, 38 Vt. 94.

A carriage-way will comprehend a foot-way, *Davies v. Stephens*, 7 C. & P. 570; 32 E. C. L. 634, and a horse-way, but not a drift-way. *Heath, J.*, in *Ballard v. Dyson*, 1 Taunt. 284.

A drift-way is a common way for driving cattle, and the reservation of such a way has been held to intend a way for the passage of teams. *Smith v. Ladd*, 41 Me. 320.

In *Kaler v. Beaman*, 49 Me. 207, the grant of a right of way from the high-way to a mill privilege was held to carry the right to the free and unobstructed use of the road as a way for the accommodation of the grantee's mill privilege, but not the right to deposit lumber and other materials on the sides of the way.

In *Jackson v. Stacey*, Holt N. P. 455, the grant of a way for agricultural purposes was held not to include the right to carry lime from a quarry. And in *Bradburn v. Morris*, 3 Ch. Div. 812, it was held not to embrace a right of way for mineral purposes generally. And in *Cowling v. Higginson*, 4 M. & W. 245, it was held not to include the right to convey coals over the way.

A "way on foot, or for horses, oxen, cattle and sheep," has been held not to include the right to carry manure in a wheelbarrow. *Brunton v. Hall*, 1 Ad. & El. 792; 41 E. C. L. 779.

A right "to fetch water from a river" will not sustain a plea for a right "to fetch both water and goods." *Knight v. Moore*, 3 Bing. N. Cas. 3; 32 E. C. L. 11. And a right to cart timber will not sustain a plea of a general right of way on foot and with horses, carts, wagons, and other carriages. *Higham v. Rabbett*, 5 Bing. N. Cas. 622; 35 E. C. L. 253.

A right of way to repair a race and dam must be confined to such use, and cannot be extended to mean a right of way for ordinary purposes. *McTavish v. Carroll*, 7 Md. 352; 61 Am. Dec. 353.

A way over another's estate, used for the purpose of taking away wood only, cannot be extended to other purposes when the dominant estate is occupied by dwellings and cultivated. It must be limited to the use for which it is shown by the evidence to have been originally designed. *Atwater v. Bodfish*, 11 Gray (Mass.) 150.

2. *Abbott v. Butler*, 59 N. H. 317; *Rowell v. Doggett*, 143 Mass. 487. See also *Whittier v. Winkley*, 62 N. H. 341.

3. *Rowell v. Doggett*, 143 Mass. 487.

4. *Sweet's Law Dict.*

Disturbance of Ways.—This occurs where a person who has a right of way over another's land, by prescription or grant, is obstructed by inclosures or other obstacles, or by plowing across it, by which means he cannot enjoy his right of way, or, at least, in so commodious a manner as he might have done. 3 Bl. Com. 241; *Black's L. Dict.*

the condition of the ways, works, or machinery connected with, or used in, the business of the employer."¹

1. Employers' Liability Acts—Ownership of Ways Not Necessary—But Control of Them Is.—In *Coffee v. New York, etc., R. Co.*, 155 Mass. 21, the court said: "The want of ownership by the defendant is not of much significance. By the term, 'ways, works or machinery connected with or used in the business of the employer,' we understand something in the place, or means, appliances, or instrumentalities provided by the employer for doing or carrying on the work which is to be done. The use of other words may not make the meaning clearer, but it would seem that there must be a defect in something which can in some sense be said to be provided by the employer." Here it was held that if a freight car, which is hauled empty by a railroad company to the terminus of its road, for transfer to another line where it belongs, while being shifted there to another train upon a connecting line, occasions an injury to a brakeman employed by such company by reason of a defect in the brake wheel, such car is not part of the 'ways, works, or machinery connected with or used in the business of the employer,' such as will give a right of action against the company under the statute.

In *Trask v. Old Colony R. Co.*, 156 Mass. 298, it was said that it may not be necessary, in order to render an employer liable for an injury occurring to an employee through a "defect in the ways, works, or machinery," within the meaning of the *Massachusetts Statute* (1887) ch. 270, that they should belong to him, but it should at least appear that he has the control of them, and that they are used in his business by his authority, express or implied.

In *Regan v. Donovan*, 159 Mass. 1, the plaintiff, while in the employ of the defendants, was ordered by them to carry a bar of iron down a flight of movable stairs leading into, and intended to furnish permanent means of access to, a cellar, in which the defendants were making some alterations for the owner of the building. There was nothing to show that the steps were not suitable to be placed as they were, or reasonably expected to be in such position, or that the defendants had reason to suppose that they were inse-

curely fastened. As the plaintiff stepped upon the stairs, they slipped from under him and he was injured. It was held that the defendants did not adopt the stairs as a way used in their business, within the meaning of the term in the statute.

A track in the yard of A, owned, maintained, and repaired by him, and used by a railroad under a contract with him for the delivery of freight in the yard, is no part of the railroad's ways, within the meaning of the statute, and if an employee of the railroad is killed by a defect in it, an action will not lie against the railroad on that statute. *Knowlton, J., dissenting. Engel v. New York, etc., R. Co.*, 160 Mass. 260.

Ways Must Be of a Permanent Character.—The statute has reference to ways and works of a permanent character; such as are connected with or used in the business of an employer. Thus, the liability of a bank of earth, upon which laborers employed by a person are at work, to fall when undermined, if not shored up, is not a defect in the condition of the ways, works, etc., when the work on the bank is simply the leveling of it for the purpose of grading the land of a third person. *Lynch v. Allyn*, 160 Mass. 248.

And in *Howe v. Finch*, 17 Q. B. Div. 187, it was held that the statute did not apply to ways or works in process of construction.

In *Willets v. Watt* (1892), 2 Q. B. Div. 92, where a workman was injured by falling into a catch-pit in the floor of a workshop, which was generally kept covered, but the cover of which was off at the time of the accident for a temporary purpose, it was held by the court of appeal that there could not be said to be a defect in the condition of the way, and Lord Justice Fry said that the language of this section pointed to a defect of a chronic character. All the members of the court concurred in saying that there was no defect in the condition of the way, but merely a negligent user of it by allowing the way to be used when the lid was off without giving warning. So it has been held that rubbish of an accidental or temporary character, on the floor of a room where an employee is at work, cannot be said to be a defect in the condition of the ways, etc.

WEAPON.—(See also ASSAULT, vol. 1, pp. 813, 816; CONCEALED WEAPONS, vol. 3, p. 408.)

This term occurs in a number of phrases used in criminal law, as in the statutory provisions against "carrying concealed weapons," against assaults with "deadly" or "dangerous weapons," etc. Numerous examples of the meaning of these expressions will be found in the cross references given above, and further illustrations are given in the notes below.¹

O'Connor v. Neal, 153 Mass. 281; May v. Whittier Mach. Co., 154 Mass. 29.

Again, in Burns v. Washburn, 160 Mass. 457, a temporary staging, put up by masons in the employ of a contractor, for the purpose of erecting a building on the land of a third person, was held to be not a part of the employer's ways or works.

In McGiffin v. Palmer's Shipbuilding, etc., Co., 10 Q. B. Div. 5, a workman was employed in the defendant's iron works, and part of his duty was to take iron in balls, by means of a two-wheeled car, along a road-way of iron plates. While he was so engaged, the car struck against a piece of a substance used for lining the furnaces, which had been negligently placed projecting into the road-way, and a ball fell on him, causing personal injuries which resulted in his death. In an action against the employers, it was held that the obstruction caused by the substance projecting into the road-way was not a defect in the condition of the way, within the meaning of the act, and the defendants were not liable. Compare Brannigan v. Robinson (1892), 1 Q. B. Div. 344.

A staging fifteen feet high, twenty feet long, and five feet wide, erected in the front of a sawmill, by the side of a wood-pile, for the purpose of enabling the workmen to pile the wood higher, and which is taken down and put up from time to time in different places, and intended to be used from four days to a week at a time in each place where it is erected, has been held to constitute a part of the "ways, works, or machinery" of the mill. Prendible v. Connecticut River Mfg. Co., 160 Mass. 131.

A pipe projecting from a water-tank, whereby a brakeman is knocked off a railroad train and killed, has been held to be a part of the ways, works, machinery, etc., of a railroad company, within the meaning of the Alabama

Code, § 2590. East Tennessee, etc., R. Co. v. Thompson, 94 Ala. 636.

In U. S. Rolling Stock Co. v. Weir, 96 Ala. 396, the complaint alleged that a plank upon which the deceased was required to walk, in the discharge of his duties as a watchman at the defendant's works, was eight inches broad, was laid upon rafters three feet apart and about thirty feet from the floor of a building, and that this was "an unsafe and dangerous appliance for the purpose." It was held that the complaint alleged a defect in the condition of the ways connected with or used in the business of the employer, within the meaning of section 2590 of the Alabama Code.

See generally, upon this subject, FELLOW-SERVANTS, vol. 7, p. 856.

1. Offensive Weapon.—A stick has been held to be an "offensive weapon" within a statute against assault. Rex v. Johnson, 1 R. & R. 492. See also Reg. v. Williams, 14 Cox C. C. 59.

Deadly Weapon.—(See also ASSAULT, vol. 1, pp. 813, 816; HOMICIDE, vol. 9, pp. 545-548, 587, 588, 599.)

The trial court in effect instructed the jury that a deadly weapon was any weapon or instrument by which death might be produced, or would be likely to be produced, when used in the manner in which it was used in the affray; that the jury were the judges as to whether the weapon was or was not a deadly weapon. And on appeal the instruction was sustained. People v. Rodrigo, 69 Cal. 601. See also Doering v. State, 49 Ind. 56; 19 Am. Rep. 669, where it was held that the question whether a particular weapon is or is not dangerous is one of fact, and not of law, and should be submitted to the jury for ascertainment.

In State v. Roberts, 39 Mo. App. 48, the court said: "A pistol is a deadly weapon only when carried for use, and all that can be said is that, *prima facie*, the fact of its being carried is evidence that it is carried for use; but

the defendant is at liberty to rebut this inference, by showing that he carried it as a mere article of merchandise, or, as in this case, as a mere messenger for transmission to a third party, without any intention to use it as a weapon."

A Club Is a Deadly Weapon.—In *State v. Phillips*, 104 N. Car. 786, the court said: "It being admitted that the indictment was found within six months after the offense was committed, the defendants insist that the superior court did not have jurisdiction, because, in the first count, the description of the instrument used is not such that the court can determine that it was a deadly weapon, and the nature of the injury is not set forth in the second count. If the court can neither conclude, upon the face of the indictment, that the weapon described in the first count was one that would probably produce death when used offensively, nor that the injury, as charged in the second count, was of a serious nature, then there was a want of jurisdiction. *State v. Russell*, 91 N. Car. 624; *State v. Porter*, 101 N. Car. 713. In the latter case, the court say: 'The present indictment manifestly falls short of this requirement, for, while called a deadly weapon, it is designated simply as a stick, with no description of its size, weight, or other qualities or proportions, from which it can be seen to be a deadly or dangerous implement, calculated in its use to put in peril life or inflict great physical injury upon the assailed.' This indictment is defective, upon the same reasoning, unless the word club, *ex vi termini*, can be declared such an instrument as would probably produce death or great bodily harm when used to strike a blow. Worcester defines a club as 'a heavy staff or stick, fit to be used in the hand as a weapon; a bludgeon.' Bludgeon, according to the same lexicographer, is 'a short stick with one end loaded, used as an offensive weapon.' The definition of club given by Webster is 'a heavy staff or piece of wood.' So that the court can declare that a blow stricken with such an implement would endanger life. In *State v. West*, 6 Jones (N. Car.) 509, Judge Ruffin says: 'Whether an instrument or weapon be a deadly one is, at least generally speaking, for the decision of the court, because it is a matter of reason that it is, or is not, likely to do great bodily

harm, which determines its character in this respect. *State v. Craton*, 6 Ired. (N. Car.) 164. Hence, it is clear that a gun, sword, large knife, or bar of iron, or any other heavy instrument, by a blow from which a grievous hurt would probably be inflicted, are deemed, in law, deadly instruments.' The instrument declared to be deadly in that case, was an oaken staff, nearly three feet long, and of the diameter of an inch and a half at one end and two inches at the other end. It was manifestly so heavy as to make it dangerous. Greenleaf says (*Greenleaf on Evidence* (14th ed.), vol. 3, § 147): that malice may be presumed from 'casting stones or other heavy bodies . . . over a wall, or from a building, with intent to kill,' etc., 'or where a parent or master corrects a child with an instrument likely to cause death,' etc. Wharton, in *Precedents of Indictments*, vol. 1, p. 244, approves a precedent for assault with 'a large stick,' when it was necessary to allege an intent to kill, and a charge of assault with 'a large knife' has been held good under like circumstances. A club means more, not only a large, but a heavy, stick. We think that a club is such an instrument, in its weight, dimensions, and character, that the court must conclude that a blow stricken with it by a man would probably produce death, or great bodily harm. We therefore hold that the superior court has jurisdiction of the offense charged in the first count, and the failure to prove that particular charge does not oust the jurisdiction acquired by virtue of the form of the indictment. *State v. Ray*, 89 N. Car. 587; *State v. Reeves*, 85 N. Car. 553."

A pitchfork is a deadly weapon, within the meaning of *Kentucky Gen. Stat.*, ch. 29, art. 6, § 2, prescribing the punishment for willful and malicious striking with a deadly weapon, with intent to kill. In *Evans v. Com.* (Ky. 1889), 12 S. W. Rep. 768, the court said: "A pitchfork is an instrument with which life may be readily taken, and therefore a deadly weapon."

A Hoe Held Per Se to Be a Deadly Weapon.—In *Hamilton v. People*, 113 Ill. 38; 55 Am. Rep. 396, the court said: "The point is made there is no proof that the hoe with which the assault is alleged to have been made is a deadly weapon. The indictment alleges, and the proofs show, that an assault was made upon Parks with a loaded pistol and a hoe. This, we think, was sufficient.

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Conceding it was necessary that the deadly character of the weapons with which the assault was made should have been established before the jury (a matter not necessary to be determined), we are of opinion that was sufficiently done by proof that it was done with a hoe and loaded pistol. A hoe, both in popular and legal signification, is *per se* a deadly weapon, fully as much so as a loaded pistol or an axe. Such things as all persons of ordinary intelligence are presumed to know, are not required to be proved. While the indictment is somewhat informal, yet we think it is sufficient, at least after verdict, no motion having been made to quash. In a case of this kind the gist of the offense is the assault with a felonious intent, hence it is not necessary to set out the manner of the assault with any degree of particularity."

Pin Thrust down Infant's Throat.—In *State v. Norwood* (N. Car. 1894), 20 S. E. Rep. 712, it was held that the pushing of a pin down an infant's throat, thereby causing its death, was killing it with a deadly weapon. The court said: "The question whether an instrument with which a personal injury has been inflicted is a deadly weapon depends, not infrequently, more upon the manner of its use than upon the intrinsic character of the instrument itself. (*State v. Huntley*, 91 N. Car. 620.) We may expect death to ensue from pushing such a pin down the throat of an infant, just as we may look for death or serious bodily harm as a consequence of firing a pistol into a crowd of human beings, or at a particular person."

A Chisel—"Deadly Weapons."—These words, as used in *Kentucky Rev. Stat.*, ch. 28, art. 6, § 2, 1 Stanton 382, are not restricted to such weapons or instruments as are made and designed for offensive or defensive purposes, or for the destruction of life or the infliction of injury. "Deadly weapon," as used in said statute, embraces any deadly weapon with which a person may be wounded by cutting or stabbing. A chisel is held to be a deadly weapon in this case. *Com. v. Branham*, 8 Bush (Ky.) 387.

Dangerous Weapon.—(See also *ASSAULT*, vol. 1, pp. 813, 816, for a number of instances, and see *supra*, this note, *Deadly Weapon*).—A weapon likely to produce death or great bodily harm. *U. S. v. Reeves*, 38 Fed. Rep. 404; *U. S. v. Williams*, 6 Sawy.

(U. S.) 244; *Skidmore v. State*, 43 Tex. 96.

An Axe.—In *State v. Hertzog*, 41 La. Ann. 777, the court, by Fenner, J., said: "The defendant asked the judge to charge the jury, in substance, that, inasmuch as the wound was inflicted with an axe, which is not *per se* a dangerous weapon within the meaning of the statute, defendant could not be convicted without allegation and proof that the wound was inflicted 'with intent to kill.' Exception was taken to the refusal of the judge so to charge. The contention of defendant is that the first clause of the statute applies to weapons technically dangerous, constructed and employed for use as weapons; and that, where the offense is committed with instruments intended and employed for innocent and useful purposes, and only becoming dangerous weapons when diverted from their proper use and purpose, the case falls within the second clause and requires allegation and proof of the intent to kill; and that otherwise such intent would be, in no case, essential, and that clause of the statute would be inoperative. We were much impressed with the force of this argument, though its strength was weakened by a consideration of the difficulty of holding that a wound inflicted with so deadly an instrument as an axe used as a weapon, is not inflicted with a dangerous weapon under the terms of the statute. The question, however, is not *res nova*, and our doubts are resolved by the clear authority of the case of *State v. Jacob*, 10 La. Ann. 141, in which the indictment was under the same statute and the instrument used was a pocket-knife. The lower judge had been asked to charge that 'if the knife used by the defendant was shown by the evidence to be an ordinary pocket-knife, such as is commonly used by planters for proper purposes, and was not by the accused specially provided for this occasion, then it was not a dangerous weapon within the meaning of the law.' And this court said: 'We are of opinion the judge did not err in refusing to give such instructions.' The case is directly in point, rendered over thirty years ago, and has never been overruled. We feel bound to follow it." See also *State v. Scott*, 39 La. Ann. 943.

A Knife.—In *State v. Henn*, 39 Minn. 476, Gilfillan, C. J., for the court, said: "This is an indictment for assault in

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the second degree. One of the kinds of assault that come within this degree is assault 'with a weapon or other instrument or thing likely to produce grievous bodily harm.' Penal Code, § 187, subsection 4. This indictment charges the assault to have been 'with a weapon, to wit, a knife,' 'the said knife being then and there a weapon and instrument likely to produce grievous bodily harm.' It is objected that as a knife is not necessarily a weapon likely to do grievous bodily harm, but may or may not be so, this knife ought to be more particularly described in the indictment, so that from the description it may be seen whether it was such a weapon or instrument or not. But the description of the knife, to wit, as 'a weapon and instrument likely to produce grievous bodily harm,' is sufficient to bring the case within the definition of offense cited. In *State v. Dineen*, 10 Minn. 407, the description was 'a dangerous weapon, to wit, a large, heavy stone,' and it was held sufficient. It was proper to prove the previous threats of defendant to assault the complainant. The fact of the assault being denied, it was proper to strengthen the direct proof of it by proving the threats made only a few hours before, showing defendant in the mood and temper to make the assault, and intending to make it."

On the trial of an indictment for an assault with a dangerous weapon, to wit, with a knife, there was evidence that the assault was with a jackknife. The judge ruled that a jackknife, like that exhibited to the jury, was a dangerous weapon. It was held, on a bill of exceptions, which did not more particularly describe the knife, that the court could not say, as matter of law, that the instruction was erroneous. *Com. v. O'Brien*, 119 Mass. 342; 20 Am. Rep. 325.

Question of Law or Fact.—In *U. S. v. Small*, 2 Curt. (U. S.) 243, the court said: "In many cases, it is practicable for the court to declare that a particular weapon was, or was not, a dangerous weapon, within the meaning of the law. And when it is practicable, it is matter of law, and the court must take the responsibility of so declaring. *U. S. v. Wilson*, Bald. (U. S.) 78. But where the question is whether an assault with a dangerous weapon has been proved, and the weapon might be dangerous to life, or not, according to the manner in which it was used, or

according to the part of the body attempted to be struck, I think a more general direction must be given to the jury; and it must be left for them to decide whether the assault, if committed, was with a dangerous weapon. *Rex v. Noakes*, 5 C. & P. 326; 24 E. C. L. 342." See also *Barker v. State*, 48 Ind. 163; *Doering v. State*, 49 Ind. 58; 19 Am. Rep. 669; and *supra*, this note, *Deadly Weapon*.

Sharp and Dangerous Weapon.—Clubs, sticks, staves, bricks, stones, and iron bars are not "sharp, dangerous weapons," within 3 *New York Rev. Stat.* (5th ed.), p. 970, § 24, respecting assaults "with knife, dirk, dagger, or other sharp, dangerous weapon." *People v. White*, 55 Barb. (N. Y.) 606.

Pitchfork.—A blow given with the handle of a pitchfork, without pushing or thrusting with the tines, is not an assault with a "sharp, dangerous weapon," within the meaning of the act of 1854 (*New York Laws of 1854*, ch. 74), providing for the punishment of assaults with dangerous weapons. *Filkins v. People*, 69 N. Y. 104; 25 Am. Rep. 143. Here the court said: "The assault was by a blow, as with a stick or club, and not by pushing or thrusting with the tines. As used, the weapon was no more dangerous than it would have been if there had been buttons on the tines to prevent their puncturing the flesh, or than would have been a knife held by the blade, the holder striking with the handle. A blow thus given with the handle of a knife would not be an assault with a knife or sharp instrument within the statute, any more than would an attempt to discharge a loaded gun, the touch-hole of which was plugged, be an offense under the English statute making it criminal to attempt to discharge a loaded gun at another. *Rex v. Harris*, 5 C. & P. 159; 24 E. C. L. 254; 1 *Russell on Crimes* (9th ed.) 979, marg. 725."

Concealed Weapon.—(See also **CONCEALED WEAPONS**, vol. 3, p. 408, where the subject is treated at large).—A pistol with the tubes imperfect and battered up, and the locks so much out of order that it could not be discharged by the trigger, is a firearm, the carrying of which, concealed, is prohibited. *Atwood v. State*, 53 Ala. 508; *overruling* *Evins v. State*, 46 Ala. 88.

Georgia Code, § 4527, makes it penal to carry concealed about the person

WEAR AND TEAR—(See also BAILMENTS, vol. 2, p. 52; LEASE, vol. 12, p. 1019).—A phrase commonly used in leases and contracts of bailment to limit liability for injury to the subject of the contract.¹

any pistol except a horseman's pistol. The mainspring being disabled so as to render a discharge of the weapon impossible in the ordinary mode of using firearms, is no excuse or justification. *Williams v. State*, 61 Ga. 417; 34 Am. Rep. 102.

In *Missouri* carrying a pistol, not for use as a weapon, but only for the purpose of delivering it to the owner, is not criminal. *State v. Roberts*, 39 Mo. App. 47.

A person who carries concealed about his person, all the pieces of a pistol, which could readily be put together so as to make an effective weapon, is guilty of carrying concealed weapons, though at the time he carried them concealed, the pieces were separate and incapable of use as a firearm until put together. *Hutchinson v. State*, 62 Ala. 3; 34 Am. Rep. 1. Compare *Coak v. State*, 11 Tex. App. 19.

In *State v. Duzan*, 6 Blatchf. (Ind.) 31, carrying concealed an unloaded pistol was held to be within the statute. But in *Carr v. State*, 34 Ark. 450; 36 Am. Rep. 15, a contrary decision was reached. The court said: "In this case, the implements found on defendant were pistols, and worn concealed. But they were not, either of them, loaded; and one was wholly unfit for use, if it had been. These things, affirmatively shown, rebut the presumption that the pistols were worn to be used as weapons. They could not be so used. If the state, in a given case, should show that pistols were worn concealed, the jury might well presume that they were loaded, and worn as weapons. But the defendant might remove the presumption by proof. It would be one of fact, and not of law. The attention of his honor, the circuit judge, seems to have been directed to the point of defense, based upon the journey, which he correctly decided. For want of sufficient proof that the pistol was worn as a weapon, a new trial should have been granted."

The language of the *North Carolina* statute is not "concealed on his person," but "concealed about his person," and hence, if the weapon be

within reach and control of the defendant, it is sufficient to bring the case within the meaning of the statute. *State v. McManus*, 89 N. Car. 558. In this case, the court said: "It is insisted that the pistol, if in the basket and concealed, was not about the person of the defendant, though upon his lap. Such is not the meaning of the statute. The language is not 'concealed on his person,' but 'concealed about his person;' that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive. If the pistol was concealed in the basket, and that was in the defendant's lap, on his arm, or fastened about his person, or if placed near his person, though not touching it, this would be sufficient. It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged."

In *Alabama*, a person who, in the room of another in which there are several persons, bears in his vest pocket a pistol, which is willfully or knowingly covered or kept from sight, is guilty of a violation of the statute (*Alabama Code*, § 3274) against carrying concealed weapons. *Owen v. State*, 31 Ala. 387.

1. Reasonable Wear and Tear.—In *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507, the court said: "These words ('reasonable wear and tear') no doubt, include destruction to some extent, *e. g.*, destruction of surface by ordinary friction, but we do not think they include total destruction by a catastrophe which was never contemplated by either party."

Fair Wear and Tear, etc.—In *Davis v. Davis*, 57 L. J. Ch. 1095, *Kehewich, J.*, said: "If those words, 'fair wear and tear and damage by tempest excepted,' were not there, any dilapidations found at any time, or at the end of the term, by reason of the wear and tear, the wearing out of the walls and floors of a public house, for example, from the constant traffic and so forth—the lessee would be liable to replace, and if, unfortunately, by a storm, his chimney pot was

WEARING APPAREL—(See also **SEPARATE PROPERTY OF MARRIED WOMEN**, vol. 22, p. 1).—This phrase, in exemption and revenue laws, has its popular import.¹

blown down, or he had his roof broken, he would be bound to put it straight, and restore the place to good and substantial repair."

Natural and Reasonable Wear and Tear.—In an article of agreement for the sale of real estate, by which the vendor stipulates to deliver possession of the premises, at a future day, in as good repair as they were in at the time of the execution of the contract, "natural and reasonable wear and tear excepted," the exception covers only such decay or depreciation in value, of the property, as may arise from ordinary and reasonable use; and injury to the property by a freshet is not within the exception. *Green v. Kelly*, 20 N. J. L. 547. Here Whitehead, J., said: "The last objection made by the defendant's counsel, is, that as it appears by the declaration, the injury to the dam arose from a freshet, it must be regarded as only natural wear and tear, and therefore comes within the exception in the article. We were referred to Webster's dictionary for the meaning of the terms used in the exception, particularly the words natural and tear; and from these definitions the counsel argues that, by the use of these terms, the parties meant more than the ordinary decay of the property by reasonable use. It is insisted that the exception provides, not only for the ordinary decay of the property, by the use of the term wear; but also by the use of the other terms, for the violent rending or destruction of the same by natural causes, as by freshets. It should be borne in mind, that the agreement was to be executed by payment of the purchase-money and delivery of the deed and possession of the premises, at a future day; and until then the defendant was to retain the possession. There is nothing in the agreement from which it can be inferred that the sum the plaintiff agreed to pay was not a full and fair price for the property in the condition it was at the date of the contract. It would be unreasonable to suppose that the plaintiff would covenant to pay a full price for the property at a future day, and in the meantime run the hazard of its destruction by the elements, or of its being improperly used while in the

possession of the defendant. But however this may be, the words used in the exception are to be interpreted in their popular and usual meaning, and as they are understood by plain practical men; and in that sense, they do not justify the construction contended for by the defendant's counsel. The intention of the parties was, that upon the plaintiff's performing the stipulations on his part, possession of the property was to be delivered to him, in as good condition as it was at the date of the contract, except as it might be depreciated in value by the ordinary use of it by the defendant. The word natural, in the connection in which it is here used, means no more than ordinary, as contradistinguished from unnatural or extraordinary; and the whole clause refers only to the decay or depreciation in value of the mill, by its ordinary and reasonable use by the defendant. The destruction of the dam by the freshet does not, in my opinion, come within the exception."

Wear and Tear Distinguished.—The case of *Bigge v. Bigge*, 9 Jur. 192, illustrates the distinction between "wear" and "tear." In that case a testator had, by handling, worn his will in two—a very different thing from his having torn it in two—so there was no revocation by "tearing" within the Statute of Wills.

1. Anderson's Law Dict., "Apparel."

In Freeman on Executions (2d ed.), § 232, it is said that the exemption of wearing apparel from execution was probably confined at common law to the garments in which the debtor was clad, citing *Cooke v. Gibbs*, 3 Mass. 193; *Sunbolf v. Alford*, 3 M. & W. 248; *Wolf v. Summers*, 2 Campb. 631; *Bowne v. Witt*, 19 Wend. (N. Y.) 475. None of these cases are directly in point, and an examination of the cases following shows no such interpretation has been given the statutes.

Exemptions — Bags — Bedding, etc.—Bags are not articles of wearing apparel, nor bedding; nor do they fall within the statutory designation of articles exempt from levy and sale under execution; neither are they necessary for actual use in the preservation of

articles declared by statute to be exempt. *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

Exemptions.—Cloth purchased for a coat, carried to a tailor to be made into one, and cut out, is exempted from attachment. *Ordway v. Wilbur*, 16 Me. 263; 33 Am. Dec. 663.

The provision of *Massachusetts Rev. Stats.*, ch. 97, § 22, exempting from execution "the necessary wearing apparel" of a debtor, extends to cloth and trimmings put into the hands of a tailor by the debtor, to be made into clothes necessary for him. *Richardson v. Buswell*, 10 Met. (Mass.) 506. *Dewey, J.*, in delivering the opinion of the court in this case, said: "In giving a construction to a remedial statute, we are to bear in mind the great object and purposes which apparently led to its enactment, the mischief intended to be avoided, and which called for a remedy. By the general law of attachment, independent of the exemption which the statutes have made from time to time, everything belonging to the debtor, in the nature of property, might be taken on execution and sold. The law interposed, and, to secure to the debtor the absolute necessities of life, exempted from attachment and execution, his 'necessary wearing apparel.' It is admitted that the wearing apparel which was about to be made from the articles seized on execution, was necessary to the plaintiff. But it is said that it is not exempted from execution, because the cloth and trimmings thus seized were not yet fashioned and formed into a coat; and it is contended that, until that takes place, the exemption does not apply. The counsel for the defendant asks, what is the limit to the exemption of articles adapted to clothing, if not that by him now insisted upon? Is the exemption to be applied to the earlier stages of the wool unmanufactured, or the flannel before it is fulled and dyed? Now it seems to us, that whatever difficulties might exist as to the articles in these earlier stages above supposed, they do not arise here. This cloth was not merely made, or purchased for clothing, but was actually appropriated to that purpose. The case does not, therefore, depend upon the mere purpose of mind of the debtor to make such use of it at a future day, but an actual appropriation of it to the purpose of wearing apparel. To be useful and convenient for clothing,

the articles needed the operation of the tailor, and they were placed in his hands, to be made into a coat. Having been thus appropriated and used, it assumes the character of clothing for the party, and is within the exemption given by the statute."

Exemptions.—Trunk, Jewelry, etc.—A traveling trunk, mahogany cabinet box, and breastpin, are not articles exempted from attachment and execution under the provisions of chapter 184 of the Revised Statutes of *New Hampshire*, as wearing apparel, necessary for the debtor and his family, nor as household furniture. *Towns v. Pratt*, 33 N. H. 345; 66 Am. Dec. 726.

Exemptions.—Watch.—In *Re Steele*, 2 Flipp. (U. S.) 325, the court said: "It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man 'wears' a watch or 'wears' a cane. The exemption law of *Arkansas* says that 'wearing apparel shall be exempt, except watches.' *Arkansas Dig.* 503, 504; *James' Bankruptcy* 58; *Avery & Hobbs' Bankrupt Law*, 68. In *Peverly v. Sayles*, 10 N. H. 356, under a statute which exempted 'wearing apparel necessary for immediate use,' it was held that an overcoat and a suit of clothes 'to go to meeting in' were included. In *Ordway v. Wilbur*, 16 Me. 263; 33 Am. Dec. 663, cloth sent to a tailor to be made into clothes was in that form held to be exempt as 'apparel.' In *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626, the debtor was in bed—his clothes were on a chair, and his watch on a table. The officer was sued for refusing to levy on them, and it was held that they were exempt as 'wearing apparel,' notwithstanding they were not on the person. There are some expressions in the case which indicate that possibly the court did not intend to include the watch as 'wearing apparel,' but it is probable they did. It was decided in *Smith v. Rogers*, 16 Ga. 479, that a watch was not wearing apparel. But in *Mack v. Parks*, 8 Gray (Mass.) 517; 69 Am. Dec. 269, it was held, in a case where an officer with an attachment asked the debtor to let him look at his watch, and being permitted to do it

from his person by breaking the cord to which it was attached, that the watch was exempt from seizure at common law, because by that law wearing apparel on the person was exempt from levy or distraint. See Freeman on Executions, § 232. We have no state statute in *Tennessee*, that I can find, exempting wearing apparel, and we depend on these common-law principles for immunity in such cases. It is said in *Richardson v. Duncan*, 2 Heisk. (Tenn.) 220, that our exemption laws are to be liberally construed, and this is the universal doctrine of modern times. In that case it was held that an 'ass' is included in that statute which exempts 'a horse, mule, or yoke of oxen;' and in *Webb v. Brandon*, 4 Heisk. (Tenn.) 285, an ox wagon is included in the description 'one two-horse wagon.' But whether a watch may be included in the statutory exemption of 'wearing apparel' or not, it certainly may be allowed as 'other necessities' under certain circumstances."

A watch of moderate value may be exempt from execution as "necessary wearing apparel," when it is made to appear that the watch and other articles reserved as wearing apparel do not exceed the amount limited by the statute. But in such case it lies with the party claiming the exemption to prove affirmatively the facts which establish his claim. *Stewart v. McClung*, 12 Oregon 431. Here the court said: "The question whether a watch is a necessary article of wearing apparel, and as such, exempt, seems, from the decisions, to depend upon the particular facts, or attendant circumstances of each case, such as the value of the watch, the condition and business of the debtor, etc., and has been differently decided under different circumstances."

... If a watch is in no sense 'wearing apparel,' as some of the authorities indicate, the judicial construction of the word 'necessary' is of no importance. On the other hand, it would seem that if a watch worn by a person may be considered as a part of his dress or apparel, the word 'necessary,' as judicially construed, would not so materially affect the meaning of the phrase 'wearing apparel' as to exclude it. It is probably true that a watch is ordinarily worn more for convenience than as a mere luxurious ornament. But to determine whether it is one or the other, necessary or luxurious, as an article of dress or apparel, the value of

the watch is allowed to have a controlling influence in determining that result. If the value of the watch be unreasonable, or too much money be invested in it, the law regards it, as justice to the creditors would require, rather as a luxury than a necessity. And under our statute this element of value would necessarily become an important factor, as the exemption of 'wearing apparel' is limited to one hundred dollars. But, as we have seen, upon the question whether a watch is a necessary article of wearing apparel, the authorities are conflicting. Upon the whole, our own judgment inclines us to the opinion that the phrase 'necessary wearing apparel,' as used in our statute, may include in it a watch of moderate value without doing violence to its meaning. We are not, therefore, prepared to say that a watch of moderate value is not a necessary article of wearing apparel, and as such exempt, when it is made to appear affirmatively that the watch and other articles of apparel selected or reserved do not exceed the amount limited by the statute." See also *Mack v. Parks*, 8 Gray (Mass.) 520; 69 Am. Dec. 269.

On the other hand in *Gooch v. Gooch*, 33 Me. 535, it was held that a watch, which the testator had been in the habit of carrying upon his person, did not pass by a bequest of his "wearing apparel;" nor by a bequest of his "house furniture."

A silver watch and chain, worn by the debtor, is not exempt under *Minnesota* Gen. Stat., ch. 66, § 279, as "wearing apparel of the debtor and his family," nor as "household furniture," though the debtor be a householder with a family, and has no clock or other watch or timekeeper and used the said watch to keep the time at his house. In *Rothschild v. Boelter*, 18 Minn. 332, the court said: "The statute in question exempts (sub. 5) 'all wearing apparel of the debtor and his family.' It is contended that a watch worn by a debtor is wearing apparel. It would not be urged, however, that a watch which a debtor had never worn, but which, for instance, as in one of the *New York* cases cited by defendant, had always been hung up in the house, was his wearing apparel. If, then, this watch be wearing apparel, it must be the circumstance that the debtor wears it, that makes it so. In a certain sense, indeed, he may be said to 'apparel himself' in it, as he might be said to do

with respect to any other wearable article of use or ornament, *e. g.*, a diamond ring. But, if this makes it wearing apparel, a debtor might, as suggested by the respondent, keep any number of such articles, whatever their value, from his creditors, for the quantity of wearing apparel exempted is without limit. But that an article may be worn does not make it wearing apparel within this statute. The words are to be construed, in this case, according to the common and approved usage of the language (Gen. Stat., ch. 4, § 1), namely, as referring to garments or clothing generally designed for wear of the debtor and his family."

Neither the watch, nor its chain, key, and seals, nor the finger ring which were usually worn by a person when living, are to be deemed a part of his wearing apparel, which, after his decease, are, by the *Vermont Comp. Stat.*, ch. 50, § 1, to go to his widow. Redfield, Ch. J., *dissenting*. Otherwise of a bosom pin. The court, in *Sawyer v. Sawyer*, 28 Vt. 252, said; "The county court held that the watch, watch key, watch chain, cord and seals, and the finger ring, and the sword and sword belt, were not to be deemed a part of the wearing apparel of the deceased husband, and a majority of the court think this was a sound construction of the statute. They seem to me to fall clearly within the category of ornaments. To call them wearing apparel would be, as it appears to me, to give a latitudinarian meaning to the term, which the legislature never intended it should have. Though a watch may have a further use than mere ornament, yet that is not enough to make it and its incidents wearing apparel. The finger ring is peculiarly matter of ornament; and we are disposed to consider the sword and sword belt the emblems of distinction worn on special occasions, and which were in no way attached to the wearing apparel, so as to become a part of it."

Exemptions—Necessary Wearing Apparel.—The *New Hampshire* statute exempting from attachment the necessary wearing apparel for immediate use, exempts suitable apparel for labor, with an extra suit for days of religious worship, and an overcoat at all seasons of the year. In *Peverly v. Sayles*, 10 N. H. 357, the court said: "The wearing apparel necessary for immediate use must be such an amount of

clothing as is necessary to meet the varying changes of our climate, and the customary habits and ordinary necessities of the mass of the people. The clothing worn by the individual while about his daily toil might be all that was necessary for the time, but be wholly insufficient when such labor ceased; and the clothing suitable and proper for days of labor might not be such as the common sentiment of the community would deem necessary and proper for use on days set apart for religious assembling and worship; a common privilege, which our laws accord to all, and which it deems necessary to all. A suitable overcoat, also, is no luxury but a necessity; always required to be on hand, as a protection against the frequent changes and inclement seasons of our climate. We regard, then, the instructions of the court as fully within the requirements of the statute; and that, in the words of the charge, the statute is designed to exempt from attachment, as necessary wearing apparel, 'an outside, or great coat, at all seasons of the year; and, in addition, the decent and comfortable everyday wearing apparel, a full suit, suitable to wear abroad or to meeting.'"

And in *Towns v. Pratt*, 33 N. H. 349; 66 Am. Dec. 726, it was said: "The exemption, however, under the statute is limited to the wearing apparel necessary for the debtor and his family. The word 'necessary,' as here used, is not to be understood in its most rigid sense, implying something indispensable, but as equivalent to convenient and comfortable. *Peverly v. Sayles*, 10 N. H. 356. It would, therefore, include such articles of dress or clothing as might properly be considered among the necessities in contradistinction to the luxuries of life. *Davlin v. Stone*, 4 Cush. (Mass.) 359. Whether an article attached is a necessary or a luxury, may, under some circumstances, be a question for the jury, depending upon the situation of the debtor and the character and uses, and perhaps the cost, of the article. But in reference to trinkets, like a breastpin, we think the court may be understood to know so much of their nature and purposes as to be at liberty to determine, without the intervention of a jury, that, under no circumstances, can they be held to be requisite for the comfort or convenience of the wearer, as apparel, so as to render them necessary within the meaning of the statute."

In United States Revenue Laws.—As used in the Tariff Act of 1883, "wearing apparel" is held not to include shoes. *Swayne v. Hager*, 37 Fed. Rep. 782. The court said: "So, also, in my opinion, shoes were not intended to be included in the terms, 'wearing apparel of every description,' in the provisions cited from schedule K. By reading it with the context, 'wearing apparel . . . made up or manufactured wholly or in part by a tailor, seamstress, or manufacturer,' it seems evident that Congress intended other manufacturers of a class similar to a 'tailor or seamstress'—'something *ejusdem generis*.' The principle *noscitur a sociis* appears to me to be applicable. A shoemaker is not in any respect similar to a tailor, or seamstress. In ordinary popular use of language, no one, I presume, would for a moment think that shoes are included in the terms 'wearing apparel.' See the following decisions supporting and illustrating the construction adopted. *Oates v. National Bank*, 100 U. S. 244; *Bend v. Hoyt*, 13 Pet. (U. S.) 270; *Adams v. Bancroft*, 3 Sumn. (U. S.) 386; *Reiche v. Smythe*, 13 Wall. (U. S.) 162."

Under the Tariff Act of 1846, it was held that shawls, whether worsted shawls, worsted and cotton shawls, silk and worsted shawls, barege shawls, merino shawls, silk shawls, worsted scarfs, silk scarfs, and mousseline de laine shawls, were "wearing apparel," and therefore subject to a duty of thirty per cent. under schedule C. In *Maillard v. Lawrence*, 16 How. (U. S.) 261, the court said: "The effort has been made to substitute for the literal and lexicographical and popular meaning of the phrase 'wearing apparel,' some supposed mercantile or commercial signification of these words, and to render subservient to that signification what was clearly accordant with the etymology of the language of the statute, with the essential purposes and action of the government, and with the widespread, if not the universal, understanding, of all who may not happen to fall within the range of a limited and interested class. In instances in which words or phrases are novel or obscure, as in terms of art, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes

and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. Perhaps, within the compass of the English language, and certainly within the popular comprehension of the inhabitants of this country, there can scarcely be found terms the import of which is better understood than is that of the words 'shawl' and 'wearing apparel,' or of 'shawl' as a familiar, everyday and indispensable part of wearing apparel. And it would seem to be a most extravagant supposition which could hold that, in the enactment of a law affecting the interests of a nation at large, the legislature should select for that purpose language by which the nation or the mass of the people must necessarily be misled. The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the legislature adopts such language in order to define or promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large. If, therefore, the strange concession were admissible that, in the opinion of a portion of the mercantile men, shawls were not considered wearing apparel, it would still remain to be proved that this opinion was sustained by the judgment of the community generally, or that the legislature designed a departure from the natural and popular acceptance of language."

A citizen of the *United States*, arriving home from a visit to *Europe* with his family, at the end of September, by a vessel, brought with him wearing apparel, bought there for his and their use, to be worn here during the season then approaching, "not excessive in quantity for persons of their means, habits, and station in life," and their ordinary outfit for the winter. A part of the articles had not been worn, and on these duties were exacted by the col-

WEEK—(See also TIME, COMPUTATION OF, vol. 26, p. 3; STATUTES, vol. 23, p. 140; TAXATION, vol. 25, p. 372).—The word "week," both in law and in common conversation or writing, has two separate and distinct meanings. Sometimes, it means a period of time commencing on Sunday morning and ending Saturday at midnight; at other times the term is used as signifying a period of time of seven days' duration, without any reference to when that period commences, whether on Sunday, Monday, or Saturday.¹

lector. It was held that, under the statute exempting from duty "wearing apparel in actual use and other personal effects (not merchandise) . . . of persons arriving in the *United States*," the proper rule to be applied was to exempt from duty such of the articles as fulfilled the following conditions: (1) wearing apparel owned by the passenger, and in a condition to be worn at once without further manufacture; (2) brought with him as a passenger, and intended for the use or wear of himself or his family who accompanied him as passengers, and not for sale, or purchased or imported for other persons, or to be given away; (3) suitable for the season of the year which was immediately approaching at the time of arrival; (4) not exceeding in quantity, or quality, or value, what the passenger was in the habit of ordinarily providing for himself and his family at that time, and keeping on hand for his and their reasonable wants, in view of their means and habits in life, even though such articles had not been actually worn. *Astor v. Merritt*, 111 U. S. 202.

1. *State v. Yellow Jacket Silver Min. Co.*, 5 Nev. 430.

Though "a week" usually means any consecutive seven days, it will sometimes be interpreted to mean the ordinary notion of a week reckoning from Sunday to Sunday. *Bazalgette v. Lowe*, 24 L. J. Ch. 368, 416.

And, probably, a "week" usually means seven clear days; thus where a statute provided that notice of appeal should be given "within one week" before such appeal was to be heard, and notice was given on the twenty-second for the twenty-ninth, it was held that the notice was insufficient. *Reg. v. Sweeney*, 2 Ir. L. R. 278.

"Per Week."—A theatrical engagement at so much "per week," may be shown, by usage, to mean, "per week during every week that the theater is

open." *Grant v. Maddox*, 16 L. J. Exch. 227.

"Week Next Preceding."—The word "week" in the provision of the *Nevada* Act of 1873, for the removal of the county seat of Humboldt County, that all the offices shall be removed to W. "on the week next preceding May 1, 1873," does not mean the week ending at 12 o'clock on Saturday night, but the seven days prior to May 1, 1873. *Evans v. Job*, 8 Nev. 322.

Once a Week.—Where a statute for the maintenance of public schools provided that to impose an additional school tax, an election should be called by posting notices for twenty days, and "if there is a newspaper in the county, by advertisement therein once a week for three weeks," it was held, that it was not necessary for the call to be published twenty-one days before the day of election, but that three insertions upon three successive weeks and at any time in any of such weeks before the election were sufficient. *State v. Yellow Jacket Silver Min. Co.*, 5 Nev. 340.

The first publication of a notice of a sale under a power contained in a mortgage, which requires the notice to be published "once each week for three successive weeks," need not be made three weeks before the time appointed for the sale. *Dexter v. Shepard*, 117 Mass. 480. See also *Fröthingham v. March*, 1 Mass. 247.

In *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 361, the court said: "The words of the law are, 'once a week.' Does this limit the publication to a particular day of the week? If the notice be published on Monday, is it fatal to omit the publication until the Tuesday week succeeding? The object of the notice is as well answered by such a publication, as if it had been made on the following Monday. A week is a definite period of time, commencing on Sunday and ending on Saturday. By

WEEKLY.—See note 1.

this construction the notice in this case must be held sufficient. It was published, Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still the publication on Saturday was within the week succeeding the notice of the sixth. It would be a most rigid construction of the act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of a week. If published once a week, for three months, the law is complied with, and its object effectuated."

In *Steinle v. Bell*, 12 Abb. Pr. N. S. (N. Y. C. Pl.) 172, it was held that a week is a definite period of time, commencing on Sunday and ending on Saturday; and under the rule requiring service by publication to be made, by publication "not less than once a week for six weeks," the notice need not be published on the same day in each week, but may be on any day in each week during the six weeks. Seven days' interval between publications is not essential.

Statute Prescribing Time for Capital Executions.—A "week of time," within the meaning of the *Colorado* statute prescribing that such week shall be appointed within which a condemned person shall be executed, means a period beginning and ending Saturday at midnight. In *re Tyson*, 13 Colo. 482. In this case the court said: "The command of the statute is that a week of time shall be fixed by the court within which the sentence must be executed, such week not to be less than two weeks, nor more than four weeks, from the day of passing sentence. We are of the opinion that a week of time so to be fixed must be held to be calendar week, *i. e.*, a period of time extending from twelve midnight, Saturday, until twelve midnight the following Saturday. By consulting lexicographers of established accuracy, this conclusion will be found to be in accordance with the primary and usual definition given to the word 'week.' 'Week. A period of seven days; particularly the period of seven days commencing with Sunday.' Worcester's Dict. . . . 'Seven days of time. The week commences immediately after twelve o'clock on the night between Saturday and Sunday, and ends at twelve o'clock, seven days, of twenty-four hours each, thereafter.'

Bouvier's Law Dict. The word was judicially construed in accordance with the foregoing definitions in the case of *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 361 (7 L. Ed. 886), where it is said: 'A week is a definite period of time, commencing on Sunday and ending on Saturday.' It follows from this construction that while in most cases more than two full calendar weeks must necessarily elapse, under the statute, between the time of sentence and the execution, in no case could such execution take place within less than fifteen days from the date of sentence. Sunday being a non-judicial day, the most favorable case possible in support of the theory advanced by counsel for the prisoner—that the time could be shortened under the late act—would arise if a defendant should be sentenced upon a Saturday. For convenience, we will assume that such Saturday is the first day of the month. The week of execution could in no event commence to run until the third Sunday thereafter,—the sixteenth day of the month,—which would be the earliest possible day for the sentence to be executed, under the terms of the act. And the same result would follow under the former law, requiring at least fifteen days from the time of sentence to the execution; as it has been decided in this state that when time is to be computed, either prior or subsequent to a day named, the usual rule is to exclude either the first or last day of the designated period, and include the other. *Stebbins v. Anthony*, 5 Colo. 348. So, under either law in the case supposed, a sentence might be executed upon the sixteenth day, for aught that appears in either act to the contrary. We are not, on account of the illustration given, to be understood as sanctioning the execution of the death penalty upon the Sabbath day. Such a course would be highly improper, if not positively illegal. If the latter, an additional day would be gained under the new law. In addition to the authorities herein before cited, we refer to the following in support of the conclusion reached in this opinion: 1 *Bishop's Criminal Law* (8th ed.), § 280 *et seq.*; *Wharton's Criminal Law* (8th ed.), § 31; *Wade Retroactive Laws*, § 283; *State v. Arlin*, 39 N. H. 179; *Marion v. State*, 20 Neb. 233; 57 Am. Rep. 825."

1. **Weekly Paper.**—Trustees, in selling

WEEKLY PAYMENT LAWS.—In several of the states statutes have been recently enacted known as the "Weekly Payment Laws," the purpose of which is the protection of the employees of corporations from what has been termed "the greed of corporate capital." The terms of the *Rhode Island* statute,¹ are as follows: Every corporation, other than religious, literary, or charitable corporations, and every incorporated city, but not including towns, shall pay weekly the employees engaged in its business the wages earned by them to within nine days of the date of such payment, unless prevented by inevitable casualty; provided, however, that, if at any time of payment any employee shall be absent from his place of labor, he shall be entitled to said payment at any time thereafter on demand. Any corporation violating any of the provisions of this act shall be punished by a fine of not less than one hundred dollars and not more than one thousand dollars. The constitutionality of this statute was assailed upon the following grounds: First, because it interfered with the liberty of the individual to contract for the sale of his labor to the best advantage, as he deemed fit, and also with the liberty of the corporation so to contract with the individual; and second, because it was class legislation, in that it applied only to corporations, and further, to certain classes of corporations only. The court negated these contentions and upheld the statute.²

certain church property, under *Ontario Rev. Stat. (1887), ch. 237, § 13*, advertised on the same day of the week for four successive weeks in a daily paper. It was held that this was not a compliance with the provision of the statute directing publication in a "weekly paper," to make a proper sale of the lands, and that the purchaser had good grounds for refusing to accept the title offered. *East Presbyterian Church v. McKay*, 16 Ont. 30.

1. *Rhode Island Pub. Laws*, ch. 918, §§ 1, 2.

2. *State v. Brown, etc., Mfg. Co. (R. I. 1892)*, 39 Am. & Eng. Corp. Cas. 190. In this case it was urged that the statute was in conflict with article V of the amendments to the *United States* constitution, but the question was dismissed with the observation that "that amendment, like all the rest of the first ten amendments, is intended solely as a limitation on the exercise of power by the government of the *United States*, and is not applicable to the legislation of the states." Citing *Barron v. Baltimore*, 7 Pet. (U. S.) 247; *State v. Paul*, 5 R. I. 185; *In re Liquors of Fitzpatrick*, 16 R. I. 60; *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *Withers v. Buckley*, 20 How. (U. S.) 84; *Twich-*

ell v. Com., 7 Wall. (U. S.) 321; *Ex p. Spies*, 123 U. S. 131; *Cooley's Const. Lim.* (6th ed.) 29. The second point urged against the statute was that it contravened article XIV., section 1, of the amendments to the *United States* constitution, but it was held that an incorporated company was neither a citizen of the *United States* nor a person within the meaning of the amendment, and therefore could not be included within its provisions. The court reviews and relies upon the following cases: *Insurance Co. v. New Orleans*, 1 Woods (U. S.) 85; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 586; *Paul v. Virginia*, 8 Wall. (U. S.) 177.

It was also contended that the statute violated sections 2, 10, and 16 of article 1 of the constitution of *Rhode Island*, relating, respectively, to the equal distribution, among the citizens, of the burdens of the state; to depriving one of property, etc., except by the judgment of his peers or the law of the land; and to taking private property for public uses without just compensation. Upon this point, the court said: "It seems to us that the question of conflict with these constitutional provisions may be determined by a solution of the question whether chapter 918 is

a valid exercise of the power reserved to the general assembly to amend or repeal acts of incorporation. If it is a valid exercise of such reserved power, then these constitutional provisions, as to so much thereof as it is claimed chapter 918 violates, would have no application; for as the defendant is an artificial and not a natural body, it accepted its charter—its creation, so to speak—on such conditions as its creator, the general assembly, either originally or subsequently imposed." The court, relying upon *Greenwood v. Union Freight R. Co.*, 105 U. S. 13; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Wales v. Stetson*, 2 Mass. 143; 3 Am. Dec. 39; *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Miller v. New York*, 15 Wall. (U. S.) 478; *Roxbury v. Boston, etc., R. Co.*, 6 Cush. (Mass.) 424; *Bangor, etc., R. Co. v. Smith*, 47 Me. 34; *Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446; *Sherman v. Smith*, 1 Black (U. S.) 587; *Massachusetts General Hospital v. State Mut. L. Assur. Co.*, 4 Gray (Mass.) 227; *Fitchburg R. Co. v. Grand Junction R., etc., Co.*, 4 Allen (Mass.) 198; *Com. v. Eastern R. Co.*, 103 Mass. 254; 4 Am. Rep. 555; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345, *overruling Miller v. New York, etc., R. Co.*, 21 Barb. (N. Y.) 513; *State v. Northern Cent. R. Co.*, 44 Md. 131; *Worcester v. Norwich, etc., R. Co.*, 109 Mass. 103; *Munn v. Illinois*, 94 U. S. 113, and *distinguishing Shields v. Ohio*, 95 U. S. 319, determined that the statute in question operated as an amendment to the defendant's charter, and was of such a character as to constitute a proper and legal exercise of the state's reserved power to amend corporate charters; and the fact that a penalty was attached to the requirement contained in the statute, did not in any wise militate against its being an amendment to the charter. *Citing*, with approval as to this last point, *Shaffer v. Union Min. Co.*, 55 Md. 74.

A question was made upon the argument whether the statute was to be deemed an exercise of the police power of the state. In regard to this, the court said: "While, if it were a police power, there can be no question of the propriety of its exercise, yet the converse is not true, viz., that if it is not a police power, it would necessarily be unreasonable and an invalid exercise of the power reserved to the general

assembly to amend charters. As this act applies only to corporations and is, therefore, intended to remedy evils presumably attaching to them only, we do not, in our view of the case, consider it necessary to consider that point further."

The point was made by counsel that the power to contract, granted in the charter, was such property of the defendant that modifying or limiting it by the general assembly was taking away the defendant's property without compensation. In negating this position, the court said: "The property of a corporation that cannot be taken away by the general assembly through the exercise of its reserved power is such property as, upon the dissolution of the corporation, would belong to its creditors and stockholders, and not a privilege it derived from the creating power, and which it was agreed, upon accepting the charter, might be amended at will by the general assembly." It was argued that the statute would prevent contracts for payment by the piece or job, but the court construed it differently, saying: "If employees are to be paid by a time standard, then they must be paid weekly; but if they are to be paid by the piece, then wages are not 'earned' until the piece is done, and the wages to be paid weekly are the wages 'earned' to within nine days of the date of payment." Continuing, the court said: "It has been urged that chapter 918 is unconstitutional, because it interferes with the rights of employees to make such contracts with a corporation as they see fit. No inhibition is placed upon employees to make such contracts as they choose with any person or body, natural or artificial, that is authorized to contract with them. But corporations are artificial bodies and possess only such powers as are granted to them, and natural persons dealing with them have no right to demand that greater power should be granted to corporations in order that they may make other contracts with such corporations than the corporations are authorized to enter into. Chapter 918 was clearly passed in the interest of the employee, and it is not easy to see how it would operate to his disadvantage. If he did any labor under a time contract which the corporation was not authorized to make, he would be paid, not under the contract, but under a *quantum meruit*, every week. Stress was laid upon the fact

But in *Illinois*, a somewhat similar statute¹ was declared unconstitutional, as constituting a taking of property without due process of law, and as being special or class legislation.²

that chapter 918 applied only to certain kinds of corporations, as it does not include religious, literary, or charitable corporations." The court dismissed this question with the following observation: "The excepted corporations rarely, if ever, have capital stock; rarely, if ever, are prosecuted merely for pecuniary gain, and, being for the spiritual, mental, and physical elevation of mankind, would not come within the ends to be subserved by the act as to other corporations. The different aspect from other corporations with which they are regarded by the state is clearly indicated by the constitutional provision regarding petitions for acts of incorporation in general, presented to the general assembly, to be continued until another election of members shall have taken place, and public notice thereof shall have been given; whereas, petitions for acts of incorporation for religious, literary, or charitable purposes may be acted on at any time without such continuance and notice. *Rhode Island* constitution, art. 4, § 7. We fail to see any force in the objection that an invidious distinction has been made in favor of such corporation." The circumstance of the inclusion of cities in, and the exclusion of towns from, the operation of chapter 918, in the opinion of the court, required no consideration, for, as public corporations, they are governed by rules of law not applicable to the corporation in question, and the only inquiry being whether the statute was constitutional so far as related to the latter.

1. *Illinois* Act approved April 23, 1891, entitled "An act to provide for the weekly payment of wages by corporations."

2. *Braceville Coal Co. v. People*, 147 Ill. 66; 44 Am. & Eng. Corp. Cas. 1. In this case *Shope, J.*, for the court, said: "Property, in its broader sense, is not the visible thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it. And the right of property preserved by the constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful in-

dustrial pursuit which the citizen in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. . . . It is undoubtedly true that the people in their representative capacity may by general law render that unlawful in many cases which had hitherto been lawful. But laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid, must be based upon some existing distinction or reason, not applicable to others not included within its provisions. And it is only when such distinctions exist that differentiate in important particulars persons or classes of persons from the body of the people, that laws having operation only upon such particular persons or classes of persons have been held to be valid enactments. . . . The act under consideration applies not to all corporations existing within the state, nor to all that have been or may be organized for pecuniary profit under the general incorporation laws of the state. There is no attempt to make a distinction between corporations and individuals who may employ labor. The slightest consideration of the act will demonstrate that many corporations that may be and are organized and doing business under the laws are not included within the designated corporations. No reason can be found that would require weekly payments to the employees of an electric railway that would not require like payment by an electric light or gas company; to a corporation engaged in quarrying or lumbering that would not be equally applicable to a corporation engaged in erecting, repairing, or removing buildings or other structures; to mining that would not exist in respect to corporations engaged in making excavations and embankments for roads and canals, or other public or

It should be observed that in the first case all ordinary business corporations are within the purview of the statute, while in the other case, many corporations of this character are omitted from the statute. This explains one point of difference between the two decisions.

There are statutes in some of the states prohibiting corporations from withholding, under certain circumstances, the wages due their employees, and from paying them by orders redeemable by the corporations in goods or truck, in lieu of cash wages. These statutes have been discussed in other parts of this work, but they may be read with profit in connection with the present subject, and reference is here made to them.¹

WEIGHAGE.—A duty or toll imposed by the English law, to be paid for weighing merchandise, as for weighing wool at the king's beam, or for weighing other avoirdupois goods.²

private improvements of like character; that will apply to a street or elevated railway that will not make it equally important in other modes of transportation of freight and passengers. The public records of the state will show, and it is a matter of common knowledge, that very many corporations have been organized and are doing business in the state which necessarily employ large numbers of men, that are not included within the act under consideration. The restriction of the right to contract affects not only the corporation and restricts its right to contract, but that of the employee as well.

... An illustration of the manner in which it affects the employee, out of many that might be given, may be found in the conditions arising from the late unsettled financial affairs of the country. It is a matter of common knowledge that large numbers of manufacturing were shut down because of the stringency in the money market. Employers of labor were unable to continue production for the reason that no sale could be found for the product. It was suggested in the interest of employees and employers as well as in the public interest that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories or workshops to be opened and operated with less present expenditures of money. Public economists and leaders in the interest of labor suggested and advised this course. In this state and under this law no such contract

could be made. The employee who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers in the state might do. The corporations would be prohibited from entering into such a contract, and if they did so, the contract would be voidable at the will of the employee, and the employer subject to a penalty for making it. The employee would, therefore, be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. The employees would, by the act, be practically under guardianship; their contracts voidable as if they were minors; their right to freely contract for, and to receive the benefit of their labor, as others might do, denied them." It was also said that the statute under consideration, not being a general law, was in conflict with the *Illinois* Constitution, art. 11, § 1, providing that "no corporation shall be created by special law, or its charter extended, changed, or amended, . . . but the general assembly shall provide by general laws for the organization of all corporations hereafter to be created."

1. STORE ORDER ACTS, vol. 23, p. 935; WAGES—STATUTES REGULATING PAYMENT OF, vol. 28, p. 517.

2. *Hoffman v. Jersey City*, 34 N. J. L. 176. Here it was said that this royal duty or toll had never been conferred upon weigh-masters and measures in any of the charters and ordinances of our cities.

WEIGHTS AND MEASURES.—(See FALSE WEIGHTS AND MEASURES, vol. 7, p. 796.)

I. Definition, 49.

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54.
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I. DEFINITION.—A weight may be said to be a body of determinate mass, intended to be used on a balance or scale for measuring the weight or mass of the body in the other pan or part of the scale (as the platform in a platform-scale). A measure is a unit or standard adopted to determine dimension, volume, or other quantity of an object.¹

II. POWER TO REGULATE.—Power to regulate and fix a standard of weights and measures in the *United States* is vested by the constitution² in Congress, but up to the present time that body has not availed itself of the authority thus conferred.³ However, a mere grant of power to Congress, by the federal constitution, to regulate weights and measures, does not extinguish in the states the right over the same subject, until Congress shall have exercised the power given it, and, accordingly, numerous statutes have been passed by the various states in the attempt to reduce their weights and measures to a uniform system.⁴ In

1. Century Dict.

2. *United States* Const., art. 1, § 8.

3. *The Miantinomi*, 3 Wall. Jr. (U. S.) 46; *Caldwell v. Dawson*, 4 Metc. (Ky.) 123.

The only legislation upon the subject of weights and measures has been statutes prescribing the weights and measures to be used in invoices. *United States* Rev. Stat., § 2837; providing for the prescription of certain weighing and gauging instruments by the commissioner of internal revenue, § 3249; providing a penalty for use of false weights and measures by distillers, § 3306; providing the standard troy pound for the regulation of coinage and providing standard weights for mints and assay offices, §§ 3548, 3549; sanctioning the use of the metric system, § 3569; providing for the keeping on board merchant vessels certain weights and measures, § 4571; and providing for the distribution of standards amongst the several states for the use of agricultural colleges, § 5460.

4. This view is opposed in *The Miantinomi*, 3 Wall. Jr. (U. S.) 46, where it was said that "the regulation of weights and measures having been

given by the constitution to Congress, it is doubtful whether the enactment of any state on the subject is of any validity whatever, even though Congress has wholly neglected to attend to this regulation;" but the rule laid down in the text is sustained by a number of text writers and decisions. *Story's* Const., § 1122; *Cooley's* Const. Lim. (6th ed.) 744; *Pomeroy* on Const. Law, § 410; *Weaver v. Fegely*, 29 Pa. St. 27; 70 Am. Dec. 151; *Harris v. Rutledge*, 19 Iowa 388; 87 Am. Dec. 441; *Farmers', etc., Bank v. Smith*, 3 S. & R. (Pa.) 69; *Caldwell v. Dawson*, 4 Metc. (Ky.) 123. See *Frazier v. Warfield*, 13 Md. 279.

In *Weaver v. Fegely*, 29 Pa. St. 27; 70 Am. Dec. 151. *Lewis, C. J.*, said: "In every state in the Union weights and measures have been constantly governed either by a standard established by a state statute, or by the common law of the state. The power of each state to establish its own common law on this subject has never been denied. If the states have this power, they certainly have the power to enact statutes. The power being acknowledged, it is not for the federal government to interfere with the manner of exercising it. To deny the

existence of that authority now would overturn the practice which has uniformly been acted on by all the states during the whole period of their political existence." And in *Harris v. Rutledge*, 19 Iowa 388; 87 Am. Dec. 441, Judge Dillon, in delivering the opinion of the court, said: "Under the national constitution Congress has power to 'fix the standard of weights and measures.' This power it has never exercised, and until it is exercised, the respective states may, for themselves, regulate weights and measures."

In *Caldwell v. Dawson*, 4 Metc. (Ky.) 121, it was held that as Congress had not passed a law fixing the standard of weights and measures, as authorized to do by the federal constitution, the laws of the state must govern the subject. And in *State v. Peel Splint Coal Co.*, 36 W. Va. 819, it was said that the inspection and regulation of weights and measures have always been regarded as proper subjects of police supervision.

The states may exercise powers granted to Congress where Congress fails to exercise them, save where the grant to Congress is in express terms exclusive, or the states are expressly prohibited from exercising it, or where the grant to one would make the exercise by the other absolutely and totally repugnant. Thus, it is held that states may pass bankruptcy laws when Congress fails to exercise its power on the subject. In *Farmers', etc., Bank v. Smith*, 3 S. & R. (Pa.) 68, Tilghman, J., said: "The states are not to be divested of their power by inferences, unless the inferences be inevitable. Now that is not the case here. On the contrary the power contended for, on behalf of the states, is in perfect harmony with the power granted to Congress. A power to legislate on a subject of necessity at a time when Congress does not think it expedient to act. I think the constitution has received a practical construction on this point, although I know that the weighty opinion of Judge Washington has lately been pronounced to the contrary, but to that opinion is opposed the strong argument of the supreme court of *New York* in *Livingston v. Van Ingen*, 9 Johns. (N. Y.) 507, in which it was adopted as a principle that in cases where power is affirmatively vested in Congress, and not expressly taken away from the states, they may go on to legislate until their

laws come into collision with the acts of Congress. By practical construction, however, I do not mean judicial decision, but practice sanctioned by general consent. In the same section of the constitution from which Congress derives its power to establish a uniform system on the subject of bankruptcies, they have also given to them the power to fix the standard of weights and measures. This they have never done, but the states have regulated them at their pleasure, and, I believe, without question."

The following note is appended to the report of *Mays v. Jennings*, 4 Humph. (Tenn.) 102: "By an order of Congress, June 5, 1836, a set of standard weights and measures, similar to those in use in *England* anterior to the passing of the 'Act of Uniformity,' in May, 1834, was prepared by Mr. Hassler, for the use of each customhouse, and for each state. Hence, the old measures of *England*, superseded by the imperial system, with such modifications as local customs or state laws have ingrafted upon it, may be regarded as the general standard adopted in this country. Most of the states of the Union have attempted to reduce their standards of weights and measures to a uniform system, and numerous laws have been enacted with that view; but so far from succeeding in their object, they have had, in most instances, an opposite effect. There are but few states in which the proportions of their measures are required by law to be the same—lineal, superficial, and cubic measures excepted—although they may bear the same names; and owing to the difficulty of enforcing new regulations, strong prejudices against any innovation, and a constant influx of settlers from one state into another, and from various countries of *Europe*, who bring their own accustomed weights and measures, uniformity cannot be said to exist in any state of the Union. In this country, as in *England* and *France* before their new systems were adopted, local consumers do not feel the whole disadvantage of this confusion; but merchants and others, who make large sales or purchase in different parts of the country, often experience serious difficulties in converting to their own local standards the quantities expressed according to another rate. The proportion which one standard bears to another is not always easily obtained; and when it is, the calculations to be

England the subject is regulated by the Weights and Measures Act of 1878, and subsequent statutes.¹

III. REGULATION AND INSPECTION.—Laws and ordinances regulating the character of weights and measures to be used,² and making provision for their being periodically inspected and stamped by a duly authorized officer, are not unreasonable.³ The test is usually required to be made with reference to the standards in the possession of the proper officer of

made are often long and difficult, and may not always give an accurate result." Hunt's Merchants' Magazine, vol. iv., p. 344; McCulloch's Commercial Dict., p. 370.

In *Alabama*, legal weights of agricultural products of the state were established by Act of February 18th, 1891. Acts 1890-91, No. 596, p. 1353. And in *California*, general provisions were enacted in 1891 establishing a standard of weights and measures. *California* Stat. 1891, ch. 263, p. 487. And in *Idaho* a uniform standard of weights and measures was established and the office of state sealer and inspector created. *Idaho* Laws 1890-91, p. 204. In *Massachusetts*, standard weights, measures, and balances are provided for, and also the testing of weights, measures, and balances of merchants. *Massachusetts* Acts 1890, ch. 426, p. 325.

1. 41 & 42 Vict., ch. 49. And see the Weights and Measures Act of 1889, 52 & 53 Vict., § 21.

2. *Snell v. Bellville*, 30 U. C. Q. B. 81. The by-law in this case provided that every person selling meat or articles of provision by retail, whether by weight, count, or measure, should provide himself with scales, weights and measures, but that no spring balance, spring scale, spring steelyards, or spring weighing machine should be used for any market purpose. Wilson, J., in delivering the opinion of the court, said: "Nor is there any reason to say that the prohibition of the use of spring balances, etc., is beyond their power either. It is well known that these springs become affected by use and by the change of temperature so as not to remain true."

3. *People v. Rochester*, 45 Hun (N. Y.) 102. In this case it was held that the common council of Rochester was authorized by the provisions of its charter to make an ordinance providing that "it shall be the duty of the city sealer, and he is hereby authorized to inspect and examine at least once in

every six months hereafter, and as much oftener as he thinks proper, all weights and measures used by any corporation, merchant, retailer, trader, or dealer for weighing or measuring, such weights and measures shall be inspected at the place or places where the same are kept for use, but if such weights and measures shall be found unconformable to the standard, they shall be sent by the owner or owners thereof to such place in said city as the sealer shall direct, for the purpose of being sealed, within three days after such owner or owners shall be required to do so by said sealer."

Under the general law relating to weights and measures, and the city charter of 1834, the council of Cincinnati had the power to appoint an inspector or sealer of weights and measures, and to enforce by fine the use of weights and measures sealed by such inspector. *Huddleson v. Ruffin*, 6 Ohio St. 604.

By *Massachusetts* Gen. Stat., ch. 51, § 11, it is provided that every sealer of weights and measures shall annually in May advertise in some newspaper, or put up notifications in different parts of the city or town, for every inhabitant who uses weights and measures for the purpose of buying and selling, and for public weighers who have the same, to bring in their weights, measures, etc., to be sealed and adjusted, and who shall forthwith adjust and seal all weights and measures brought to him for that purpose. Section 16 provides that any person who sells by any other weights or measures than those which have been adjusted as before provided, shall forfeit a sum not exceeding twenty dollars for each offense. There being no other provision for sealing weights and measures than that provided in section 11, the necessary construction is that persons using weights and measures must have them sealed by the sealer of the town in which he lives, and therefore it was held that where a plaintiff

was an inhabitant of Stow, and sold beef by weights and scales which had been tested in Boston, the sale was illegal. *Smith v. Arnold*, 106 Mass. 269.

Minnesota Gen. Stat., ch. 21, § 11, contains provisions for a penalty for selling or disposing of goods, wares, or merchandise by unsealed and unproved scales or measures, and such provision implies a prohibition. Such sales, therefore, are illegal, and no recovery can be had for the price against the purchaser. *Bisbee v. McAllen*, 39 Minn. 143.

Under *Massachusetts* Stat. 1859, ch. 206, § 4, providing that milk shall be sold in wine measure and that all persons engaged in selling milk, shall annually cause to be sealed by the sealer of weights and measures, all cans used in the buying or selling of milk at wholesale, it was held that although the sealer refused to seal at the price allowed by statute, the seller could not recover the price. *Miller v. Post*, 1 Allen (Mass.) 434.

By the *Georgia* Code, § 1592, ordinaries are required to give notice by publication or otherwise when standard weights and measures are obtained by them, and under the general rule that all public officers are presumed to do their duty, the ordinaries will be presumed to have given such notice. But a failure to give such notice would not relieve one selling goods by weights and measures from his obligation to have them duly marked as required by section 1589. *Finch v. Barclay*, 87 Ga. 393.

Where the weights or measures have once been stamped or sealed as required by law, but the stamp or seal has become obliterated by time and use, the person using them is not liable to the penalty imposed for the use of unstamped weights and measures, provided such weights or measures be otherwise unobjectionable. *Starr v. Stringer*, L. R., 7 C. P. 383.

Under the English Licensing Act of 1872, § 8, all intoxicating liquor sold by retail and not in a cask or bottle, and not sold in a quantity less than half a pint, is required to be sold in measures marked according to the imperial standards. A publican who was asked for a pint of beer by a customer went into an inner room where he drew the beer into a marked measure and poured it into a jug, which he then brought into the room where the customer was sitting and handed it to him.

The customer could not see the beer drawn and never saw it while in the measure. It was held that the sale was not complete until the beer was handed to the customer, that the beer was not sold by a marked measure as required by statute and that the publican was properly convicted of an offense thereunder. *Addy v. Blake*, 19 Q. B. Div. 478.

The English statutes usually vest the power of appointing inspectors of weights and measures with the magistrate at quarter sessions. *Reg. v. Jarvis*, 3 El. & Bl. 640. In counties of cities and counties of towns, to which a court of quarter sessions has been granted under 5 & 6 Will. IV., ch. 76, the recorder has the powers relating to inspectors of weights and measures usually given to the magistrates in quarter sessions assembled. *Reg. v. Hull*, 8 Ad. & El. 638; 3 N. & P. 595; 1 W. W. & H. 385. But see *Duly v. Sharwood*, 6 El. & Bl. 830; 3 Jur. N. S. 63.

The Statute of 37 Geo. III., ch. 143, § 1, by which the justices at their respective petty sessions within the divisions, districts, and other places of the several counties of *England*, were authorized to appoint examiners of weights and balances, extends only to such divisions, etc., as were known and recognized at the time when the act was passed, and therefore such appointment made at petty sessions by two justices for a district which they had, without the consent of the other magistrates, created within the last five or six years, was held illegal. *Rex v. Devon*, 1 B. & Ald. 588.

Scales Kept in Stock for Sale.—The *Pennsylvania* Act of April 15th, 1845, which provided for the inspection and sealing of weights and measures, does not require the maker, vendor, or proprietor of beams, scales, weights and measures kept in stock for sale, to have them tested and sealed, but is obligatory and penal only as to such scales, weights, etc., as are in actual use for the measuring and weighing of commodities bought and sold. *Stolle v. Gabel*, 14 Phila. (Pa.) 616.

Must Act Within His District.—The inspector, in the performance of his duties, must confine himself to the district for which he is appointed, and if he knowingly stamps weights sent to him for that purpose by a person residing within a district for which another inspector has been legally appointed, he

the state,¹ and where anyone is found using false weights and measures, provision is usually made for the seizure of such false instruments² and the punishment of the offender.³

will, under some statutes, incur a penalty therefor. *Reg. v. Skelton*, 1 El. & El. 816; 5 Jr. N. S. 1347.

Earthen Vessels.—Earthenware jugs, or drinking cups ordinarily used as imperial measures by a publican in his business, although not stamped as measures and exempted by 5 & 6 Wm. IV., ch. 63, § 21, from being so stamped, are, nevertheless, measures within section 28. *Reg. v. Aulton*, 3 El. & El. 568; 30 L. J. M. C. 129.

Penalty for Use of Unstamped Measure.—Where goods are sold in improved scales or measures in violation of law, no recovery can be had for the price against the purchaser. *Bisbee v. McAllen*, 39 Minn. 143.

Measurement in Evidence—Proof of Conformity with Standard.—By the *New York Laws* 1851, ch. 134, § 33, it is provided that "no surveyor shall give evidence in any cause, pending in any of the state courts or before arbitrators, respecting the survey and measurement of lands which he may have made, unless such surveyor shall make oath, if required, that the chain or measure used was conformable to the standards which were the standards of the state at the time at which the survey was made." It was held that this applies not to measurements of quantity of an excavation, but only to surface surveys. *McManus v. Gavin*, 77 N. Y. 36.

1. According to *Howell's Michigan Ann. Stat.*, ch. 34, it is unlawful to allow any test of scales or weights except by reference to the standards in the state treasurer's office. *McGeorge v. Walker*, 65 Mich. 5. And see *Finch v. Barclay*, 87 Ga. 393.

An inspector is not authorized in seizing any weight without having first compared it with the standard, in order to ascertain whether it is just or not. *Kershaw v. Johnson*, 1 C. & K. 329.

2. Under 5 & 6 Wm. IV., ch. 63, earthen vessels were liable to seizure if ordinarily used as measures, and if found on examination to be unjust. *Washington v. Young*, 5 Exch. 403. And see *Reg. v. Aulton*, 3 El. & El. 568.

But where, under a city ordinance requiring baskets used for the sale of fruits and vegetables to have the fraction-

al parts of a bushel contained in each, marked or stamped thereon, or else to be forfeited with their contents, the clerk of the city market seized several baskets of apples and forfeited them as offered for sale in unmarked baskets, it was held in replevin therefor that as no act of the legislature expressly authorized the forfeiture, the city council had no power to inflict that penalty for the violation of the ordinance. *Phillips v. Allen*, 41 Pa. St. 481; 82 Am. Dec. 486.

Under 5 & 6 Will. IV., ch. 63, § 28, weighing machines are not forfeited, though unjust, although weights and measures are; and consequently where a jury held that a pair of scales were a weighing machine, it was held that the inspector was not authorized in seizing them. *Thomas v. Stephenson*, 2 El. & Bl. 108; 17 Jur. 597; 22 L. J. Q. B. 258; 75 E. C. L. 107.

Where a spring balance is against the seller and in favor of the buyer, they are not liable to seizure as being false and unjust. *Booth v. Shadgett*, 8 L. R. Q. B. 352.

3. See FALSE WEIGHTS AND MEASURES, vol. 7, p. 796.

By the English *Weights and Measures Act of 1889* (52 & 53 Vict., § 21) it is provided that any inspector of weights and measures, or officer appointed for the purpose by the local authority, may, at all reasonable times, enter any building or part of a building or other place in which coal is sold, or kept, or exposed for sale, and may stop any vehicle carrying coal for sale and for delivery to a purchaser, and may test any weights and weighing instruments found in any such place or vehicle, and may weigh any load, sack, or other less quantity of coal found in any such place or vehicle which is in the course of delivery to any purchaser, and that if it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling, or keeping, or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding five pounds. And it was held that in order to convict the seller of coal of an offense under this act there

The inspector may, under his general warrant and appointment, enter any shop within his district at all seasonable times to examine and seize false weights and measures, and need not have a special warrant for each individual case.¹

By custom in some of the manors in *England*, the leet jury had authority to examine, break, and destroy all weights and measures found by them to be false.²

IV. PUBLIC WEIGHERS, SURVEYORS, ETC.—A state or municipality may, in the exercise of its police power, appoint public or licensed weighers, surveyors, etc., and provide that all sales of certain commodities, such as hay, grain, etc., shall be upon the weight or quantity as ascertained by such weighers or surveyors,³

must be an actual representation by him as to the weight of the coal sold, and that a representation made to an inspector by a servant in charge of a vehicle carrying coal for delivery to a purchaser was not of itself the representation of the master, so as to make him liable under this section. *Roberts v. Woodward*, 25 Q. B. Div. 412.

If a purchaser knows that he is receiving a less quantity than the law requires the measurement to contain, and consents to receive it, the seller cannot be convicted of selling at a less weight and measure than prescribed by law.

In *Blanchard v. State*, 3 Ind. App. 395, New, J., in delivering the opinion of the court, said: "If Keys, the purchaser of the coal, knew that eighteen hundred pounds was all he was to get for a twenty-five bushel load, was not deceived in the weight, and was satisfied with the amount he received, we do not see how it can be said that he was cheated or defrauded by the appellant, nor does the evidence fairly tend to show that it was the purpose of the appellant to wrong him."

Penalties imposed on the seller of coal for every sack deficient in weight, are recoverable by action. *Collins v. Hopwood*, 15 M. & W. 459; 16 L. J. Exch. 124.

Proof of Measure.—The contents of measures are not to be proved but by a production in court. *Chenie v. Watson*, Peake's Add. Cas. 123.

1. *Hutchings v. Reeves*, 9 M. & W. 747; 6 Jur. 439; *Kershaw v. Johnson*, 1 C. & K. 329. And the same privilege extends to a servant assisting such inspector in the discharge of his duty, but who has not himself received any warrant or authority in writing from the quarter sessions or a justice of the

peace. *Hutchings v. Reeves*, 9 M. & W. 747; 6 Jur. 439.

2. *Wilcock v. Windsor*, 3 B. & Ad. 43. But all the jury must be sufficiently near to concur in the condemnation of the scales. *Holland v. Heath*, 2 Jur. 234. And see *Sheppard v. Hall*, 3 B. & Ad. 433.

A custom to swear the jurors at one court-leet to inquire and return their presentments at the next court, is bad in law. *Davidson v. Moscrop*, 2 East 56.

Any one obstructing the jury in the execution of their duties in examining weights and measures, may be amerced, but the presentment should state what the act of obstruction is. *Frost v. Lloyd*, L. R., 9 Q. B. 130; 11 Jur. 59; 16 L. J. Q. B. 13.

3. *State v. Tyson*, 111 N. Car. 687; *Johnson v. Martin*, 75 Tex. 33.

Laws requiring articles to be inspected, or weighed and measured before being sold, are in the nature of police regulations, and valid. Ordinances regulating the traffic in all kinds of products and prohibiting their sale except upon the certificate of weight according to public scales, are common to all cities. *Gaines v. Coates*, 51 Miss. 335; *Yates v. Milwaukee*, 12 Wis. 673. But municipalities have only power to pass such ordinances when the authority is specially conferred by the legislature. See *MUNICIPAL CORPORATIONS*, vol. 15, p. 1175.

An ordinance requiring oats to be weighed by the public weighmaster before being offered for sale, and imposing a penalty for its violation, is not unconstitutional. *Raleigh v. Sorrell*, 1 Jones (N. Car.) 49. And so, also, are ordinances requiring all hay sold within the municipality, or brought there to be used therein, to be weighed upon the hay scales of the corporation. *Gass*

v. Greenville, 4 Sneed (Tenn.) 62; Yates v. Milwaukee, 12 Wis. 673.

A city ordinance prohibiting the sale of any timber brought into the city for sale without a survey, does not apply to timber delivered there to be used for a specific purpose under a special contract made elsewhere. *Briggs v. A Light Boat*, 7 Allen (Mass.) 287.

Where a city ordinance, passed under due authority of law, provides that every person who shall sell or purchase any lumber not surveyed, marked, or numbered as required should forfeit and pay a penalty for each offense, "provided, however, that lumber may be sold to, or purchased by, any person for his own use, not intended to be sold again by him, without being surveyed, marked, or numbered as aforesaid, and that in such case, if the purchaser so request, the surveyor shall not be required to number and mark such lumber but only to survey the same," it was held that a sale of lumber to a person for his actual use without being surveyed was not in violation of the city ordinance, and that the seller might recover the price. *Howe v. Norris*, 12 Allen (Mass.) 82.

There can be no doubt that lumber could be sold in the bulk or lump, so much payable for the whole, and no survey would be necessary. There would be no need of the statutory protection in such case, but when lumber is sold, the price of which is to depend upon the number of thousands of feet, which is to be ascertained by the survey or inspection of some person, the surveyor must be an official surveyor, or the sale is void and the seller can not recover the price. *Richmond v. Foss*, 77 Me. 590.

Maine Rev. Stat., ch. 41, § 2, provides that firewood and bark are to be measured by a sworn measurer before being sold, but this does not apply to trimmings of lumber consisting of small pieces when they are sold under a contract, whereby the purchaser agrees to take all that should be made at the seller's mill at fifty cents per cart load. *Duren v. Gage*, 72 Me. 118. And a statute which requires lumber of any kind to be surveyed or measured to ascertain its quantity, does not apply to labor in any way expended on lumber, though to be paid for according to the thousands of cords—it only applies to sales of lumber. *Bruce v. Sidelinger*, 82 Me. 318.

In *Stokes v. New York*, 14 Wend. (N.

Y.) 87, it was held that an ordinance of the city of New York requiring anthracite or hard coal to be weighed by weighers appointed by the corporation, was a valid by-law, not unreasonable or in restraint of trade, and that a penalty imposed for violation of it could be enforced by action. And see *State v. Peel Splint Coal Co.*, 36 W. Va. 819; *Charleston v. Rogers*, 2 McCord (S. Car.) 495.

Where a statute requires coal delivered in sacks to be weighed if required, each sack with the coal, and afterward each sack without the coal, it was held that a weighing by putting the sacks of coal successively in one scale against weights equal to the weight of which each sack should contain and an empty sack in the other scale, was not a weighing according to the statute. *Meredith v. Holman*, 16 M. & W. 798; 16 L. J. Exch. 126.

It is provided by the *Massachusetts* Gen. Stat., ch. 49, §§ 187, 190, that coal when sold in quantities of five hundred pounds or more, except by the cargo, shall be sold by weight, and that on or before the delivery of such coal the seller shall cause the same to be weighed by a sworn weighmaster, and a certificate of the weight thereof signed by the weigher shall be delivered to the buyer, or his agent, at the time of delivery of the coal, a violation of which renders the seller liable to a penalty. It was held that no action would lie to recover the price of such coal unless these requirements are complied with. *Libbey v. Downey*, 5 Allen (Mass.) 299.

The statute in *Maryland*, requiring grain which is brought to the city of Baltimore by water, to be weighed by the weigher general, does not apply to grain brought by water and carried through elevators. *Gill v. Cacy*, 49 Md. 243.

Under an act to provide for the inspection, measuring, and weighing of grain in the city of Baltimore, it was held that the weight of wheat might be ascertained by weighing one bushel in every sixty according to the long established usage of the city of Baltimore, notwithstanding a particular section of the act provided that the inspector should "carefully determine the weight of all wheat" that should be inspected by him. *Frazier v. Warfield*, 13 Md. 279.

A weighmaster under the charter and ordinances of Jersey City is an officer appointed for the convenience of commerce and trading, to determine weights

for which they may charge a reasonable fee.¹ Unless prohibited by statute, a person not a public weigher may keep scales and obtain orders for weighing produce, without becoming liable to the public weigher.²

V. CONTRACTS AND SALES BY WEIGHT AND MEASURE.—Unless the contrary appears, contracts and sales are presumed to be made with reference to the standards of weights and measures as fixed by law, and local custom will not be allowed to control;³ but the

and measurements when called upon to do so; and a conviction against a person who was employed by the seller to measure plaster as it was taken from the vessel and delivered on the cars because, as was alleged, he was exercising the office of weighmaster without appointment by the common council, is illegal. *Hoffman v. Jersey City*, 34 N. J. L. 172.

Weight of Bread.—A city ordinance regulating the weight of loaves of bread is a valid police regulation. *Paige v. Fazackerly*, 36 Barb. (N. Y.) 394; *Tanner v. Albion*, 5 Hill (N. Y.) 121; *People v. Wagner*, 86 Mich. 594; 24 Am. St. Rep. 141. And even, it seems, the price. *Guillotte v. New Orleans*, 12 La. Ann. 432; *Mobile v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441. And see **POLICE POWER**, vol. 18, p. 753.

In *England*, statutes have been frequently passed regulating the sale of bread and requiring it to be sold by weight. See *Williams v. Deggan*, 16 L. T. N. S. 492; *Jones v. Huxtable*, 8 B. & S. 433; *L. R.*, 2 Q. B. 460; *Mitton v. Troke*, 20 L. T. N. S. 563; *Reg. v. Kennett*, 20 L. T. N. S. 656; *L. R.*, 4 Q. B. 565; *Reg. v. Wood*, *L. R.*, 4 Q. B. 559; 10 B. & S. 534; *Hill v. Brownings*, *L. R.*, 5 Q. B. 453. And requiring all persons selling bread from any cart or other carriage to be provided with a pair of scales. *Robinson v. Cliff*, 1 Exch. Div. 294; 45 L. J. M. C. 109; 34 L. T. N. S. 689; *Ridgway v. Ward*, 14 Q. B. Div. 110; *Daniel v. Whitfield*, 15 Q. B. Div. 408.

Prescriptive Right to Weigh.—The right of a corporation by custom to measure all coals imported into the port of London was not converted by the act of 5 & 6 Will. IV., ch. 63, into a right to weigh. *Smith v. Cartwright*, 6 Exch. 927; 20 L. J. Exch. 401.

1. In *Yates v. Milwaukee*, 12 Wis. 676, *Cole J.*, said: "We do not think that the charge for weighing a load of hay and giving a certificate of the weight, was exorbitant. It was but twelve cents—a trifle, when we take into ac-

count the cost and expense of procuring and keeping up such scales." And see *Goody v. Penny*, 9 M. & W. 687; *Mills v. Furnell*, 2 B. & C. 899; 4 D. & R. 561.

In *State v. Tyson*, 111 N. Car. 687, the fee was eight cents for weighing a bale of cotton, one-half to be paid by the buyer and one-half by the seller, and it was held a valid and reasonable regulation.

2. *Watts v. State*, 61 Tex. 184.

But one who is not in a public position as weighmaster, bound to weigh for all persons, but who has scales designed for weighing heavy articles, and does such weighing for a fee, is bound to use only reasonable diligence to know that his scales are correct, and reasonable care to avoid mistakes in using them. *McGeorge v. Walker*, 65 Mich. 5.

3. **Custom, Etc.**—Where a covenant was made for the delivery of a given number of barrels of corn, the quantity should be ascertained by the bushel measure, as fixed by law, and not by weight and neighborhood custom, which cannot be permitted to control law. *Mays v. Jennings*, 4 Humph. (Tenn.) 102.

In *Pennsylvania*, 2,000 pounds constitute a ton. In *Evans v. Meyers*, 25 Pa. St. 114, where a contract was made for a given number of tons of iron, it must be considered to have been made in reference to the act which declares a ton to be 2,000 pounds, and it was an error to admit evidence of a local custom giving 2,268 pounds to a ton, which existed where the contract was made, to control the statute. See also *Weaver v. Fegely*, 29 Pa. St. 27; 70 Am. Dec. 151. A contrary view was held in *The Miantinomi*, 3 Wall. Jr. (U. S.) 46, where the court, in effect, said: When parties contract for any material by weight, using terms that have come to us from times past with a definite meaning, such as ton, which has commonly been regarded as meaning

parties may provide in the contract for a different standard and will be bound by such agreement,¹ unless the statute forbids the use of any other than the standard fixed by law.²

2,240 pounds, the mere fact that a state has undertaken to regulate weights and measures, and in discharge of such office, has fixed the ton at 2,000 pounds, will not dispense with the obligation to furnish the old measure.

In *Harris v. Rutledge*, 19 Iowa 388; 87 Am. Dec. 441, it was held that a contract for masonry at so much per perch should be construed to mean the standard perch as fixed by the statutes of the state, and that no implied contract to the contrary was competent. And see *Caldwell v. Dawson*, 4 Metc. (Ky.) 121.

A custom that every pound of butter sold in a particular market town shall weigh eighteen ounces, is bad. *Noble v. Durell*, 3 T. R. 271.

When a contract was made to deliver one thousand bushels of wheat, it was complied with by the vendor's tendering a quantity of wheat, equal in the aggregate to one thousand bushels statute weight, although it would not fill the statute measure of eight gallons to the bushel. Generally the term bushel in a contract calls for a quantity equal to eight gallons, but in respect to wheat, rye, and Indian corn an exception is made, and the term bushel is satisfied by a quantity equal in weight alone to the statute requisition, unless the parties have otherwise agreed. *Milk v. Christie*, 1 Hill (N. Y.) 103.

If the *reddendum* in an hospital renewed lease is so many quarters of corn, it will be understood to mean legal quarters. *St. Cross Hospital v. De Walden*, 6 T. R. 338. And a contract described as having been made for a certain number of bushels of corn must be considered as a contract for that number of statute bushels. *Hockin v. Cooke*, 4 T. R. 314.

Where a testator devised "forty-five acres of the lands of Dromquin, known as the house division" to A, "and fifty acres of the same lands" to B, it was held that extrinsic evidence was inadmissible to show that he meant Irish, and not statute, acres. *O'Donnell v. O'Donnell*, L. R., 1 Ir. Ch. 284.

1. Where the statute fixes the ton at 2,000 pounds, contracts of sale by the ton will be held to be for a ton of 2,000 pounds, but if the parties agree for the

sale of so many tons, "2,240 pounds to the ton," the seller will be bound to furnish tons of 2,240 pounds. *Sise v. Rockingham County*, 62 N. H. 441; *Harrison v. Mora*, 8 Pa. Co. Ct. Rep. 224. And a contract for the sale of a certain number of tons of iron by the ton "long weight" is not in contravention of the statutes 5 Geo. IV., ch. 74, and 5 & 6 Wm. IV., ch. 63, as it is a multiple of the standard pound and consequently such contract is valid. *Giles v. Jones*, 11 Exch. 393, *affirming* 10 Exch. 119.

2. By 22 & 23 Car. II., ch. 12, the buyer of corn by any other than the Winchester measure was subject to the penalty of forty shillings in addition to the value of the corn so bought. *Rex v. Arnold*, 5 T. R. 353. And a contract for the sale of corn by the hobbet was held to be in contravention of 22 Car. II., ch. 8, § 2, and, therefore, an action would not lie for the breach of it. *Tyson v. Thomas, M'Clell. & Y.* 119.

But 5 & 6 Wm. IV., ch. 53, § 6, abolishing the use of certain weights and measures, and section 21 enacting that any contract, bargain, or sale made by any such weights and measures should be wholly null and void, do not render void a contract entered into in the United Kingdom for the sale of goods to be weighed and measured by the weights and measures mentioned in section 6, unless such goods are also weighed and measured in *England*. *Rosseter v. Cahlmann*, 8 Exch. 361; 22 L. J. Exch. 128. And it seems that 5 Geo. IV., ch. 74, § 15, is not repealed by the above statute, and that consequently contracts by local weights may be lawfully made, if the proportion to the standard is expressed, though it is otherwise with respect to measures, all local measures being abolished by 5 & 6 Wm. IV., ch. 53, § 6. *Giles v. Jones*, 11 Exch. 393. Hence, the sale of wheat by the hobbet, which is the denomination of a measure in *Wales*, if the quantity delivered is to be determined by the weight, is a sale by weight and not by measure, and therefore not contrary to this last section, which applies to sales by measure only, and not to sales by weight. *Hughes v. Humphreys*, 3 El. & Bl. 954; 23 L. J. Q. B. 360.

Where malt was sold by a measure

WEIR.—A dam across a river.¹

WELL.—(See also UNDERGROUND WATERS, vol. 27, p. 425).—
See note 2.

called a hobbet, being a measure established by local custom, without specifying what proportion that measure bore to the standard as directed by 5 Geo. IV., ch. 74, § 15, and the parties afterwards settled their accounts *inter alia* as to the malt, it was held in an action by the plaintiff against the defendant that he might prove the settlement of accounts as a payment of the demand. *Owens v. Denton*, 1 C. M. & R. 711; 5 Tyr. 359.

1. *Arnold v. Mundy*, 6 N. J. L. 55. *Connecticut* Gen. Stat., tit. 23, § 2, provides that "whoever shall first make a weir for catching fish on any flat within any river, cove, creek, or harbor, shall not be interrupted in the enjoyment of it by any other person, etc." This statute is an ancient one and was passed before modern fishing pounds were used. It was held, however, that these pounds, being used for the same purpose as weirs and in substantially the same way, are to be regarded as weirs within the statute. *Stannard v. Hubbard*, 34 Conn. 375. The court, in this case, said: "The statute on which this claim is founded is an ancient one, passed at a time when, in this country, structures like the modern fishing pound were unknown. Still, as the structures of the petitioner and the respondents are used for the same purpose as the weirs in use at the time of the passing of the statute, and operate in the same way by leading the fish into an inclosure where they are retained until taken out of it by the fishermen, we are of opinion that they come within the meaning of the statute, and are weirs within any proper definition of the term; so that the question fairly arises whether the respondents' weir was an unlawful interruption of the one previously erected by the petitioner. And as they were both in the same harbor, and within the distance within which a second one cannot lawfully be erected so as to intercept the fish in their course to the first, and as the one last built did in fact to some extent thus interfere with and prevent the fish going to the petitioner's weir, the lawfulness of the last erection must, of course, turn upon whether the petitioner's weir was upon a 'flat' within the meaning of the statute."

2. **Agreement to Dig a Well.**—An agreement to dig a well does not imply that water other than surface water shall be obtained. *Littrell v. Wilcox*, 11 Mont. 83. The court said: "Now, as to the special contract to reach water. It cannot be seriously contended that it appears from the evidence that the plaintiffs ever agreed, in terms, to sink to water. But defendant founds his argument upon his construction of the word 'well;' that plaintiffs agreed to drill a 'well;' that a 'well' is a hole in the ground, containing water other than surface water; that when plaintiffs agreed to drill a 'well' they contracted to furnish an article meeting that definition, and that, if they did not produce a hole in the ground containing water other than surface water, they did not drill a 'well,' and cannot recover. Let it be observed here that nothing was said about price when the work was commenced and the contract made. The defendant himself selected the site for the proposed well. Nothing was said about plaintiffs undertaking to reach water. All that can be gleaned from the conversations of the parties is that plaintiffs were to dig a well. From this contract, and the circumstances, to construe an undertaking on the part of the plaintiffs to reach water or receive no pay, seems to us to do great violence to language, and to the ordinary transactions of sane men. It appears that the services of plaintiffs were worth what they charged. When plaintiffs went to dig a well, when they took a site selected by defendants, when no guaranty of reaching water was made, when no price was fixed for performing the services or reaching water, can a court for a moment regard it as within the contemplation of the parties, as shown from their words or their acts, that they used the word 'well' as meaning a hole in the ground, containing water other than surface water? We think not. *Bouvier's Law Dictionary* defines a 'well' as 'a hole dug in the ground in order to obtain water.' This is, to our mind, the only practical view. The object of a well is to obtain water. The well may be unsuccessful. The object of a mining shaft is to develop a mine that will pay

WELSH MORTGAGE—(See also MORTGAGES, vol. 15, p. 729).—

The Welsh mortgages, which are mentioned in the English books, though they have now gone out of use, resembled the *vivum vadium* of Coke, or the *mortuum vadium* of Glanville; for though in them the rents and profits were a substitute for the interest, and the land was to be held until the mortgagor refunded the principal, yet, if the value of the rents and profits was excessive, equity would, notwithstanding any agreement to the contrary, decree an account.¹

—an object not always attained. Under the circumstances of the case, we cannot construe the word 'well' as defendant insists; and he must depend wholly upon the construction of that word, for he utterly failed to prove any special contract in terms, and the jury so found."

Whether Well Includes the Land.—In *Johnson v. Rayner*, 6 Gray (Mass.) 110, the court said: "The single question arising on the construction of this deed is, whether these words convey a fee in the premises occupied and used as a well, or whether they purport to grant merely an easement or right to use them for a particular designated purpose; and it seems to us entirely clear that it is a grant of a fee. The deed conveys a certain, definite and specific parcel of land, describing it, not by metes and bounds, but by the use of a term which indicated the purpose to which it was then appropriated and the structure by which it was occupied. The term 'well' aptly designates the soil covered by and used with it. It is an artificial excavation and erection in and upon land, which necessarily, from its nature and the mode of its use, includes and comprehends the substantial occupation and beneficial enjoyment of the whole premises on which it is situated."

In *Mixer v. Reed*, 25 Vt. 257, the court, by Redfield, C. J., said: "The principal question in this case is, whether the defendant owned the land in which the well was, or only the right to use the water. John H. King, before his deed to Blodgett, seems to have owned the land and well. In that deed, he reserved it by the terms 'two-thirds of the well, on the above described premises, in common' with the grantee. This he conveys to defendant by the terms 'spring or well, situate,' etc. These terms all evidently mean the same thing, so that we can gather very little, properly, from any supposed difference between 'well' and 'well of water.' One

might conclude, perhaps, that a well possibly might import land rather more distinctly than 'a well of water;' for we use the expression 'a dry well,' which is probably as much of a solecism as a dry spring. The question, after all, returns, whether a well imports the land in which it is dug and erected. We think it does, as much as *stagnum*, which is usually rendered pool, which is nothing more than a large spring, or standing water, or as *gurgies*, which is ordinarily rendered a whirlpool, or a deep spring, or pool, as it is translated in the notes of Coke, Litt. 1, ch. 1, § 1. And this writer, and all the writers on this subject, regard these words as conveying the land, covered with water. The well included, *ex vi termini*, not only the orifice which reached down to the water, but the whole opening in the earth, before it was stoned, and the stone, and the stone laid into the wall, and the water therein. And this, we think, must be regarded as the thing intended to be conveyed, and not the water merely, which only imports the right to use the water, and by which term nothing passes but the easement, or right to take the water."

1. 4 Kent's Com. (13th ed.), p. 137.

A Welsh mortgage is where the mortgagee enters at once and takes the rents instead of interest, and is by agreement, or distinct understanding, to have no remedy for the principal.

"It is true likewise, that it must have been a mortgage at first, or *ab initio*, and not by any subsequent parol agreement.

"This case was of that character, confessedly on both sides at first, in 1824. And if once a mortgage in any way, no subsequent or collateral agreement to prevent a redemption is allowed to bar it; as once a mortgage, it is always a mortgage until a foreclosure, regular and designed as one. 2 Vern. 520; 1 Eden R. 59; 7 Ves. 273; 4 Ves. 350." Bentley v. Phelps, 2 Woodb. & M. (U. S.) 444.

WHARVES; WHARFAGE; WHARFINGERS.—(See also BOUNDARIES, vol. 2, p. 495; CARRIERS OF GOODS, vol. 2, p. 770; DOCKAGE, vol. 5, p. 848; DOCKS, vol. 5, p. 851; EMINENT DOMAIN, vol. 6, p. 509; LIENS, vol. 13, p. 574; MARITIME LIENS, vol. 14, p. 410; NAVIGABLE WATERS, vol. 16, p. 236; NAVIGATION, vol. 16, p. 270; NEGLIGENCE, vol. 16, p. 386; PILOTS, vol. 18, p. 443; RIPARIAN RIGHTS, vol. 21, p. 411; SHIPS AND SHIPPING, vol. 22, p. 710; STOPPAGE IN TRANSITU, vol. 23, p. 903; WATERCOURSES, vol. 28, p. 943.)

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I. DEFINITION.—A wharf is a structure on the shore of a harbor, river, or other navigable water, for the convenience of loading or unloading vessels, and receiving and landing passengers.¹

1. *Ex p.* Easton, 95 U. S. 68; Geiger v. Filor, 8 Fla. 325. When the structure projects into the water it is a pier, and when there is no particular artificial structure, but the mere natural bank, it is generally known as a landing.

Any construction of timber or stone upon the bank of a nontidal stream, of such shape that a vessel may lay alongside of it with its broad side to the shore, is a wharf. *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196. But a

II. IN GENERAL.—One of the special powers conferred by the legislature upon municipalities bordering upon navigable waters, is the authority to erect wharves and charge compensation for keeping them and their approaches in a safe condition.¹ But the authority of the states over such waters and their shores is of course subject to the constitution of the *United States*, and acts of Congress made in regulation of commerce.²

structure erected for ferry purposes, on a river bank, by permission of the common council of the city of New York, consisting of piles covered with flooring, is not a "pier" within the meaning of *New York Laws* 1857, ch. 563. *Stevens v. Rhinelander*, 5 Robt. (N. Y.) 285. Also, a paved street extending to the water's edge and used by vessels as a place for receiving and discharging freight is a wharf. *Keokuk v. Keokuk Northern Line Packet Co.* 45 Iowa 196; *Geiger v. Filor*, 8 Fla. 325.

"A wharf is a structure, on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded, and wharfage is the fee paid for tying vessels to a wharf, or for loading goods on a wharf or shipping them therefrom." *Langdon v. New York* 93 N. Y. 129.

The Charlestown Wharf Company were authorized to extend and maintain their several wharves, into the channel, as far as the line established for the harbor of Boston, with the right and privilege to lay vessels at the sides and ends of such wharves, and to receive wharfage and dockage therefor. At the passing of this act, the Charlestown Wharf Company were the proprietors of several wharves within the limits mentioned in the act, and of a sea wall built below high-water mark, and filled up behind to high-water mark, and used for the purpose of landing lumber and other things upon, with pier or pile wharves about eighty feet in width, projecting therefrom, toward the channel. It was held that the sea wall was a wharf within the meaning of the act, and that the proprietors were thereby authorized to extend the same along their whole front to the line of the harbor. *Fitchburg R. Co. v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 58.

1. *Com. v. Alger*, 7 Cush. (Mass.) 82; *The Wharf Case*, 3 Bland Ch. (Md.) 383; *Pollard v. Hagan*, 3 How. (U. S.) 212; *New Orleans v. U. S.*, 10 Pet. (U.

S.) 737; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *Municipality v. Pease*, 2 La. Ann. 538; *Worsley v. Municipality*, 9 Rob. (La.) 324; 41 Am. Dec. 333; 1 Dillon on Mun. Corp. (4th ed.), § 103.

That such power does not violate the constitution of the *United States*, see *Cincinnati Packet Co. v. Catlettsburg*, 105 U. S. 559.

Particular Municipalities.—For the rights and powers of the city of New York in respect to wharves, see *Hill v. New York* (Supreme Ct.), 18 N. Y. Supp. 399; *Kingsland v. New York*, 110 N. Y. 569; *Williams v. New York*, 105 N. Y. 419; *Langdon v. New York*, 93 N. Y. 129; *Walsh v. New York Floating Dry Dock Co.*, 77 N. Y. 448; *People v. Green*, 65 Barb. (N. Y.) 505; *People v. Mallory*, 2 Thomp. & C. (N. Y.) 76; *New York v. Huntington*, 114 N. Y. 631; *Hoeft v. Seaman*, 38 N. Y. Super. Ct. 62; *Bigler v. New York*, 9 Hun (N. Y.) 253; *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90; *The Craigendoran*, 31 Fed. Rep. 87; *Crocker v. New York*, 15 Fed. Rep. 405.

Brooklyn.—*Brooklyn v. New York Ferry Co.*, 87 N. Y. 204; *Atlantic Dock Co. v. Brooklyn*, 1 Abb. App. Dec. (N. Y.) 242. **New Orleans.**—*The Lizzie E.*, 30 Fed. Rep. 876; *Silver v. Tobin*, 28 Fed. Rep. 545; *New Orleans v. Wilmot*, 31 La. Ann. 65; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166. **Baltimore.**—*Hazlehurst v. Baltimore*, 37 Md. 199.

For the right to collect wharfage for the use of certain wharves, constructed under a peculiar arrangement between the town commissioners and private parties, see *Dugan v. Baltimore*, 5 Gill & J. (Md.) 357. **Mobile.**—*Mobile v. Moog*, 53 Ala. 561. **Philadelphia.**—*The Volusia*, 3 Wall. Jr. (C. C.) 375.

2. *Cooley v. Philadelphia Port Wardens*, 12 How. (U. S.) 296; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Cisis v. Roberts*, 36 N. Y. 292; *New Orleans Port Wardens v. Ship, etc.*, 14 La. Ann. 289; *Port Wardens v. Prats*, 10 Rob.

And the legislature in conferring these powers may make the cities repositories of them in such a manner as it deems expedient.¹ It may modify them or revoke them altogether, if in so

(La.) 459; *Chapman v. Miller*, 2 Spears (S. Car.) 769; *Com. v. Alger*, 7 Cush. (Mass.) 82; *Jeffersonville v. Louisville, etc., Ferry Co.*, 35 Ind. 19; *Mobile Harbormaster, etc. v. Southerland*, 47 Ala. 511.

A state government may authorize the construction of wharves on navigable streams, within its own territorial limits, even below low-water mark, where the power of the Congress of the *United States* has not been exercised in the premises. *Savannah v. State*, 4 Ga. 26.

Local Ordinances.—An ordinance which demands of all steamboats which shall moor or land in a particular port, a sum measured by the tonnage of the vessel is in violation of the federal constitution, and void, and cannot be justified under the plea that it is intended as a compensation for the use of wharves built by the city. *Cannon v. New Orleans*, 20 Wall. (U. S.) 577.

An ordinance which provides that "steam packets and other vessels trading steadily and performing regular successive voyages from adjoining states of the Union, shall pay to the harbor master one cent per ton every three months," is void, as being a duty on tonnage. *Alexander v. Wilmington, etc., R. Co.*, 3 Strobb. (S. Car.) 594.

But a city ordinance which authorizes the collection of a wharfage rate to be measured by the tonnage of the vessels which use the wharves, and estimated to be sufficient to light the wharves and to keep them in repair, and which may be in excess of their expenses, is not in conflict with the constitution or with any law of the *United States*. *Ouachita Packet Co. v. Aiken*, 121 U. S. 444.

Nor is an ordinance which provides for the levying of a tax on "money or capital invested in shipping" in contravention of the federal constitution, as being a regulation of commerce or a duty on tonnage or even as a preference of the ports of one state over the ports of another. *State v. Charleston*, 4 Rich. (S. Car.) 286.

"In view of the decisions there is no room to contend that a state statute fixing rates of compensation to be paid to a wharfinger for the use of his wharf by a vessel moored thereat, is a tax upon

tonnage or an impediment to navigation." *The Barge John M. Welch*, 9 Ben. (U. S.) 507.

But a state statute which authorizes the levy of a tonnage tax on vessels owned in foreign ports, and entering its ports in pursuit of commerce, in order to defray the expenses of her quarantine regulations, is in violation of the federal constitution and void. *Peete v. Morgan*, 19 Wall. (U. S.) 581.

A statute of a state which enacts that the masters and wardens of a port within the state shall be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform any service or not, for every vessel arriving in port, is unconstitutional and void. *Southern Steamship Co. v. New Orleans Port Wardens*, 6 Wall. (U. S.) 31.

In *Transp. Co. v. Parkersburg*, 107 U. S. 691, *Bradley, J.*, said: "A duty on tonnage is a charge for the privilege of entering, or trading, or lying in a port or harbor. Wharfage is a charge for the use of a wharf. Exorbitant wharfage may have a similar effect as a burden on commerce as a duty of tonnage has; but it is exorbitant wharfage, and not a duty of tonnage."

A city ordinance which compels vessels laden with the products of other states to pay, for the use of the public wharves of the city, fees which are not exacted from vessels laden with the products of its own state, is void. *Guy v. Baltimore*, 100 U. S. 434.

1. *Waddingham v. St. Louis*, 14 Mo. 190; *Baltimore v. White*, 2 Gill (Md.) 444; *Wilson v. Inloes*, 11 Gill & J. (Md.) 351; *Ravenswood v. Flemings*, 22 W. Va. 52; 46 Am. Rep. 485; *Weber v. State Harbor Com'rs*, 18 Wall. (U. S.) 57; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166.

It was held in *Fuller v. Edings*, 11 Rich. (S. Car.) 239, that where the owner of a plantation owned a private wharf which yielded him a considerable income, and the legislature authorized a public wharf to be made near the private one, on the same plantation, and directed the appointment of commissioners to estimate the amount of damage which should be made to the owner

doing it does not deprive the cities of property actually acquired under the exercise of the power.¹

III. KINDS OF WHARVES.—1. **Public or Private.**—Wharves may be either public or private. Whether the one or the other depends, in case of dispute, upon the purpose for which they are built, the uses to which they have been applied, the place where located, and the character of the structure.²

"for the value of the premises taken for public use as well as for the damages generally to the same," the owner was not entitled to compensation for the damages he might sustain for the loss of income from his private wharf.

A grant of a right to erect a public toll wharf is not a contravention of the *Mississippi* Constitution, art. 1, § 1, which provides that no one shall have exclusive public emoluments or privileges from the community but in consideration of public service; such a grant is presumed to be for the public good. *Martin v. O'Brien*, 34 Miss. 21.

Unless clearly intended, no exclusive right of wharfage passes as incident to a grant, by the state, of land under water, below high-water mark, in a harbor or navigable stream. *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90. See also *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. (U. S.) 420.

For effect of the fourteenth amendment to the federal constitution on the power of the legislature to grant exclusive privileges, see *Slaughter House Cases*, 16 Wall. (U. S.) 36.

1. In *New Orleans, etc., Co. v. Ellerman*, 105 U. S. 172, Matthews, J., said: "Whatever powers the municipal body rightfully enjoys over the subject are derived from the legislature . . . and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration." See 1 Dillon on Mun. Corp. (4th ed.), § 103.

That a municipal corporation may be authorized to establish a public wharf upon private property on making compensation to the owner of the land, see *Waddingham v. St. Louis*, 14 Mo. 190; *Iron R. Co. v. Ironton*, 19 Ohio St. 299; *Page v. Baltimore*, 34 Md. 558; *State v. Jersey City*, 34 N. J. L. 390.

Cities, when authorized by the legislature, may build wharves on streets bordering on the Mississippi river, and make other improvements thereon. *Barney v. Keokuk*, 94 U. S. 324; *Illinois*,

etc., *R. & Canal Co. v. St. Louis, etc., Elevator Co.*, 2 Dill. (U. S.) 70.

Notwithstanding a city has the right to erect and maintain wharves, the legislature may grant lawfully to a railroad company a portion of the water front for its own wharf purposes, free from the control of the city. *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166.

In respect to wharves, see *Georgetown v. Chew*, 5 Cranch (C. C.) 508.

2. *Dutton v. Strong*, 1 Black (U. S.) 23.

But it does not always follow because an individual owns a wharf that he always has a right to the exclusive enjoyment of it, for he may at the same time be obliged to let others use it upon the payment to him of a reasonable compensation as wharfage. *Dutton v. Strong*, 1 Black (U. S.) 23.

In *Horn v. People*, 26 Mich. 222, Campbell, J., said: "There is no instance in which the term 'public wharf' has been used in our legislation to indicate anything analogous to a dedication to any public use, like that of highways. Such a public right is unknown to the common law. Wharfage includes exclusive use, for longer or shorter periods, by each vessel, depending on the nature of its business, and the extent of its cargo. All that is meant in the charter by a public wharf is a wharf belonging to the city and to be used like any other wharf property. The term is applied as well to wharves on city property away from streets, as to wharves at the ends of streets." Compare *Scott v. Layng*, 59 Mich. 43.

A private wharf projecting into a navigable river is not private property to such an extent, that a person who temporarily goes upon it or fastens his vessel to it becomes thereby a trespasser. *Degan v. Dunlap*, 15 Phila. (Pa.) 69.

Wharves and piers of the city of New York are streets of the city, for the free passage of all citizens. *Taylor v. Atlantic Mut. Ins. Co.*, 37 N. Y. 275.

When the grantees of a wharf have

2. **Private.**—If private, the public have no right to use them without the owner's consent, express or implied.¹

3. **Public.**—When, however, they are thrown open to the use of the public, a general license is conferred upon anybody to use them for all lawful purposes, and this license can be terminated only by notice and request to discontinue such use. The presumption is that the owner consents to such use.²

been in possession of it as originally built for fifty years, it is too late for anyone to dispute their title to it as built. *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263; *Chicago v. Laffin*, 49 Ill. 172. See also *New Orleans, etc., R. Co. v. Hanning*, 15 Wall. (U. S.) 649.

A right in private individuals to soil on a channel may be devoted to wharves and the like without being subject to the control of the public. *Galveston v. Menard*, 23 Tex. 349.

A legislative grant authorizing the grantee to erect a wharf, and conveying the right "to the use and occupancy of the adjoining land," with a provision that "it shall be used for none other than wharf purposes," for a specified time, confers an interest in the land sufficient to entitle the grantee to recover possession from a party who has deprived him of it. *Frisbie v. McClernin*, 38 Cal. 568.

Where the structure is not erected in any harbor or place where vessels are in the habit of resting, but is confined within the shore of the sea or the navigable waters of a lake, and has never been held as intended for such use by the public, no implication arises that the owner of the structure has consented that the public may use it. *Dutton v. Strong*, 1 Black (U. S.) 23.

The presumption is that a wharf erected by a city is for public use; and in the absence of an ordinance prescribing wharfage dues, a vessel is not liable to make payment to the city for using such wharf. *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185.

The right to erect a wharf is founded either in the ownership of the soil, or the right of eminent domain. *Jeffersonville v. Louisville, etc., Steam Ferry Co.*, 27 Ind. 100; 89 Am. Dec. 495.

That compensation is received for the use of a public wharf does not deprive it of its public character. See *Galveston Wharf Co. v. Galveston*, 63 Tex. 14.

The possession of a wharf, under color of title, is sufficient to put another

claimant upon proof of a title as good as that of the person in possession. *Linthicum v. Ray*, 9 Wall. (U. S.) 241.

1. **Public Wharves.**—*Christie v. Malden*, 23 W. Va. 667.

The owner of a private wharf, by permitting others to use it, does not dedicate it thereby to the public, or give the right to use it without his permission. Whether one has an exclusive use of his own wharf depends, not upon whether it be erected above or below low-water mark, but solely upon the question in whom the title to the property is vested. *O'Neill v. Annett*, 27 N. J. L. 290; 72 Am. Dec. 364.

The fact that the expense incurred by a city in filling up a dock was raised in the same manner as if it were for paving and regulating the streets, will not have the effect of a dedication of the land so made to the public. *Schermerhorn v. New York*, 3 Edw. Ch. (N. Y.) 119.

2. **Use of Public Wharves.**—*Nicoll v. Gardner*, 13 Wend. (N. Y.) 289; *Lansing v. Smith*, 4 Wend. (N. Y.) 9; 21 Am. Dec. 89; *Dutton v. Strong*, 1 Black (U. S.) 23.

There is an implied license to vessels upon navigable waters to enter and occupy docks adjacent to such waters, in the manner and for the purpose contemplated by their erection; but such license may be revoked by reasonable notice given by the owner of the dock to persons having vessels lying therein; and if the owner of such dock unfastens and casts loose a vessel lawfully moored at the same, without such notice, he is liable for the injury which may be occasioned to such vessel thereby. *Heaney v. Heaney*, 2 Den. (N. Y.) 625.

The owner of a wharf or landing on a navigable river has the right to prohibit its being used for unusual and unaccustomed purposes, such as the storage of lumber in such a way as to obstruct the free access to and from the vessels. *Compton v. Hawkins*, 90 Ala. 411; 24 Am. St. Rep. 823.

4. **Right to Erect Public Wharves a Franchise.**—While the public may make use of a private wharf, with the consent of the owner, the right to erect public wharves and to demand wharfage therefrom is a franchise derived only from legislative grant.¹

IV. RIGHT OF A RIPARIAN OWNER—1. To Erect Wharves.—The right of a riparian owner to construct wharves upon his own land bordering on navigable waters is generally recognized. This right, however, terminates at the point of navigability, unless special authority be granted, and is subject to the condition that its exercise does not obstruct or impede the paramount right of navigation.²

But the proprietor of a wharf who is obliged to permit the use of his wharves for the loading and unloading of vessels, cannot make a rule that no steam engines, except his own, shall use them for that purpose. *Lincoln v. Pennsylvania Warehousing Co.*, 8 Pa. Co. Ct. Rep. 195. See further, on the same subject, *Taylor v. Atlantic Mutual Ins. Co.*, 37 N. Y. 275; *Schermerhorn v. New York* 3 Edw. Ch. (N. Y.) 119.

Where a city, having rights in any premises, has parted with those rights, by her own repeated voluntary acts, any attempt to assume them, by depriving the public of the easement which they had acquired, or denying the purchasers of the lots the right of way, or the privilege of improving their property, except on the payment of wharfage or tolls, is illegal. *Breed v. Cunningham*, 2 Cal. 361.

1. **Right to Erect Public Wharves.**—*People v. Broadway Wharf Co.*, 31 Cal. 34; *Wharf Case*, 3 Bland (Md.) 383; *The Geneva*, 16 Fed. Rep. 874; *Carrollton R. Co. v. Winthrop*, 5 La. Ann. 36; *Municipality v. Pease*, 2 La. Ann. 538; *Worsley v. Municipality*, 9 Rob. (La.) 324; 41 Am. Dec. 333; *St. Martinsville v. Steamer "Mary Lewis"*, 32 La. Ann. 1293; *State v. Jersey City*, 25 N. J. L. 525; *Pollard v. Hagan*, 3 Howe (U. S.) 212; *New Orleans v. U. S.*, 10 Pet. (U. S.) 735; *Weber v. State Harbor Com'rs*, 18 Wall. (U. S.) 57.

The right to erect public wharves "is a franchise, and cannot be exercised by an individual except by a grant for that purpose by the sovereign power, or by prescription. . . . The right to take wharfage or tolls being a charge upon the public and against common right, could not be granted, even by the crown, except upon some consideration of benefit to the public—as the erection of a wharf, the keeping of it in repair and

the like; or in consideration of a right of way given to the public over the property of the individual to whom the toll was granted." *Wiswall v. Hall*, 3 Paige (N. Y.) 313.

The general assembly has authority to grant to corporations the right to make and maintain wharves, and the corporations, or their lessees, can build wharves with inclines or aprons. *De Gruy v. Aiken*, 43 La. Ann. 798.

2. *Simons v. French*, 25 Conn. 346; *Kean v. Stetson*, 5 Pick. (Mass.) 492; *State v. Wilson*, 42 Me. 9; *Wetmore v. Atlantic White Lead Co.*, 37 Barb. (N. Y.) 70; *Rice v. Ruddiman*, 10 Mich. 125; *Lorman v. Benson*, 8 Mich. 18; *Ensminger v. People*, 47 Ill. 384; 95 Am. Dec. 495; *Chicago v. Laffin*, 49 Ill. 172; *Bell v. Gough*, 23 N. J. L. 624; *Stevens v. Paterson, etc., R. Co.*, 34 N. J. L. 532; 3 Am. Rep. 269; *Dutton v. Strong*, 1 Black (U. S.) 23; *St. Paul, etc., R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272; *Weber v. State Harbor Com'rs*, 18 Wall. (U. S.) 57; *Irwin v. Dixon*, 9 How. (U. S.) 10. And see generally, *Lay v. King*, 5 Day (Conn.) 72; *Com. v. Shaw*, 14 S. & R. (Pa.) 9; *Wilson v. Inloes*, 11 Gill & J. (Md.) 351; *Fleet v. Hegeman*, 14 Wend. (N. Y.) 42; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 519; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *O'Neill v. Annett*, 27 N. J. L. 290; 72 Am. Dec. 364; *Keypoint Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 516; *Fitchburg R. Co. v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 58; *Storer v. Freeman*, 6 Mass. 435; 4 Am. Dec. 155; *Sale v. Pratt*, 19 Pick. (Mass.) 191; *Bell v. Hull, etc., R. Co.*, 6 M. & W. 699.

"By the common law, the riparian owner has the right to establish a wharf on his own soil, this being a lawful use of the land. The right is judicially

2. Extent of Riparian Owner's Right.—Any interference with the right of navigation constitutes a nuisance, the existence of which,

recognized in this country, and riparian proprietors on ocean, lake, or navigable river have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the state for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country. The right terminates at the point of navigability, unless special authority be conferred, because at this point the necessity for such erections ordinarily ceases. Such structures are presumptively lawful where they are confined to the shore, and no positive law is violated in their erection." *Dillon Mun. Corp.* (4th ed.), § 106.

The owner of land on a navigable river has certain riparian rights, whether his rights extend to the middle of the stream or not, and these rights, though they must be enjoyed subject to general rules and laws of the legislature, are valuable and cannot be taken away without compensation. *Yates v. Milwaukee*, 10 Wall. (U. S.) 497.

In *East Haven v. Hemingway*, 7 Conn. 186, *Hosmer, C. J.*, said: "Proprietors on navigable rivers have a right to the soil covered by the water so far as they can occupy it; *i. e.*, to the channel, with the exclusive privilege of wharfing and erecting piers in front of their land, but with this qualification that they do not impede the navigation of the water."

The owner of a lot upon the "water front" of San Francisco, as established by the Act of March 5, 1851, is not a riparian proprietor in the sense in which that term is used in the law of tide waters, and he has not such a right of entry upon a wharf erected by a stranger adjoining his lot, when his lot extends below low-water mark, that he can maintain ejectment for it. *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; 89 Am. Dec. 164.

That rights of wharfage do not attach necessarily to grants of land by the state beyond low-water mark, see *Weber v. State Harbor Com'rs*, 18 Ware (U. S.) 57; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*,

109 U. S. 672. Compare *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90; also *Langdon v. New York*, 93 N. Y. 129.

As to the general power of legislature in making grants under water, see *Gould v. Hudson River R. Co.*, 6 N. Y. 522; *New York v. Hart*, 95 N. Y. 443; *Davenport, etc., R. Co. v. Renwick*, 102 U. S. 180; *Backus v. Detroit*, 49 Mich. 110; 43 Am. Rep. 447.

In *Grant v. Davenport*, 18 Iowa 179, the court said: "In thus holding, it must be borne in mind that this wharf does not interrupt or interfere with the free navigation of the river. On the contrary, it rather assists than obstructs."

We entertain no doubt as to the right of the riparian proprietor (outside of any incorporated city or town), to erect wharves or landing places on the shores of navigable rivers, if they conform to state legislations (if any), and do not obstruct the paramount right of navigation. The right is expressly recognized in *Dutton v. Strong*, 1 Black (U. S.) 23, and we find no case to the contrary. If the proprietor's land is within the limits of an incorporated town or city, his right must yield to the paramount right (when the right is given by the law of its creation) of the corporation to build, erect, and regulate the wharves and landings." See also *Atty. Gen'l v. Richards*, 2 Anstr. 603; *Atty. Gen'l v. Philpot*, 2 Anstr. 607; *Atty. Gen'l v. Cleaver*, 18 Ves. Jr. 218; *Rex v. Ward*, 4 Ad. & El. 384; 31 E. C. L. 92; *Rex v. Russell*, 6 B. & C. 566; 13 E. C. L. 254; *Atty. Gen'l v. Parmeter*, 10 Price 379; *Atty. Gen'l v. Burridge*, 10 Price 350; *Atty. Gen'l v. Forbes*, 2 Myl. & C. 123; *Ripon v. Hobart*, 3 Myl. & K. 169; *Mohawk Bridge Co. v. Utica, etc., R. Co.*, 6 Paige (N. Y.) 554; *Atty. Gen'l v. Cohoes Co.*, 6 Paige (N. Y.) 133; *Com'rs v. Wright*, 6 Am. Jur. 185.

In *Groton v. Hurlbut*, 22 Conn. 178, *Ellsworth, J.*, said: "It is time the public should understand that not every ditch in which the tide ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, can be considered a navigable stream. Nor is every small creek in which a fishing skiff or gunning canoe can be made to float, deemed navigable; but in order to have this character, it must be

however, must be proved and not presumed. A wharf even in navigable water is not a nuisance *per se*.¹

No consideration of convenience or utility will justify such unlawful obstructions.² It is not enough that a city council

navigable for some general purpose useful to trade or business." *Approved* in *Burrows v. Gallup*, 32 Conn. 493; 87 Am. Dec. 186.

1. *Wharf as Nuisance*. — *Dutton v. Strong*, 1 Black (U. S.) 23; *Rex v. Grosvenor*, 2 Stark. 511; *Rex v. Russell*, 6 B. & C. 566; 13 E. C. L. 254; *Rex v. Tindall*, 6 Ad. & El. 143; 33 E. C. L. 26; *Reg. v. Russell*, 3 El. & Bl. 942; 77 E. C. L. 942; *Com'rs v. Wright*, 6 Am. Jur. 185; *Colchester v. Brooke*, 7 Q. B. 339; *Gann v. Free Fisheries*, 11 H. L. Cas. 192; *Atty. Gen'l v. Cohoes Co.*, 6 Paige (N. Y.) 133.

In *Reg. v. Betts*, 16 Q. B. 1022, the defendant was indicted for maintaining a nuisance by building a bridge partly in the bed of a navigable river. The court said: "According to the authority of Lord Tenterden in *Rex v. Russell*, 6 B. & C. 566; 13 E. C. L. 254, and to the opinion of this court in *Rex v. Ward*, 4 Ad. & El. 384; 31 E. C. L. 92, it is for the jury to say whether an erection of this kind is a damage to the navigation or not. . . . The true question is whether a damage accrues to the navigation in the particular locality, and that is a question for the jury."

In *Mohawk Bridge Co. v. Utica, etc., R. Co.*, 6 Paige (N. Y.) 554, where an injunction was sought to prevent a bridge being erected across the Mohawk river at the city of Schenectady, *New York*, the court said: "The principles upon which this court should proceed in granting or refusing relief by injunction in cases of this kind are correctly laid down by Lord Brougham in the recent case of *Ripon v. Hobart*, 3 Myl. & K. 169. If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, when the complainants' right is not doubtful, without waiting for the result of a trial. But where the thing sought to be restrained is not in itself noxious, but only something which may, according to circumstances, prove to be so, the court will refuse to interfere until the matter has been tried at law by an action."

2. *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61.

In *Atlee v. Northwestern Union Packet Co.*, 21 Wall. (U. S.) 389, the court, by Miller, J., said: "In all incorporated towns or cities located on navigable waters, there is in their charters, or in some general statute of the state, either express or implied power for the establishment and regulation of these landings. This may be done by the legislature of the state, or by authority expressly or impliedly delegated to the local municipal government. In all such cases there is exercised a control over the location, erection, and use of such wharves or landings, which will prevent their being made obstructions to navigation and standing menaces of danger. The wharves or piers are generally located by lines bearing such relation to the shore and to the navigable waters as to present no danger to vessels using the river, and the control which the state exercises over them is such as to secure at once their usefulness and safety. These structures are also allowable in a part of the water which can be used for navigation, on the ground that they are essential aids to navigation itself. The navigable streams of the country would be of little value for that purpose if they had no places where the vessels which they floated could land, with conveniences for receiving and discharging cargoes, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect they must reach so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them, and are lashed to their sides. They must of necessity occupy a part of the stream over which a vessel could float if they were not there."

Where the owners of lots bordering on the Chicago river had erected docks thereon, and enjoyed the use of the same for a period of over twenty-five

declares an obstruction to be a nuisance; it must be proved to be one in fact.¹

A riparian proprietor has an exclusive right to the use and improvement of his own water front between high and low-water mark; and the erection of wharves or other improvements upon the same by others, is an infringement of his rights as such owner.²

years, without complaint or interruption from any source, the court held that even if they were not riparian proprietors, and their boundaries did not extend beyond the water's edge, the corporate authorities could not declare the docks a nuisance. If a nuisance, they had become so by the act of the city, and it had no power to require their removal without first making compensation to the owners. *Chicago v. Laflin*, 49 Ill. 172.

In an indictment for building a wharf in a navigable river, the defendant showed that the wharf was a convenience to the public, as by its erection the channel of the river was kept clear. The court held that the question for the jury was whether the wharf occasioned any hindrance to the navigation of the river by vessels of any description, and not whether the erecting of the wharf had caused a benefit to the navigation in general. *Reg. v. Randall*, 1 C. & M. 496; 41 E. C. L. 272.

1. In *Yates v. Milwaukee*, 10 Wall. (U. S.) 497, the court said: "It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the state within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every place of business, and all the property of the city, at the uncontrolled will of the temporary local authorities." See also *Atlee v. Northwestern Union Packet Co.*, 21 Wall. (U. S.) 389; *Bainbridge v. Sherlock*, 29 Ind. 364; 41 Ind. 35.

"So where a riparian proprietor had constructed a wharf which extended to, but did not encroach upon, the navigable part of the river, and which was not shown to be a nuisance in fact, it was held by the supreme court of the United States that the city within which the wharf was situated could not, under the charter power to establish docks and wharf lines, and restrain and

prevent encroachments upon the river and obstructions thereto, pass an ordinance declaring the wharf to be an obstruction to navigation, and a nuisance, and ordering it to be summarily abated."

1 *Dillon Mun. Corp.* (4th ed.), § 111.

2 *People v. Davidson*, 30 Cal. 379.

In *Hagan v. Campbell*, 8 Port. (Ala.) 9, the court said: "It is clear that no part of such erections can be rested upon the lands of the riparian proprietor, nor can he be excluded from the use of the water, or denied other riparian rights."

If a private person constructs a wharf upon land belonging to a city, he acquires no rights in it apart from what belongs to the public at large, and in such an event, possession of the wharf could be recovered by the city in ejectment, and afterward used as the city thought expedient. *Walker v. State Harbor Com'rs*, 17 Wall. (U. S.) 648; *Northwestern Union Packet Co. v. Atlee*, 2 Dill. (U. S.) 479; *People v. Davidson*, 30 Cal. 379.

In *Steers v. Brooklyn*, 101 N. Y. 51, the plaintiff owned the fee of the street extending to the river. He constructed a wharf on the water line and had the right to collect wharfage. The city, without his consent, built a pier at the end of the street, shutting the plaintiff's wharf off from the water. The court held that the pier belonged to the plaintiff by accretion, and that the city must account to him for all wharfage collected without allowing expense of collecting the same.

A steamboat company owning a wharf adjacent to the slips of a ferry company, has the same right of navigation in front of the slips as in any part of the river, but has no right willfully to obstruct the ferry company in the use of their slips. *Delaware River Steamboat Co. v. Burlington, etc., Steam Ferry Co.*, 81 Pa. St. 103.

There is much conflict among the decisions as to the extent of the rights of a riparian proprietor. In some states he is regarded as owning to low-water mark; in others only to high-water

3. Limitations on Riparian Rights.—The rights of riparian proprietors in respect to the erection of wharves are subject to such limitations as the legislature may see fit to impose. It is therefore competent for the legislature to pass acts establishing harbor and dock lines, and to take away, without making compensation, the rights of proprietors to build wharves on their own land beyond the lines, even when such wharves would occasion no actual injury to navigation.¹ But a right of wharfage acquired

mark; while in others a still different rule prevails. What the rule is in such state must be determined by consulting the statutes of that state. Even when the right extends only to high-water mark, the owner clearly has an inchoate right to use the lowland for improving his property and constructing wharves upon the same. But such a use gives him no property in the land under the water, and the state can transfer its right in such land to a stranger at any time before it is reclaimed by the owner. *Wetmore v. Brooklyn Gas Light Co.*, 42 N. Y. 384; *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102; *State v. Jersey City*, 25 N. J. L. 530. See also *Simpson v. Neill*, 89 Pa. St. 183.

1. *In re Port Wardens Line*, 13 Phila. (Pa.) 453; *Hart v. Albany*, 9 Wend. (N. Y.) 571, *affirming* 3 Paige (N. Y.) 213; *Hagan v. Campbell*, 8 Port. (Ala.) 9; *Mobile v. Eslava*, 9 Port. (Ala.) 577; 33 Am. Dec. 325; *Carrollton R. Co. v. Winthrop*, 5 La. Ann. 36.

As to the power of the legislature in respect to making grants of lands under navigable waters, see *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, *distinguishing* *Hoboken Land, etc., Co. v. Hoboken*, 36 N. J. L. 540. For the leading case in *New York* on this point, see *Langdon v. New York*, 93 N. Y. 129.

In *Com. v. Alger*, 7 Cush. (Mass.) 53, the court said: "On the whole the court are of opinion that the act fixing a line within the harbor of Boston, beyond which no riparian proprietor should erect a wharf or other permanent structure, although to some extent it prohibited him from building such structure on flats of which he owned the fee, was a constitutional law, and one which it was competent for the legislature to make; that it was binding on the defendant and rendered him obnoxious to its penalties if he violated its provisions."

But in *Yates v. Milwaukee*, 10 Wall. (U. S.) 498, the court, by Miller, J.,

said: "We are of opinion that the city of Milwaukee cannot, by creating a mere artificial and imaginary dock line, hundreds of feet away from the navigable parts of the river, and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose."

Chicago Lake Front Case.—An act passed by the legislature of the State of Illinois in 1869, granted to the Illinois Central Railroad Company, certain submerged land in the harbor of Chicago in fee, with a proviso that the defendant should not have power to alienate such lands, and that the gross receipts from the use, profits, and lease of the lands, or improvements thereon should be a part of the gross receipts of the company, for the purpose of taxation; and provided also that the harbor should not be obstructed or the right of navigation impaired, and that the legislature might regulate the rates of wharfage and dockage. It was held that the grant was in trust only, with the additional privilege to make certain improvements in the harbor, and was revocable except as to such lands as, at the time of the repeal thereof, had already been improved and reclaimed upon the faith of the grant. *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730.

This case was carried on appeal to the supreme court of the *United States*, where the decision of the court below was affirmed. The material part of the statute embodying the grant was as follows:

"Sec. 3. The right of the Illinois Central Railroad Company under the grant from the state in its charter, which said grant constitutes a part of the consideration for which the said company pays to the state at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use, and control,

and the riparian ownership incident to such grant, appropriation, occupancy, use, and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the State of *Illinois* in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for a distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago, are thereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns; provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same, and that all gross receipts from use, profits, leases or otherwise, of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the state treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter; and provided, also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor."

Field, J., rested the conclusion of the majority of the court upon the following reasoning: "The question, therefore, to be considered, is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of

power over them by the state. That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the *United States* hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be

disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains than it can abdicate the police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body; but there always remains with the state the right to revoke those powers and exercise them in a more direct manner and one more conformable to its wishes. So with trusts connected with public property or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state. The harbor of Chicago is of immense value to the people of the State of *Illinois* in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislation can deprive the state of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose—one limited to transportation of passengers and freight between

distant points and the city—is a proposition that cannot be defended. . . . It is hardly conceivable that the legislature can divest the state of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature, transferring the title to its submerged lands and the power claimed by the railroad company to a foreign state or nation would be repudiated without hesitation as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another state. It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case. Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claims to the ownership of the submerged lands, and the right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated. We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists when the harbor of a great city, and its commerce, have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor, and of the land under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned, of parcels used

under a valid city grant is a property right, which cannot be taken away by the legislature without first compensating the owner thereof.¹

V. RIGHTS AND DUTIES OF MUNICIPALITIES OVER WHARVES—

1. **Right to Erect.**—If a city is itself a riparian owner, this probably, in the absence of any restrictive provision in its charter, will give to it an implied authority to erect wharves thereon and to charge compensation for their use,² and it will not be presumed, because the city merely has abstained from control of them, that it has dedicated them thereby to any other public use.³

in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested." Illinois Cent. R. Co. v. Illinois, 146 U. S. 387.

In *Baltimore v. White*, 2 Gill (Md.) 444, it was held that under an act of the legislature prohibiting any person from making or extending any wharf in the city of Baltimore, without the consent of the city, the city might refuse its assent to the erection of a wharf except upon condition that its exterior margin should constitute a public wharf. If individuals act upon the city's assent thus conditioned, they consent to the dedication of the exterior margin of the wharves for that purpose, and in the absence of any contract or legislative provision as to wharfage, the city is entitled to collect it and not the owner and builder of the wharf.

1. *Langdon v. New York*, 93 N. Y. 129; *Williams v. New York*, 105 N. Y. 419.

2. *Com. v. Roxbury*, 9 Gray (Mass.) 519, and note; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166.

In *Murphy v. Montgomery*, 11 Ala. 586, Ormud, J., said: "The title to the wharf is in the city, and such being the fact, it had the same right as any other proprietor to collect wharfage from those landing goods there. The right, resulting from its proprietary interest, is not a franchise, but a right of property."

Wharves may be constructed by a city either by direct construction on its own part or by contract with others, giving them the revenue for a period of time to compensate for the erection. *Geiger v. Filor*, 8 Fla. 325.

A public wharf may be established by a city where any public street abuts upon a navigable stream, whether the riparian owner has or has not title to the land under the water to the middle of the stream. *Backus v. Detroit*, 49 Mich. 110; 43 Am. Rep. 447.

Where a city government has authority and proposes to erect a wharf for public convenience, it is not bound to accept the offer of the owners of the land on which it is proposed to erect it, to build the wharf at their own expense, to be under the control of the city. *Waddingham v. St. Louis*, 14 Mo. 190.

A *bona fide* purchaser of a wharf, erected under contract with a city and in which the city had certain rights, is affected with notice of these rights. *Baltimore v. White*, 2 Gill (Md.) 444.

A private wharf erected upon land within the limits of a municipal corporation, but not dedicated to the public, cannot be taken by the city without compensation, nor can the authorities collect wharfage at the same. Such right is not conferred by a clause in the city charter authorizing the city to regulate the erection and repair of private wharves, and the rate of wharfage thereat. *Grant v. Davenport*, 18 Iowa 179.

A city authorized by its charter to erect wharves on its own property, to obtain control over other wharves in the city, and to raise a revenue therefrom, has no power to take a lease of a wharf containing a provision that it should be kept as a free wharf. *Mobile v. Moog*, 53 Ala. 561.

Wharves, whether terminating streets or not, are not streets. If owned by a city they may be leased to private individuals. The interest in such a case is not in the nature of an easement, but proprietary. *Horn v. People*, 26 Mich. 221.

3. In *Boston v. Lecraw*, 17 How. (U.

2. Power Over Wharves.—Except where a city is itself a riparian owner, all of its power in respect to wharves must be derived from the legislature.¹ Being thus derived, the

S.) 426, the court, by Grier, J., said: "The people of Boston, who owned this land as their common and private property, acted through a corporation, whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit cannot be called a dedication of it to any other public or wider extent. Whether it was called 'town dock' or 'public dock' (which were used as synonymous terms), it would furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or city."

1. Source of Power.—*Carrollton R. Co. v. Winthrop*, 5 La. Ann. 36; *State v. Jersey City*, 25 N. J. L. 525; *Municipality v. Pease*, 2 La. Ann. 538; *St. Martinsville v. Steamer Mary Lewis*, 32 La. Ann. 1293; *Snyder v. Rockport*, 6 Ind. 237.

Cities having legislative authority to establish and regulate wharves, may cause public wharves to be constructed at the ends or in front of streets terminating or fronting on navigable waters, without invading the rights of the owner of private property abutting on such streets, or the rights of the adjoining riparian proprietor—and this, irrespective of whether the fee in the street is in the city or in the adjoining proprietor. *McMurray v. Baltimore*, 54 Md. 104; *Dugan v. Baltimore*, 5 Gill & J. (Md.) 375; *Haight v. Keokuk*, 4 Iowa 199; *Barney v. Keokuk*, 94 U. S. 324.

Where a city in *Alabama* constructed a wharf at the end of a dedicated street leading to the water, it was held that the adjoining proprietor was not the owner of the wharf, and could not eject the city therefrom. *Doe v. Jones*, 11 Ala. 63.

An ordinance by which municipal authorities undertake, without express legislative authority therefor, to give to private persons the right to occupy a portion of the public wharf with a grain elevator for fifty years, without reserving the right to resume possession and regulate the charges, is void. *Illinois, etc., R., etc., Co. v. St. Louis*, 2 Dill. (U. S.) 70.

The legislature of *Massachusetts* has power to establish lines in the harbor

of Boston, beyond which no wharf shall be extended or maintained, and to declare any wharf extended or maintained beyond such lines a public nuisance; and statutes establishing such lines take away the right of the proprietors of flats in the harbor beyond the lines, to build wharves thereon, even when they would be no actual injury to navigation; and such statutes, although they provide for no compensation to such proprietors, are not unconstitutional, as taking private property and appropriating it to public uses without compensation, within the meaning of article 10, of the Declaration of Rights; nor as impairing the obligation of the grant made by the colony ordinance, and thus transgressing the prohibition of *United States Const.*, art. 1, § 10, against passing laws impairing the obligation of contracts. But such statutes do not affect the right to maintain wharves erected before their passage. *Com. v. Alger*, 7 Cush. (Mass.) 82.

It was held that the power given to San Francisco to erect, repair, and regulate public wharves, to regulate the erection and repairs of private wharves, and to fix the rate of wharfage, did not vest in the city any property interest in the wharves. *People v. Broadway Wharf Co.*, 31 Cal. 33.

The legislature may confer its authority as it deems fit. *Fuller v. Edings*, 11 Rich. (S. Car.) 239; *Weber v. State Harbor Com.*, 18 Wall. (U. S.) 57.

A city authorized by its charter to erect a public wharf on the land of a private citizen, is not bound to select, as agent for the accomplishment of the work, the owner of the land upon which the erection is proposed. *Waddingham v. St. Louis*, 14 Mo. 190. But unless expressly empowered by its charter to erect wharves, a city has no right to do it as a distinct and independent undertaking, though a city will not be restrained from grading a street to the river, merely because a wharf may be incidentally formed thereby. *Snyder v. Rockport*, 6 Ind. 237.

The power to prohibit the establishment of other wharves and landings is a necessary part of the power to erect and regulate. *Muscataine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185.

Where a city is authorized by its

charter to establish and regulate the use of wharves, fix the rates of wharfage, and regulate the anchorage and mooring of boats and rafts, it possesses, and by ordinance may exercise, the incidental power of prohibiting any and all persons, including those owning lots abutting on the stream navigated, from using any other place than the wharf as established by the city authorities, without permission of the city and payment of the ordinary wharfage fee. This grant of power necessarily confers the authority to fix the location and limits of the wharves and landings, and to prohibit the use of any other place for that purpose. The mere power to establish wharves and regulate them and the boats and rafts choosing to land there instead of elsewhere, would be idle and useless. The power to prohibit the landing of boats or rafts at other places than the public wharves is necessary in order to the full exercise of the power granted, and is necessary also in order to protect the city in its revenues granted by the charter. *Dubuque v. Stout*, 32 Iowa 80; 7 Am. Rep. 171. *Compare Dubuque v. Stout*, 32 Iowa 47.

The authority to erect wharves includes the power to condemn private property for that purpose, upon making proper compensation to the owner, and also the power to extend or diminish those already in existence. *Hannibal v. Winchell*, 54 Mo. 172.

A city may authorize a steamboat company to erect a building on or near the banks of a river in front of land belonging to a private owner, reserving, however, public control over the structure. *Barney v. Keokuk*, 4 Dill. (U. S.) 593, *affirming* 94 U. S. 324.

But a grant of a privilege to construct a wharf or dock in a public highway does not authorize the erection of a warehouse. *Bingham v. Doane*, 9 Ohio 165.

Wharves at Ends of Streets.—A city cannot erect a wharf at the foot of a street, if the fee within the lines of the street be in a private owner, *In re Cramp*, 13 Phila. (Pa.) 16; *People v. Pacific Rolling Mills Co.*, 60 Cal. 323; *People v. San Francisco Gas Light Co.*, 60 Cal. 349; though it may establish a wharf where any street duly dedicated to the public abuts on a navigable river, irrespective of whether or not the riparian owner's title runs to the middle of the stream; *Backus v. Detroit*, 49 Mich. 110; 43 Am. Rep. 447; and it has been held that the right of a city to erect wharves under

the circumstances was not affected by the question whether the street had been regularly opened and condemned as a highway, or its use as such had been acquired by dedication, *McMurray v. Baltimore*, 54 Md. 103.

It was held in *Horn v. People*, 26 Mich. 222, that wharves constructed by the city under this power, whether at the end of highways or on its property, are the property of the city, and may be leased as such. In this case, Campbell, J., said: "There is no instance in which the term 'public wharf' has been used in our legislation to indicate anything analogous to a dedication to any public use, like that of highways. . . . The term is applied as well to wharves on city property away from streets as to wharves at the end of streets."

When a city has acquired the right of extending streets over the flats to the channel, it has the like right to erect wharves in front of the streets. *Galveston v. Menard*, 23 Tex. 349.

An ordinance of a city provided that the wharf company might have and exercise all the rights, privileges, and powers conferred by the charter, provided the wharf company so used the privileges "as not to obstruct the free passage of the streets on land south of" the street named. It was held that the company had no right to construct switches on the south side of its main track on such street, and that the fact that the wharf company improved and reclaimed the street did not give the company any privileges not granted, nor deprive the city of its power over such street. *Galveston Wharf Co. v. Gulf, etc., R. Co.*, 81 Tex. 494.

Where a proprietor of lands laid out a town on a navigable river, and dedicated the land along it for a common, it was held that the town authorities had thereby the right to build wharves upon it. *Newport v. Taylor*, 16 B. Mon. (Ky.) 699.

Wharves and the franchise of collecting wharfage may be leased by the corporation. *Farnum v. Johnson*, 62 Wis. 620.

For construction of ordinances of the city in respect to obstructing public piers and wharves, see *Vandewater v. New York*, 2 Sandf. (N. Y.) 258; *Com. of Pilots v. Erie R. Co.*, 5 Robt. (N. Y.) 366.

For validity and effect of acts and ordinances regulating the cording of wood, as to private wharves and landings, see *Com. v. Gillam*, 8 Serg. & R.

legislature may revoke such powers at its will, provided that in doing so, it does not deprive the city of property acquired under legislative grant.¹ In regard to private wharves lawfully erected, cities have only such power of regulation and control as is conferred directly or indirectly upon them by their charters.² Even when conferred in terms, the power must be strictly construed when it affects private rights; not so strictly, however, as to defeat the purpose of the grant.³

On the other hand, as cities are incorporated for the promotion

(Pa.) 50; *Southwark v. Neil*, 3 Yeates (Pa.) 54.

For effect of the ordinance of 1852, passed by the city council, setting apart one of its water lots to the public as a free dock, see *San Francisco v. Calderwood*, 31 Cal. 585; 91 Am. Dec. 542.

For powers of the corporation, under various statutes, to construct and extend piers abutting on the wharf or street called "South street," or to require proprietors of adjacent lots to do so, and rights to wharfage, see *Marshall v. Guion*, 4 Den. (N. Y.) 581; *New York v. Whitney*, 7 Barb. (N. Y.) 485; *Thompson v. New York*, 3 Sandf. (N. Y.) 487; *Murray v. Sharp*, 1 Bosw. (N. Y.) 539.

For jurisdiction of harbor masters and dock masters, see *Hecker v. New York Balance Dock Co.*, 24 Barb. (N. Y. Supreme Ct.) 215; *Adams v. Farmer*, 1 E. D. Smith (N. Y.) 588.

Action by the city to set aside a lease made by corporate officers of wharves and piers, is maintainable. See *New York v. Union Ferry Co.*, 55 How. Pr. (N. Y. Supreme Ct.) 138; *New York v. North Shore Staten Island Ferry Co.*, 55 How. Pr. (N. Y.) 154.

1. **Revocation of Power.**—Whatever powers the municipal body rightfully enjoys over the subject are derived from the legislature, and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration. *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166.

2. **Municipal Control.**—*McLaughlin v. Stevens*, 18 Ohio 94; *Martin v. Evansville*, 32 Ind. 85; *Brooklyn v. New York Ferry Co.*, 87 N. Y. 204.

Where the charter of a city authorizes it to regulate the erection and repair of private wharves and the rates of wharfage thereat, "the city," said *Wright, C. J.*, in *Grant v. Davenport*, 18 Iowa 179, "may regulate but not

destroy; may exercise control, as over other private property within its limits, but not to the extent of appropriating the use and enjoyment thereof to the public without compensation."

For power of the corporation to regulate the use of the docks and basins of the city, and to direct what class of vessels shall resort to certain slips or docks, see *Hecker v. New York Balance Dock Co.*, 24 Barb. (N. Y.) 215.

For what constitutes a violation of the by-law of the village, which provides that no boat shall "lay against or near to the south bank of the basin in the public square for more than twenty-four hours during any one week," see *Larned v. Syracuse*, 5 Wend. (N. Y.) 166.

For the power of the city council to establish and enforce by-laws, etc., respecting the harbor and wharves, and regulation for the security, welfare, and convenience of the city, see *Dubois v. Augusta*, *Dudley* (Ga.) 30.

An ordinance of the city of Muscatine, passed under section 18, clause 5, of the charter, prescribing that rafts of lumber "landed and sold or drawn out within the city limits, shall pay a wharfage," does not entitle the city to charge the wharfage upon a raft still in the water, and not sold. *Muscatine v. Hershey*, 18 Iowa 39.

3. **Construction of Powers.**—A city charter provided for regulating wharfage "of all articles brought to public landings in said district." A by-law was enacted imposing a fine on any person "who shall sell on any of the wharves or landings, within the said district, any cord wood, unless the same shall have been corded or measured by the proper corder." This was held not to affect private wharves. The court said: "Their powers in this particular are limited by the act of incorporation to public landings and their public estate. Their special authority respecting the authority of individuals

of the public good, the erection of a wharf, like the paving of a street or other public improvement, will be presumed to be for the benefit of the public; and, in the absence of any express intention to require compensation for the use of its wharves, the presumption is that none was intended.¹ But cities which have authority to regulate and control wharves within their corporate limits, may refuse to allow a wharf to be built, or may impose such limitations, restrictions, and conditions upon the construction of them as they may deem most beneficial for the navigation and commerce of the city.² They cannot, however, under a

must appear on the face of the proceedings to be strictly pursued." *Southwark v. Neil*, 3 Yeates (Pa.) 54. See also *Muscatine v. Hershey*, 18 Iowa 39; *Martin v. Evansville*, 32 Ind. 85.

The *Georgia* Act of 1841, requiring the mayor and aldermen of the city of Savannah, the commissioners of pilotage for the bar of Tybee and river Savannah, and the proprietors and owners of wharves and lands on the shore of Hutchinson's Island, to appoint commissioners to determine the proper line of wharf heads along the shore of said island, is mandatory in its language, and not permissive merely; and the service therein enjoined not being foreign to the official duties of the appointees, its performance is obligatory on them; and it is no sufficient excuse for their refusal, that in their own opinion, or that of others, it will injure the navigation of the river Savannah, the commerce of the city, and the public generally. *Savannah v. State*, 4 Ga. 26.

An act authorizing a tax "for building, rebuilding, and repairing such wharf as" the township owns, authorizes no assessment unless the township owns a wharf. *Bacon v. Mulford*, 41 N. J. L. 59.

1. In *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185, the court said: "The erection of a wharf by a city is and must be presumed to have been made for the use and benefit of the public, like the paving of a street or other improvement, unless the contrary is shown. Such use to be free, unless an intent to charge therefor is provided by ordinance, or possibly in some other manner, so as to clearly indicate such intent."

Where a wharf, in a public port, has been dedicated to the public use, a toll cannot afterward be imposed for the use of it. *Wharf Case*, 3 Bland (Md.) 361.

2. A city may refuse its assent to the erection of a wharf except upon the condition that its exterior margin shall constitute a public wharf. *Baltimore v. White*, 2 Gill (Md.) 444.

Limitations on Municipal Control.—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387; *Illinois, etc., R., etc., Co. v. St. Louis*, 2 Dill. (U. S.) 70; *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593; *People's R. Co. v. Memphis R. Co.*, 10 Wall. (U. S.) 380; *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; 7 Am. Rep. 469; *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538; *Stuyvesant v. New York*, 7 Cow. (N. Y.) 588; *Es. p. Albany*, 23 Wend. (N. Y.) 277; *New York, etc., R. Co. v. New York*, 1 Hill (N. Y.) 568; *Martin v. Brooklyn*, 1 Hill. (N. Y.) 548; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Western Sav. Fund v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730; *Dingman v. People*, 51 Ill. 277; *Brimmer v. Boston*, 102 Mass. 19; *Jackson v. Bowman*, 39 Miss. 671; *Oakland v. Carpentier*, 13 Cal. 540; *Smith v. Morse*, 2 Cal. 524; *Cooley's Const. Lim.* (4th ed.) *206.

A grant by a common council by deed, of the exclusive use of a public slip, cannot affect in any way the right of the corporation to enforce the ordinances which apply to the public slips of a city. *New York v. Rice*, 4 E. D. Smith (N. Y.) 604.

The mayor and city council are but trustees of the public; the tenure of their office impressed their ordinances with liability to change. They could not, if they would, pass an irrevocable ordinance. The corporation cannot abridge its own legislative powers. Their contracts, when consummated and within their chartered powers, must bind them and their successors, what-

power to regulate, surrender to private individuals the exclusive use of a wharf for a fixed period. They have no power to pass ordinances which shall cede away, control, or embarrass their legislative powers, or which shall disable them from performing at any time their public duties.

3. Limitations on Rights of Municipalities.—A city cannot condemn private property for use as a wharf, and use it for any other purpose.¹ Nor can it, under a power to regulate, grant to an individual the exclusive use of a wharf for a definite

ever be the consequences. *State v. Graves*, 19 Md. 373.

A city cannot, by contract, deprive itself of the power to regulate the reconstruction of railways, made necessary by the changes in the character of pavements used upon the streets of the city; neither can it embarrass or clog its right to exercise such power by undertaking, either expressly or by implication, to pay the expenses necessarily incurred by the company in complying with the reasonable and proper regulations made by the city on this subject. *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.) 415.

A license granted by a city to an individual, to connect his property with the city railroad by a turn-out track, is not such a contract as will prevent the city from abandoning said railroad whenever it deems expedient for the public good. *Branson v. Philadelphia*, 47 Pa. St. 329. In this case the court said: "Perhaps it might be sufficient to say that he took the license subject to 'all other ordinances relating to the railroad in the city of Philadelphia.'"

The city council of Cincinnati undertook to grant away an exclusive right to use the streets of the city for the purpose of laying gas pipes for conveying gas to be used for lighting the city, for a term of twenty-five years, and thereafter, until the gas works' pipes, etc., were purchased by the city. To enable the city council to grant such an exclusive right by ordinance in the nature of a contract, the power must be shown to have been expressly granted or to be so far necessary to the proper execution of the powers which are expressly granted, as to make its existence free from doubt. *State v. Cincinnati Gas Light, etc., Co.*, 18 Ohio St. 262.

People v. Baltimore, etc., R. Co. (Supreme Ct.), 3 N. Y. Supp. 29.

1. In *Illinois R., etc., Co. v. St. Louis*, 2 Dill. (U. S.) 70, the court, by Dillon,

J., said: "A wharf differs in many material respects from a street. The latter is primarily intended for the purposes of passage or travel, and any erection in it, without legislative authority, is a nuisance; but a wharf is intended to afford conveniences for the landing of vessels, the loading or unloading of their cargoes, and to supply a place on which the wares discharged from vessels or awaiting shipment may be laid or deposited; and it would seem that structures or appliances of any kind intended, and which have the effect to facilitate the handling and preservation of merchandise arriving at the wharf, erected upon it under municipal authority, and remaining at all times subject to municipal control, would be lawful and within the purposes for which the wharf property was acquired or dedicated. We do not say that the municipal authorities could use the wharf property for mere warehouse purposes, though we have no doubt that it would be competent for them to erect, or authorize the erection thereon, of such structures, for the receipt and shipment of goods by water, as they might deem expedient in order to promote the trade and commerce of the city. And we are clearly of opinion that the erection, under the sanction of the city, of an elevator to be used in handling grain at the wharf, and at all times under the direction and control of the municipal authorities, is such a use of wharf property as does not fall without the scope of dedication, and such a structure would not, therefore, be a public nuisance. We have not met with, nor have counsel cited, any adjudication upon the precise point; and we have therefore been compelled to decide it upon principle, and have felt that it was due to the importance of the question to set forth our views, as we have done, with considerable fullness."

In *Belcher Sugar Refining Co. v.*

period. It has no power to pass ordinances or make contracts that will destroy or abridge its legislative powers or embarrass it in the performance of its public duties.¹

4. Duties of Municipalities.—Municipalities like individuals are bound, in assuming control of their wharves and landings, to provide safe wharves for the landing of goods, and are liable for whatever damages are occasioned by any neglect in this respect.²

St. Louis Grain Elevator Co., 10 Mo. App. 401, the court held that a city which had condemned property for use as a wharf, under legislative authority, might have, for a limited time, a portion thereof for the erection of an elevator warehouse; but on appeal to the supreme court in *82 Mo. 121*, the court held that while the city, in order to meet the demands of commerce and the changed methods of handling grain, might license the erection of elevators and warehouses to be used in connection with the wharves without violating the rights of the owners of the land, it had no right to lease any portion of it for a term of years without a reservation of the right to cancel the lease—that without such a reservation it was but a lease of a portion of land condemned solely for public use for wharf purposes, for the private use and private gain of the lessee.

In *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 10 Mo. App. 401; 82 Mo. 121*, it was held that the legislature had the power to give to municipal authorities portions of a public wharf for wharf purposes, and that where property was condemned as “a public highway for wharf purposes,” its use for grain elevators was not inconsistent with such a purpose.

A lease of a wharf and landing from the city of Philadelphia, does not give the tenant a right to store street dirt on its whole length, the wharf being part of the street. *Struthers v. Bickley, 9 Phila. (Pa.) 539*.

It would not do to permit property condemned for one purpose to be used for another and different purpose, or property condemned for public use to be used for a private use. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 121*.

1. Milhau v. Sharp, 27 N. Y. 611; 84 Am. Dec. 314; New York v. Cunard Steamship Co. (Supreme Ct.), 15 N. Y. Supp. 904; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475; 7 Am. Rep. 469;

Gale v. Kalamazoo, 23 Mich. 344; 9 Am. Rep. 80; Dingman v. People, 51 Ill. 277; Brimmer v. Boston, 102 Mass. 19; Johnson v. Philadelphia, 60 Pa. St. 445; Jackson v. Bowman, 39 Miss. 671.

A board of trustees of a city gave the defendants the exclusive privilege of laying out, establishing, and constructing wharves, etc., in the city for a term of thirty-seven years. It was held that the ordinance under which the grant was made was void as being a transfer of the corporate powers of the board, and that the powers delegated by the government to municipal corporations were trusts not subject to be delegated by the corporations. *Oakland v. Carpenter, 13 Cal. 540*.

A grant of the right to use a portion of a pier for ferry purposes, does not include the right to erect and maintain sheds suitable for running the ferry. *Cunard Steamship Co. v. Voorhies, 50 N. Y. Super. Ct. 253*.

2. McGuiness v. New York, 52 How. Pr. (N. Y. Supreme Ct.) 450; Jeffersonville v. Louisville, etc., Steam Ferry Co., 27 Ind. 100; 89 Am. Dec. 495.

A city, keeping a wharf and charging for the anchoring of boats, is bound to protect the boats against the dangers of ordinary floods. *Shinkle v. Covington, 1 Bush (Ky.) 617*.

If a city owns a river wharf and charges toll to those using the wharf as a landing, it is bound to use the precautions and appliances for securing and holding boats and rafts that a diligent man ordinarily would employ for the protection of his own boat at his own wharf. *Wiley v. Allegheny, 118 Pa. St. 490; 4 Am. St. Rep. 608*.

The obligations assumed by a city, upon taking charge of its wharves and landings, and by charging and receiving wharfage dues, are to provide a good and safe wharf for the landing of goods, and to keep it in repair. *Fennimore v. New Orleans, 20 La. Ann. 124*.

The libellant occupied a portion of a public wharf, under a lease from the city, with floats used by him as a coal

So municipalities which assume the function of maintaining wharves may be compelled to keep the same in repair.¹

VI RIGHT TO ACCESS TO WHARVES.—The owner of a wharf on a navigable river is entitled to free access to it at all times,² and

yard. In a sudden flood, the chains by which his floats were held to a mooring post on the wharf broke, and his floats were swept away, the mooring post remaining firm. He sought to recover of the city on the ground of its negligence in not replacing posts which were cut down by a railroad company, to which it had granted a right of way along the wharf, and which he might have used in time of flood for additional moorings. It was held that the city was not liable, in the absence of any evidence that the libellant complained of the cutting of the posts, or notified the city to replace them; he not being entitled to the same degree of care due from a wharfinger to navigators using its wharf. *Jackson v. Allegheny*, 41 Fed. Rep. 886.

But a city is not liable to an individual because its common council refuses to repair certain docks which it is directed to repair. For this purpose the common council is an agent of the state and not of the city. *New York, etc., Saw Mill, etc., Co. v. Brooklyn*, 8 Hun (N. Y.) 37.

When, however, it is made by statute the duty of the department of docks of a city to keep a wharf belonging to the city in repair, although the use of the dock is solely for the benefit of the department of charities, but in its custody, the city is liable for damages caused to a vessel rightfully using the dock, by the failure of the department of docks, as its agent, to keep the dock in repair. *Philadelphia, etc., R. Co. v. New York*, 38 Fed. Rep. 159.

The liability of public trustees who have been vested by statute with the control of wharves and docks, differs in no way from that of absolute owners levying tolls for their own benefit. *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686.

But when trustees are not vested with any such control, and the duty of removing obstructions imposed by statute is discretionary and not compulsory, no liability attaches. *Forbes v. Lee Conservancy Board*, 4 Exch. Div. 116. And harbor trustees cannot be held liable for failing to cleanse, deepen, or remove obstructions from harbors, when they have no funds to enable

them to do so. *Grant v. Sligo Harbor Com'rs*, 11 Ir. R. C. L. 190.

A city is liable for injury to boats occasioned by its failure to remove at reasonable intervals the accumulations from drains at public wharves to which boats are invited, and at which the city collects wharfage. *The Dave & Mose*, 49 Fed. Rep. 389.

A city maintaining a wharf, is liable to the owner of a boat, who has paid the wharfage, for the loss of the boat while fastened to the wharf, if such loss was occasioned by its negligence in not furnishing proper fastenings. *Shinkle v. Covington*, 1 Bush (Ky.) 617. See also *People v. Albany*, 11 Wend. (N. Y.) 539; 27 Am. Rep. 95; *Buckbee v. Brown*, 21 Wend. (N. Y.) 110.

In order to establish the liability of a city for negligence in maintaining a wharf, it is not necessary to show title in the city, and that it is impowered to exercise control over the wharf. It is enough if it can be shown that it is in possession of the wharf, controlling and charging toll for its use, and it is not material whether the city has adopted ordinances for the regulation of the wharf or having such, neglected to enforce them. *Pittsburg v. Grier*, 22 Pa. St. 54.

1. When a charter of a city imposes upon it the duty of repairing its wharves, an indictment will lie for a failure to do so. *Lyme Regis v. Henley*, 3 B. & Ad. 77; 23 E. C. L. 32. See also *People v. Albany*, 11 Wend. (N. Y.) 539.

A wharf built by individuals is private property. One built by a city, under the general law, is under the jurisdiction and control of the city authorities. In the latter case the city can be compelled to repair it, and is liable for damages occasioned by the neglect to repair. *Jeffersonville v. Louisville, etc., Steam Ferry Co.*, 27 Ind. 100; 88 Am. Dec. 495.

For effect of a grant of the wharfage to be collected at a public pier upon the obligation of the corporation to repair. see *Taylor v. New York*, 4 E. D. Smith (N. Y.) 559.

2. *Delaware River Steamboat Co. v. Burlington Steam Ferry Co.*, 81 Pa.

any unauthorized obstruction which materially interferes with this right is unlawful and constitutes a nuisance.¹ He, however,

St. 103; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *Thayer v. Boston*, 19 Pick. (Mass.) 511; 31 Am. Dec. 157; *Simpson's Appeal*, 77 Pa. St. 270.

The defendant, owning a vessel and a wharf upon a navigable stream, and finding a raft of lumber belonging to the plaintiff fastened in the stream so as to obstruct the approach of his vessel to his wharf, untied the raft, doing no unnecessary damage; and, not being in charge of any person, it floated away. It was held that he was not liable for the loss of the lumber, as raftsmen on navigable streams have no right to moor their rafts in such a manner as to deprive wharf owners of access to their wharves. *Harrington v. Edwards*, 17 Wis. 586; 84 Am. Dec. 768. The situation and customary use of a pier may be such as to impliedly license (authorize) any vessel to moor to it, subject to a charge for wharfage. Where the pier is built in the shallow waters of a lake, out to, but not into, navigable waters, and on the open shore, and not in any harbor, and has been used only for the private business of the owner, no implied license can arise. *Dutton v. Strong*, 1 Black (U. S.) 23.

One who uses a pier which projects from a bulkhead near a wharf in such a way as to prevent the owner of the wharf from using it as he had a right, is liable for whatever damages the owner sustains on account of such obstructions. *Camden, etc., R. Co. v. Finch*, 5 Sandf. (N. Y.) 48.

Where a city obstructed a private wharf by turning the course of a stream so as to cause sand to form an embankment in front of it, thus obstructing the approach of vessels, *Archer, C. J.*, in *Barrow v. Baltimore*, 2 Am. Jur. 204 observed as follows: "I cannot permit myself to doubt but that the character of the plaintiff's rights were such that he might well complain of any injury to them. He had the right which every man has to the benefits flowing from a navigable stream contiguous to his land. He had a right to pass and repass with his vessels. No man has a right to moor a vessel to his land without his consent, and if he was in the habit of asking and receiving a compensation from owners of vessels for such consent, and has been deprived

of this benefit and profit by this filling up of the navigable stream opposite to his land, he has been deprived of an important privilege and been compelled to surrender it for the public benefit. He has been disseised, or more properly speaking, deprived, of an easement appurtenant to his land, which constitutes a great portion of its value. It would be in vain to guard with such vigilance the freehold itself, if the liberties and privilege appurtenant to it were not also subject to constitutional guardianship. Over the soil covered by the water, over the water itself which belongs to the state, I need not say he has no right; but he has a perfect right to the soil of the wharf itself, to the profits growing out of the depth of the navigable water attached to it which are incident to the soil itself."

A and B were adjoining dock owners. A sought to restrain B from erecting a wooden platform alongside of his wharf, whereby the water space between the two docks would be diminished materially. *Peirce, J.*, said: "These wharf owners have concurrent rights in the dock, and to deprive one of the lawful use of the dock and wharf that another may have more room for the storage of cargo, seems so inequitable, if not illegal, that it cannot be justified." *Bailey's Appeal*, 9 Phila. (Pa.) 506.

The riparian proprietor, as proprietor of the adjoining land and as connected with it, has the right of exclusive access to and from the waters of the lake at that particular point; he has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation, not interfering with the public use. *Delaplaine v. Chicago, etc., R. Co.*, 42 Wis. 215; 24 Am. Rep. 386.

In *Railway Co. v. Renwick*, 102 U. S. 180, the better and more substantial doctrine is laid down, that the land under the water in front of a riparian proprietor, though beyond the line of private ownership, cannot be taken and appropriated to a public use by a railway company under its right of eminent domain, without making compensation to the riparian proprietor. But see *Langdon v. New York*, 93 N. Y. 129.

1. In *Northwestern Union Packet Co. v. Atlee*, 2 Dill. (U.) S. 479, the

cannot maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public, although, if by reason of such a nuisance he sustains a peculiar injury differing in kind and not merely in degree and extent from that which the general public sustains from the same cause, he may recover damages in a private suit for such peculiar injury.¹

court, by Dillon, J., said: "Any erection or obstruction not authorized by competent legislative enactment, which materially interferes with the paramount right of navigation, is unlawful, and comes within the legal notion of a nuisance. . . . The river is a highway, or water way, for the use of the public, just the same as a street or highway; and individuals, for their own convenience, have no more right, without legislative authority, to obstruct the one than they have to incumber or obstruct the other. . . . A pier built within the navigable channel, that is at point in the river where vessels may go, and where they have a right to go, is an unlawful structure in the eyes of the law. Indeed, any permanent structure which interferes with, or which may endanger or obstruct navigation, is unlawful, and cannot be legalized by any considerations of utility, or otherwise, except by direct legislative authority."

1. *Suit for Private Injury*.—Haskell v. New Bedford, 108 Mass. 208; Brightman v. Fair Haven, 7 Gray (Mass.) 271; Smith v. Boston, 7 Cush. (Mass.) 255; Franklin Wharf Co. v. Portland, 46 Me. 42; Wilkes v. Hungerford Market Co., 2 Bing. N. Cas. 281; 29 E. C. L. 336.

The owner of a wharf on public navigable waters cannot maintain a private action for illegally filling up such waters and thereby obstructing his access to his wharf. Harvard College v. Stearns, 15 Gray (Mass.) 1.

In Greasley v. Codling, 2 Bing. 263; 9 E. C. L. 407, Burrough, J., said: "The question in all these cases is, whether the inconvenience complained of is general, or a particular inconvenience of the party complaining; that is the point of the decisions and who can doubt about the particular injury in the present case."

No action lies for the obstruction of a navigable stream by the building of a bridge, whereby the owner of a parcel of land and a wharf above the bridge is prevented from coming to the wharf from the sea in vessels, although

his wharf is the only one above the bridge used for business purposes, and he is compelled thereby to abandon the use of his wharf for such purposes and to transport his goods by land at an enhanced expense. Dougherty v. Bunting, 1 Sandf. (N. Y.) 1.

In Blackwell v. Old Colony R. Co., 122 Mass. 1, the court, by Gray, C. J., said: "The fact that the plaintiff alone now navigates the stream, or has a wharf thereon at which he carries on his business, only shows that the present consequential damage to him may be greater in degree to him than to others; but does not show that the injury is different in kind, or that other riparian proprietors and the rest of the public may not, whenever they use the stream, suffer in the same way."

The owner of a wharf and dock, who dredges out a channel from his dock over flats belonging to other persons and lying between high and low-water mark, cannot recover damages, in a private suit, from a city for an injury to the channel by the discharge of sewage from a common sewer into the dock, whereby the channel is partly filled up, and the owner put to additional expense in getting vessels to his wharf; although he dredged out the channel openly and with a claim of right. Breed v. Lynn, 126 Mass. 367.

The owner of a wharf upon a tide-water creek cannot maintain an action for an illegal obstruction to the creek occasioned by emptying into the same, a short distance above the plaintiff's dock, a large quantity of gravel, sand, stones, etc., to such an extent as to damage the plaintiff seriously in the conduct of his business; but he can maintain an action for an obstruction adjoining the wharf, which prevents vessels from lying at it in the accustomed manner, this being a particular damage. Brayton v. Fall River, 113 Mass. 218; 18 Am. Rep. 470. In this case the court said: "An individual cannot maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public. The only remedy is by

Nor is he entitled to the exclusive use of the water adjacent to his wharf as against the parties temporarily occupying the same in the due course of navigation of the river.¹

VII. REMEDIES OF OWNERS OF WHARVES.—The owner of a wharf not only has the right to recover damages in an action at law for any injury actually done to his wharf, but he is entitled also to the benefit of equitable remedies for the prevention of injuries to his rights by injunction to prevent the erection of obstructions or otherwise.²

indictment, or other public prosecution. But, if by reason of a public nuisance, an individual sustains peculiar injury, differing in kind, and not merely in degree or extent from that which the general public sustains from the same cause, he may recover damages in a private suit for such peculiar injury.

Where the plaintiff had a right to erect wharves, and artificially deepen its docks, it is not barred from recovery from the city for filling up its dock with sewage, because such use of its property changed somewhat the currents of the tide, and made the matter negligently discharged by the defendant accumulate in larger quantities than it otherwise would have done. *Constitution Wharf Co. v. Boston*, 156 Mass. 397.

While A was the owner of a dock, a railroad company erected a pier in the river for a bridge, whereby A's property was injured for dock purposes. A sold the property to his wife, who sued the company. It was held that A had a right of action for damages, but that it did not pass to his wife by the conveyance. *Chicago, etc., R. Co. v. Maher*, 91 Ill. 312.

For the power of city authorities to construct a certain sewer, with an outfall in a public dock, and how much power should be exercised to avoid creating a nuisance in the dock, see *Franklin Wharf Co. v. Portland*, 67 Me. 46; 24 Am. Rep. 1.

1. In *Bainbridge v. Sherlock*, 29 Ind. 364; 95 Am. Dec. 644, it was held that a navigator landing at one wharf is not justified by any public right in the river in so mooring his vessel that, while moored, its side and stern will be carried by the current against the wharf boat of a contiguous wharfing lower down the river, thus obstructing access to the lower wharf. But this case was again considered in 41 Ind. 35, and a somewhat modified conclusion reached. It was there held that the appellee had a right to run their boat in any part of

the river not then occupied by other boats navigating the river, and to stop at any wharf which their business might require. In this case the court, by Worden, J., said: "The appellants had the right to land at such wharf or wharves as suited their convenience; and if in doing so the current of the river or other circumstances carried the stern of their boat down stream so that a portion of the boat's length lay in front of the appellee's wharf, but still in the navigable waters of the river, they were but in the exercise of a legal right, and cannot be responsible to the appellee for any consequential damages which he may have sustained by other boats being prevented from landing at his wharf, provided that the appellants, in thus exercising their rights, exercised due care, skill, and dispatch, and subjected the appellee to as little inconvenience as possible, consistently with the exercise of their own rights. Doubtless unreasonable and vexatious delays, thus wrongfully preventing ingress to and egress from the appellee's wharf, would subject the appellants to liability for the damages consequent thereon."

2. *People v. Davidson*, 30 Cal. 379; *Crocker v. New York*, 15 Fed. Rep. 405.

Thus where a shore owner has a right to erect wharves on the water front adjacent to his land, an injunction will issue to restrain the erection of obstructions to such wharves. *Parker v. Taylor*, 7 Oregon 435.

In *Penniman v. New York Balance Co.*, 13 How. Pr. (N. Y. Supreme Ct.) 40, a bill in equity was brought to prevent an injury to a private wharf by the erection of permanent obstructions which, if erected, would interfere with the ingress to and egress from a wharf. The court, in this case, said: "It is a familiar rule that an injunction will be granted to prevent and restrain a nuisance, and it will be allowed at the instance of any private individual, who sustains a special injury from it. The

VIII. OBLIGATIONS AND DUTIES OF WHARF OWNERS—1. To Keep in Repair.—The owner or occupant of a wharf who has the right to collect wharfage for the use of it is bound to keep it in repair.¹ This duty arises by implication of law, and is a natural

plaintiffs' right to the wharfage and to the gains from the pier, and the gains which they made from vessels lying in the basin, were rights peculiar to them, the loss of which constitutes an injury special to them."

In *Murray v. Sharp*, 1 Bosw. (N. Y.) 539, equity interfered to prevent a city from interfering with the rights of the owner of a private wharf by appropriating an adjoining slip for the purposes of a public wharf.

The owner of a private wharf is entitled to an injunction restraining the construction of another wharf in front of his, which would interfere with his ingress to and egress from the same, unless competent authority to erect the proposed wharf be first shown. *Cowell v. Martin*, 43 Cal. 605. On the other hand equity will not interfere to compel the owners of a private wharf to allow a particular person to use it, when the reason for excluding him is on account of the extent of their business. *Audenried v. Philadelphia, etc., R. Co.*, 66 Pa. St. 370.

Where it had been agreed that a certain part of the dock between two wharves should be kept open for a passage way for vessels going to and from the wharves, it appeared that it was the custom of the defendant to moor his vessels in that part of the lock, and to receive wharfage from vessels so moored; it was held that the plaintiff was entitled to an injunction to vindicate its rights. *Commercial Wharf Co. v. Winsor*, 146 Mass. 559.

Where it was not shown clearly that the contemplated wharf would be a public nuisance, an injunction was not granted. *Harlan v. Paschall*, 5 Del. Ch. 435.

For the remedy of an owner who desired to build a wharf, upon the refusal of the board of wardens to define the line of low-water mark, on his application, see *Tatham v. Philadelphia Wardens*, 2 Phila. (Pa.) 246.

In *Silver v. Tobin*, 28 Fed. Rep. 545, the plaintiff sought by injunction to attack a contract whereby the city of New Orleans had farmed out the right to collect wharfage on the public wharves. The court held that he had

mistaken his remedy, his right being to resist the payment of excessive wharfage, should such be demanded of him.

Where a city conveyed land under water, the grantee covenanted to build and maintain wharves thereon, and the city covenanted that the grantee should have the right to all wharfage which accrued therefrom, it was held that the city could not be enjoined from building wharves outside of those of the grantee, thereby preventing the use of the wharves of the latter. *Langdon v. New York*, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 314.

In an action brought to abate a wharf built within eight hundred feet of the plaintiff's wharf, which he had erected under an act of the legislature authorizing him to build it "as long as 1,200 feet," and granting him the use of the overflowed land for one hundred feet on each side of his wharf, the court held that the plaintiff's privilege of building was to build at right angles to the bank, directly into the slough, and not along the bank; and that the defendant's wharf did not interfere with the right of the plaintiff. *Rush v. Jackson*, 24 Cal. 308.

1. In *Swords v. Edgar*, 59 N. Y. 28; 17 Am. Rep. 295, while the plaintiff was assisting in the discharge of a cargo from a steamer, the defendant's pier, where the steamer was, fell and injured him. The court said: "Though the pier be private property, and though it be granted that the owner or occupant thereof might at any time close it and refuse entrance upon it to any and all persons, yet so long as it was kept open . . . to the public for the profit of defendant's lessees, there was, upon such lessees primarily, the duty of taking care, so long as it was thus kept open, that those who had a lawful right to go there, could do so without incurring danger to their persons."

In an action against the proprietors of a wharf for injuries, occasioned by a defect therein, to a person upon it in the employment of a party to whom the wharf was let, the jury were instructed that if the defendants had established the wharf for the use of the public for

and obvious duty under the circumstances, and so cannot be said to rest in or be founded on contract.¹

2. Degree of Care.—The decisions do not seem to be unanimous in regard to the degree of care to be exercised by the owner of a wharf. According to the weight of authority, however, such owner or occupant is required to use only ordinary care in keeping his wharf in repair,² though in some jurisdictions

a reasonable compensation, they were bound to keep it safe for such use; that if the plaintiff, when properly on the wharf in the exercise of reasonable care and diligence, sustained injury through a defect in the wharf, he was entitled to recover, unless the defect was so hidden and concealed that it could not be discovered by such examination and inspection as the construction, use, and exposure of the wharf reasonably required; and if the defendants knew that causes rendering the wharf insecure were constantly or occasionally in operation which they could by the exercise of ordinary diligence and care provide against, they ought to do so. It was held that the defendants had no ground of exception. *Wendell v. Baxter*, 12 Gray (Mass.) 494.

But the owner of a wharf boat, who is not a common carrier of passengers, and who receives no compensation from passengers for the use of his boat, while he is required to keep the pass-way safe which he permits the public to use, is not bound to maintain pass-ways for passengers over and around every part of his wharf boat. *Grand Tower Mfg. etc., Co., v. Hawkins*, 72 Ill. 386.

In *Parnaby v. Lancaster Coal Co.*, 11 Ad. & El. 223; 39 E. C. L. 54, the court, by Tindal, C. J., said: "The canal company made the canal for their profit, and opened it to the public upon payment of tolls to the company; and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal or absolutely to free it from obstructions, but to take reasonable care so long as they keep it open for public use of all who may choose to navigate it, that they may navigate without danger to their lives or property."

A pier, like any other public place, must be kept in repair, and if it is not, and damage ensues, the party who should keep it in repair is liable for his negligence. *Claway v. Byrne*, 58 Barb. (N. Y.) 449.

In an action for negligence in allowing a wharf to get out of repair, the fact that the door and fastening were in good repair when the defendant assigned the right to collect wharfage, does not relieve the defendant from its duty to keep the wharf in a safe condition. *Cleary v. Oceanic Steam Nav. Co.*, 40 Fed. Rep. 908. See *Hall v. Tillson*, 81 Me. 362.

The corporation of Pittsburg, which had charge of a wharf therein, and received tolls for its use, permitted piles of iron to remain thereon for a longer time, and nearer the water's edge, than was allowed by the city ordinances. A boat was anchored at the wharf. Soon after, the water rose rapidly and high, and carried the boat further inland and up the bank; the water then fell, and the boat, to avoid one of the piles of iron, was necessarily conducted further into the stream than the line of boats at the wharf, above and below; while in this position in the night, it struck on one of the piles of iron and was struck by some floating body and sunk. The court held that the owners could sustain an action on the case against the city for their loss. *Pittsburg v. Grier*, 22 Pa. St. 54.

Nickerson v. Tirrell, 127 Mass. 236; *Carleton v. Franconia Iron, etc., Co.*, 99 Mass. 216; *Thompson v. North Eastern R. Co.*, 2 B. & S. 106; *Mersey Docks, etc., Board v. Gibbs*, L. R., 1 H. L. Cas. 93.

1. *Collett v. London, etc., R. Co.*, 16 Q. B. 989; *Wendell v. Baxter*, 12 Gray (Mass.) 494; *Lyme Regis v. Henley*, 3 B. & Ad. 92; 23 E. C. L. 32.

In *Eastman v. Meredith*, 36 N. H. 295; 72 Am. Dec. 302, *Perley, C. J.*, said: "The case is put distinctly upon the ground that the public duty, which was the foundation of the action, arose out of the control which the city exercised over the wharf, and the income received for the use of it."

2. In *Nickerson v. Tirrell*, 127 Mass. 236, *Morton, J.*, said: "The owner or occupant of a dock is liable in damages to a person who, by his invitation,

he is required to exercise the utmost degree of care in this respect.¹

3. Extent of Duty.—His duty is not limited to persons who come on the wharf to transact business for which it is adapted, but extends to all who come there for legitimate purposes, as a customhouse officer, who comes to prevent smuggling,² or the agents of the post office,³ or the vendors of goods to persons upon a vessel lying at a dock,⁴ or hackmen carrying passengers,⁵ or those who go there to make inquiries.⁶

4. Notice of Defects.—If a wharf or its approaches are known to be in a dangerous condition, it is the duty of those having control of them either to close them or to give conspicuous notice to the public of the existence of the danger.⁷

express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care—if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby." *Pittsburg v. Grier*, 22 Pa. St. 54.

1. The owner of a public wharf is held to the utmost care in keeping it safe for vessels having a right to use it; and an instruction asked to this effect should not be modified by adding that "utmost care" must be understood as "only reasonable and proper care, in view of the safe mooring of floats and rafts under ordinary circumstances, and floods which could and should have been anticipated." *Willey v. Allegheny*, 118 Pa. St. 490; 4 Am. St. Rep. 608.

2. In *Low v. Grand Trunk R. Co.*, 72 Me. 313; 24 Am. Rep. 331, the court, by Barrows, said: "The company owes a duty to all public officers whose attendance there is made necessary by the business carried on at their wharf. . . . It avails nothing to say that the owners had not dedicated their wharf to smuggling and did not invite the plaintiff to come there to prevent it. They had dedicated their wharf to the use of vessels bringing merchandise from foreign ports, and without watchfulness

on the part of the customs officers it was sure to be misused."

3. *Wendell v. Baxter*, 12 Gray (Mass.) 494. See also *infra*, this title, *Duty of a Lessee of Wharf*.

4. *Smith v. London, etc., Dock Co.*, 3 L. R. C. P. 326.

5. *Tobin v. Portland, etc., R. Co.*, 59 Me. 183; 8 Am. Rep. 415.

6. *Stratton v. Staples*, 59 Me. 94.

7. *Thompson v. North Eastern R. Co.*, 2 B. & S. 106; *Ulrichs v. Phoenix Horseshoe Co.*, 35 Fed. Rep. 308.

Owners of wharves and slips who know them to be dangerous for public use, are bound to close them, or to give and maintain some conspicuous notice of the danger. This applies to a new landing until fit for use. *Heissenbuttel v. New York*, 30 Fed. Rep. 456. See also *Gibbs v. Liverpool Docks*, 3 H. & N. 164.

Where dock owners have knowledge of the existence and dangerous character of a bar in their dock, which they had ample opportunity to remove, they are liable to a vessel which entered the dock on their invitation, for damages caused by the bar. *The Calvin P. Harris*, 33 Fed. Rep. 295.

The owners of a wharf are liable for damages suffered by a vessel lawfully using it, caused by an obstruction known by the owners to exist, but not by the master of the vessel. *Barber v. Abendroth*, 102 N. Y. 406; 55 Am. Rep. 821.

A wharfinger is not liable for injuries sustained by a vessel by reason of obstructions in the water alongside of a dock when their existence is as well known to the agents of the vessel as to the wharfinger. *The Stroma*, 42 Fed. Rep. 922.

The master of a vessel cannot recover damages for injuries sustained by his

5. Concealed Obstructions.—A wharf owner is liable for injuries sustained by a vessel coming in contact with concealed obstructions, the existence of which he might have known by the exercise of reasonable diligence;¹ and this whether he owns the soil of the dock or not, and regardless of whether the wharf be public or private.²

6. As to Depth of Water.—Although the owner of a wharf is under no obligation to keep at any time a sufficient depth of water to accommodate vessels of all sizes, it is his duty to give information of inequalities of depth when necessary to protect vessels about to land,³ and he is responsible for all injuries sustained by vessels lawfully at his wharf, and in the exercise of due care on account of such inequalities,⁴ but he is not required to dredge

vessel while attempting to enter a dock in the night time against the advice of the dock stevedore. *Phillips v. Schlesinger*, 137 Mass. 338.

A person having the exclusive privilege of using a pier and its adjoining slip for shipping coal, is not liable to the owner of a barge loaded there with coal, for damages sustained by the barge by reason of its settling down on a pile at the bottom of the slip, although such person knew of the existence of the pile, where the barge of her own accord remained at the pier longer than it needed after being loaded. *Onderdonk v. Smith*, 23 Blatchf. (U. S.) 562.

1. The owner of a wharf procured a vessel to bring a cargo to it, to be there discharged, and suffered her to be placed there at high water over a rock sunk and concealed in the adjoining dock. Of the position of the rock and its dangers to vessels he had long been aware, but gave no notice thereof to the owners of the vessel or to anyone in the employment. Without negligence on their part, the vessel settled down upon the rock, with the ebb of the tide, and was bilged by it. It was held that the wharf owner was liable in damages, whether he owned the soil of the dock or not, and whether or not his wharf was a public wharf. *Carleton v. Franconia Iron, etc., Co.*, 99 Mass. 216.

A wharf owner is liable for damage sustained by a vessel on account of concealed obstructions, the existence of which he might have ascertained with reasonable diligence. *Manhattan Transp. Co. v. Mayor, etc.*, 37 Fed. Rep. 160.

Although the city charter prescribed the election of a wharfmaster, it was held that the city was liable for the

loss of a steamer wrecked by striking upon an iron cylinder negligently permitted to lie on the wharf, and concealed at the time by the water. Constructive possession of the cylinder by the *United States* marshal at the time was no excuse; the libel not preventing the city authorities from removing it above high-water mark. *Memphis v. Kimbrough*, 12 Heisk. (Tenn.) 133.

The occupants of a pier which has a spike projecting from it below the water are liable for the injury caused by the spike, where, by the exercise of due care, they might have discovered the dangerous character of it, and this, too, although the pier had been used with safety for years. *Smith v. Havemeyer*, 36 Fed. Rep. 927.

2. *Carleton v. Franconia Iron, etc., Co.*, 99 Mass. 216.

3. In *Nelson v. Phoenix Chemical Works*, 7 Ben. (U. S.) 37, the court, by Benedict, J., said: "A wharfinger is not bound to maintain a depth of water in the berth at his wharf sufficient for all vessels at all tides. The proposition, that it is the duty of a wharfinger to give information as to inequalities in the surface of the bottom when it is material to the safety of a vessel about to moor at his wharf (*Sawyer v. Oakman*, 7 Blatchf. (U. S.) 290), is entirely consistent with the other proposition, that it is the duty of the shipmaster, before placing his vessel in the berth, to ascertain whether the depth of water in the dock is sufficient for the draught of his vessel."

4. *Barrett v. Black*, 56 Me. 498; 96 Am. Dec. 497; *Carleton v. Franconia Iron, etc., Co.*, 99 Mass. 216; *Wendell v. Baxter*, 12 Gray (Mass.) 294; *Sweeney v. Old Colony, etc., R. Co.*, 10 Allen (Mass.) 368; 87 Am. Dec. 644;

and keep even the bed of the stream in the vicinity of his wharf.¹ He is not liable for injuries caused by delay occasioned by an insufficiency of water at his wharf.²

7. Duty of Lessee of Wharf.—The lessee of a wharf, like the owner, must keep it in repair.³ The lessor, however, is liable for

Elliott v. Pray, 10 Allen (Mass.) 378; 87 Am. Dec. 653; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; 39 E. C. L. 54; *Gibbs v. Liverpool Docks*, 3 H. & N. 164.

The owner of a wharf who makes use of it for gain in the course of his business, is liable for the damage to a vessel using the wharf and in the exercise of due care, caused by inequalities in the bottom alongside of the wharf. *Sawyer v. Oakman*, 7 Blatchf. (U. S.) 290.

1. The respondent, a town, owned a wharf on public lands on a navigable stream about one hundred and fifty feet wide, and kept the usual berths safe, for which wharfage was charged. The libellant moored his canal boat at high water nearly in the middle of the stream, outside of three other boats at the wharf, without directions from respondent, and without paying, or being liable to pay, any wharfage. The person in charge of the boat ascertained soon after her arrival, and before the tide fell, that the bottom was uneven, and knew that he would be aground at low water. The boat did ground, and was injured. It was held that the respondent was not required to dredge and keep even the bed of the stream abreast of the wharf, so that vessels against which no wharfage was chargeable might moor and lie there safely until they could come to the wharf; and that the vessel took the risk arising from the uneven nature of the bottom, and could not recover for her injury. *Elting v. East Chester*, 50 Fed. Rep. 112.

In *Carleton v. Franconia Iron, etc., Co.*, 99 Mass. 216, the court, by Gray, J., said: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of."

2. Insufficiency of Water.—The mere

fact of insufficient water depth at the wharf, does not show fault on the part of the wharfinger that renders him liable. *The Bark Francesca*, 9 Ben. (U. S.) 34.

In *Nickerson v. Tirrell*, 127 Mass. 236, the court, by Morton, J., said: "The general rules of law applicable in cases of this character are well settled. The owner or occupant of a dock is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use ordinary care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care—if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person, who, using due care, is injured thereby."

3. In *Barrett v. Black*, 56 Me. 498; 96 Am. Dec. 497, the lessee of a private wharf through whose procuration a vessel was hauled alongside of his wharf, to be there loaded by him with his cargo, in accordance with a contract of affreightment, was held liable to the owners for an injury occasioned to the vessel while loading, by grounding at low tide on rocks in the berth, which was represented by the occupant of the wharf to be safe and not known by the owners of the vessel to be otherwise. The right of the corporation of the city of New York to collect wharfage on one of the public piers of that city, carries with it the correlative duty of keeping the same in repair. And this right, duly transferred to another party, invests him with all the rights and subjects him to all the duties of the assignor; so that the lessee of a pier is liable for the value of property lost by reason of the want of a suitable

any damage caused by a defect in existence at the time the lease was made.¹

8. Damage to Vessel on Sunday.—The fact that a vessel is forbidden by statute to enter a berth at a wharf on Sunday, does not prevent the owner of a vessel hauled in on that day from recovering in admiralty for injuries sustained by her through the wrongful act or omission of another.²

guard to the pier. *Radway v. Briggs*, 37 N. Y. 256. The lessee and occupant of a public pier who is required by the terms of the lease to keep the pier in repair, is liable for the death of a stranger caused by a hole which was permitted to exist in the pier for a long time. *Gluck v. Ridgewood Ice Co.* (Supreme Ct.), 9 N. Y. Supp. 254.

The lessee of a wharf is liable for damage arising from its unusual and dangerous condition, unless he can show reasonable care and examination in regard to it. *Smith v. Havemeyer*, 32 Fed. Rep. 844.

A covenant in a lease to make such repairs to a dock and bulkhead as "they" require, includes the clearing out of accumulations in the river-bottom. *O'Rourke v. Peck*, 29 Fed. Rep. 223.

1. *Wendell v. Baxter*, 12 Gray (Mass.) 494, was a case where the plaintiff was injured while in the employ of a lessee of a wharf, and the following instruction to the jury was upheld: "That if they were satisfied that the defendants had established the wharf for the use of the public, and invited the public to use it for a reasonable compensation, they were bound to keep the wharf safe for the use for which it was made and erected at that place; that if the plaintiff, being properly on the wharf, in the prosecution of his business, and in the exercise of reasonable care and diligence, sustained the injury alleged through a defect in the wharf, he was entitled to recover, unless the defect was latent, and so hidden and concealed that it could not be discovered by such examination and inspection as the construction, use, and exposure of the wharf reasonably required; that if the defendants knew that causes rendering the wharf insecure were constantly or occasionally in operation, which they could, by the exercise of ordinary diligence and care, anticipate and provide against, they were required to do so."

The owner of a pier is liable for dam-

ages caused by its defective construction and dangerous condition, although it is in the possession of a tenant, if it was let in such a defective and dangerous state. *Moody v. New York*, 43 Barb. (N. Y.) 282. See also *Lyme Regis v. Henley*, 3 B. & Ad. 92; 23 E. C. L. 32.

2. In *Sawyer v. Oakman*, 7 Blatchf. (U. S.) 290, the court said: "I deem it unnecessary to enlarge upon the question whether the supposed violation of the laws of *Massachusetts* in hauling into the dock on Sunday, is a bar to a recovery for the injury sustained afterwards, when the vessel had grounded. The view taken by Judge Lowell of the decision in *Philadelphia, etc., R. Co. v. Philadelphia, etc., Steam Towboat Co.*, 23 How. (U. S.) 209, is entirely satisfactory to my mind."

In *Philadelphia, etc., R. Co. v. Philadelphia, etc., Steam Towboat Co.*, 23 How. (U. S.) 209, the court, by Grier, J., said: "The appellants urge, as a further ground of defense, that the collision took place on Sunday, shortly after the steamboat had commenced her voyage from a wharf's parcel of the territory of *Hartford county* in the state of *Maryland*; that the boat was used and employed by her owners in towing canal boats; and that when entering on her voyage, those who had her control and management were engaged in their usual and ordinary work and labor—the same not being a work of necessity or charity—contrary to the laws of the state of *Maryland*. . . . The law relating to the observance of Sunday defines a duty of a citizen to the state and the state only. For a breach of this duty he is liable to the fine or penalty imposed by the statute, and nothing more. Courts of justice have no power to add to this penalty the loss of a ship, by the tortious conduct of another, against whom the owner has committed no offense." See also *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. (U. S.) 247, where it was held that placing goods

IX. WHARFAGE—1. **Definition.**—Wharfage is the fee paid for tying vessels to a wharf or for loading goods upon a wharf or shipping them from it.¹

2. **Right to Charge.**—The right to charge wharfage belongs to whomsoever has the right to erect a wharf.² And this is true of both public and private wharves.³

in a warehouse on Sunday did not bar an action to recover therefor, although destroyed by fire on that same day.

1. *Langdon v. Mayor, etc., of New York*, 93 N. Y. 129; *Geiger v. Filor*, 8 Fla. 325; *Ex p. Easton*, 95 U. S. 68.

Wharfage is a charge for the use of a wharf. *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691.

Wharfage Not a Tax.—In *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196, the court, by Beck, J., said: "The wharfage fee charged under the city ordinances in question is in no sense a tax. It is a charge made as compensation for the use of the wharves built and maintained for the benefit of vessels engaged in commerce." See also *Schwartz v. Flatboats*, 14 La. Ann. 243.

Graduated Charges.—That wharfage charges may be graduated by the tonnage of vessels without thereby becoming a duty of tonnage within the meaning of the federal constitution, see *Quachita Packet Co. v. Aiken*, 121 U. S. 444; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Packet Co. v. St. Louis*, 100 U. S. 423; *Keokuk Northern Line Packet Co. v. Keokuk*, 59 U. S. 80; 45 Iowa 196; *U. S. v. Duluth*, 1 Dill. (U. S.) 469; *Northwestern Union Packet Co. v. Atlee*, 2 Dill. (U. S.) 479; 21 Wall. (U. S.) 389; *Ellerman v. McMains*, 30 La. Ann. 190.

2. *Chicago v. Laffin*, 49 Ill. 172; *The Kate Tremaine*, 5 Ben. (U. S.) 60; *Radway v. Briggs*, 37 N. Y. 256; *Muller v. Spreckels*, 48 Fed. Rep. 574; *People v. Roberts*, 92 Cal. 659; *Lesesne v. Young*, 33 S. Car. 543.

In *Ensminger v. People*, 47 Ill. 384; 95 Am. Dec. 495, the court said: "It then follows that owners of the land on a stream have the right between high and low-water mark, to establish a private wharf and charge reasonable compensation for its use, but, like the use of other property or services, the charges must not be unreasonable or exorbitantly high."

A city, though it cannot lay tonnage duties, may exact wharfage compensation for the use, by vessels, of wharves

built and maintained by the city; and rating wharfage by the size of the vessel, to be ascertained by its tonnage, does not necessarily render the enactment void. *Northwestern Union Packet Co. v. St. Louis*, 4 Dill. (U. S.) 10, 17, n.

For the right of the corporation, under the charter, to collect wharfage for a certain space in front of the city and along the banks of the river, dedicated to the public, see *Sacramento v. Steamer New World*, 4 Cal. 41.

In an action to recover the wharfage of a public wharf leased to the plaintiff by the agent of a city corporation, the plaintiff must show that the lease was made in the mode designated by law, or the complaint will be dismissed. *Taylor v. Beebe*, 3 Robt. (N. Y.) 262.

Where a tug agreed to tow a barge to a particular place and the barge was left temporarily at a wharf to await the arrival of another section of the tug's tow, the court held that the owner of the wharf could charge and collect wharfage from either the barge or the tug for such use of his wharf. *Birchall v. Barge No. 6*, 27 Fed. Rep. 472.

3. *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *De Bary Baya Merchants' Line v. Jacksonville, etc., R. Co.*, 40 Fed. Rep. 392.

In *Aiken v. Eager*, 35 La. Ann. 567, the court held that a custom to present bills for wharfage as soon as the vessel arrived at the wharf was conclusive evidence of an understanding between the parties that the bills were then due.

An ordinance establishing the rates of wharfage to be collected from vessels using the wharves of the city, does not conflict with any provision of the federal constitution. *Vicksburg v. Tobin*, 100 U. S. 430.

But a regulation by which vessels from another state are required to pay fees not exacted from domestic vessels is invalid, such fees being regarded as a mere expedient to foster domestic commerce at the expense of other states. *Guy v. Baltimore*, 100 U. S. 434.

3. Liability for Wharfage.—No use can be made of a wharf, even for a few minutes, without incurring a liability for wharfage.¹ But the question is constantly arising as to whether the use made of a wharf is of a kind to subject one to liability for wharfage.²

Wharfage dues charged by a corporation, are not, properly speaking, a tax, like that which is levied for the support of the government. *Schwartz v. Flatboats*, 14 La. Ann. 243.

1. In *Easby v. The Whitburn*, 14 Phila. (Pa.) 600, the libeled steamer in distress was obliged to make fast to a wharf. She made fast to piers 41 and 39 and thus lay across pier 40, though a few feet out in the stream. In endeavoring to come to pier 41 a line was made fast to pier 40 for a few minutes. The owner of pier 40 made a claim for wharfage. The court said: "The respondent could make no use of the wharf without incurring liability to pay for it."

2. Where the defendant was the owner of a ferry, with the right to land his boats at any point within the city limits, and the wharves of the city were used by the ferry, it was held, in an action by the city against the defendant, that the latter was not liable for wharfage, but that he was liable for a proportion of the cost of improving the landing and the wharf. *Kennedy v. Covington*, 17 B. Mon. (Ky.) 567. In this case the court, by Simpson, J., said: "It is a well settled principle of law that every owner of property shall use and exercise the rights incident thereto so as not to interfere with the rights and privileges which belong to other persons. Now, in this case, both parties have rights which attach to the same property, one of them the right to use it as a ferry landing, the other to use it for the benefit of the city and the convenience of its inhabitants. To the full enjoyment of the right which belongs to the city, the grading and paving of the landing, and the construction of wharves, is indispensably necessary. For the accomplishment of this object a considerable expenditure of money is required, and by its accomplishment, the interest of both parties is evidently promoted. The construction of wharves increases the business, the prosperity, and the growth of the city, and thereby contributes to the enhancement of the value of the ferry privilege, by a corresponding increase

of its business. As, therefore, the city is compelled to incur a large expenditure, to enable her to have the full enjoyment of her rights in the common property, and as it operates to the advantage of both parties, every principle of equity and justice requires that the owners of the ferry, if they use the improvement, should be made liable, in some form or other, to contribute their ratable proportion to the cost of the construction. This liability cannot, however, authorize the city to subject them to the payment of regular wharfage. Such a charge might materially diminish the value of the ferry franchise."

But a city authorized to collect wharfage "for any vessel lying at anchor within any slip" has no right to wharfage against a vessel that is fastened to an adjacent pier, although in lying at the pier it occupies the greater part of the slip. *Walsh v. New York F. & D. Co.*, 77 N. Y. 448.

A badly burned vessel, if fastened to a wharf, may be liable for wharfage. *The George E. Berry*, 25 Fed. Rep. 780.

Accidental Use.—When a vessel alongside of a public pier is accidentally, and without the fault of the owner, burned and sinks to the bottom near the mouth of the slip, thereby so obstructing the slip as to prevent other vessels from entering therein, those entitled to wharfage cannot recover for the loss thereof caused by such obstruction, without first showing that the owner, by due care and attention, could have removed the wreck, or at least have shifted its position so as to prevent its being a cause of injury, and that he is in default for not having done so. *Hancock v. York, etc.*, R. Co., 10 C. B. 349; 70 E. C. L. 347.

A vessel lying at a public pier in New York was burned without fault of the owner, and sank at or near the mouth of the slip, so as to prevent other vessels coming in. It did not appear that the owner, by any care, could have removed the wreck or made it less in the way of other vessels. It was held that under these circumstances the parties entitled to wharfage could main-

tain no action for the loss by the obstruction. Nor was an insurance company, which had insured an undivided interest in the vessel, and had accepted an abandonment after she sank, liable for the loss of wharfage, there being no want of due care and attention on their part. *Taylor v. Atlantic Mutual Ins. Co.*, 2 Bosw. (N. Y.) 106; 9 Bosw. (N. Y.) 369; *affirmed* in 37 N. Y. 275.

Where one person owns a wharf, and another uses a pier which projects from a bulkhead near the said wharf, so as to prevent the owner of the wharf from using it, the said owner cannot claim wharfage. Such use of the pier may be an obstruction for which the owner of the wharf may recover damages. *Camden, etc., R. Co. v. Finch*, 5 Sandf. (N. Y.) 48.

It has been held that the city of New Orleans cannot, by ordinance, exact wharfage dues from vessels landing or making fast to the batture of the Mississippi river in front of the city, at places where no artificial facilities are furnished. *The Lizzie E.*, 30 Fed. Rep. 876.

Where the defendant, who had a right to use a berth at a wharf for a certain specified time and in a specified manner, but not during a gale, ran his vessel alongside, etc., in a gale, it was held that an action *ex contractu* for use and occupation would not lie. *Hathaway v. Ryan*, 35 Cal. 188.

A vessel compelled by stress of weather to moor to a wharf for safety, is bound to pay wharfage for such use of the wharf, and the amount of wharfage due in such a case is the customary charge for wharfage. *Heron v. The Marchioness*, 40 Fed. Rep. 330.

The owner of a vessel lying at one wharf and overlapping onto an adjoining wharf is liable, after notice, to wharfage, for the use made of the wharf by the overlapping portion of the vessel. *The Wm. H. Brinsfield*, 39 Fed. Rep. 215.

Under the *Michigan* statute defining "wharfage" as the "lying immediately in front of, or attached to, any wharf . . . so as to prevent the use of any portion of such wharf . . . with or without the discharge of freight, or passengers across such wharf," the mere lapping-over of a vessel lying at an adjoining wharf was held to come within the statute. *The Hercules*, 28 Fed. Rep. 475. But compare *The Steamship Cornwall*, 10 Ben. (U. S.) 108. Here the circumstances were

these: The *Cornwall* was a large steamship which had a regular berth at a pier, but which she could enter with safety only at slack water. At the time in question she arrived at her pier at 10 a. m., but the tide did not serve until 1 p. m. She accordingly waited for the tide and made fast at the end of the pier. When so made fast her length was such that she overlapped an adjoining pier on either side. To the pier thus overlapped by her stem a line was run from the steamship, for her better security, while so waiting for the tide. It was held that the steamship did not "make fast to" such pier within the meaning of the *New York Wharfage Act*, and that the owner of the pier was not entitled to recover wharfage of her. *The Cornwall*, 10 Ben. (U. S.) 108. See also *Ellwell v. Fabre*, 5 N. Y. Supp. 60; *Demopolis v. Webb*, 87 Ala. 659.

A schooner from ten to fifteen feet from the dock, aground, scuttled, and entirely out of water at low tide, fastened in part by lines connected with an anchor on shore, and in part by lines or chains fastened to some part of the pier, is not subject to wharfage, using that term in its ordinary acceptation. The court observed: "I do not think the mere stretching of a line to the dock, under these circumstances, constitutes such wharfage as is referred to or intended in the resolution, and it should not be charged for as such." *Pelham v. Woolsey*, 16 Fed. Rep. 418.

A Float Is a Wharf.—In *Woodruff v. One Covered Scow*, 30 Fed. Rep. 269, wharfage was held to attach to a structure consisting of a float made of timbers, in width some eleven feet, and in length some twenty-three feet, constructed to float in the water, and to support above the surface of the water a floor and a house nearly the size of the float. One use of the structure was to store within the house the oars and sails of small boats landing at the float, and to afford persons means of egress from small boats coming to the ship to the adjoining wharf, and thence to the shore. But it was never used as a means for transporting upon it from place to place either passengers or freight. It remained moored to a wharf, being attached to it by lines, and then safely rising and falling with the tide. A lien was enforced for this use of the wharf.

Where, under the port regulations of Savannah, two vessels were allowed

4. Improvements Necessary to Create Liability.—Though in some cases wharfage has been allowed when no artificial improvements were made,¹ it may be considered now as settled that the owner of a wharf privilege must improve his shore so as to facilitate the receiving and discharging of cargoes, and to afford a secure mooring to vessels, before he can collect wharfage.²

5. Rights of Lessee of Wharf.—The lessee of a public wharf is entitled to the wharfage accruing at it, and all vessels using it are subject to the same rules and regulations which govern the use of public wharves.³ But a diminution of wharfage busi-

to lie abreast at the wharf, and the cargo of one was carried directly to the other, it was held that the wharf owner could, in the absence of any contrary contract, charge the rates allowed for landing and shipping. *Robertson v. Wilder*, 69 Ga. 340.

1. In *Sacramento v. Steamer New World*, 4 Cal. 41, Heydenfeldt, J., said: "A wharf is properly an artificial construction, and to such its meaning must be limited; but it does not follow that the definition of wharfage is to be confined to the charge for landing at a wharf. Words must be taken according to their most universal acceptance in common use, and so we find the term wharfage generally applied to a charge for landing goods, whether upon an artificial or a natural landing." See also *Dubuque v. Stout*, 32 Iowa 80; 7 Am. Rep. 171.

2. *The Lizzie E.*, 30 Fed. Rep. 876; *Shreveport v. Red River, etc.*, Line, 37 La. Ann. 562; 55 Am. Rep. 504; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *St. Martinsville v. Steamer Mary Lewis*, 32 La. Ann. 1293.

In *New Orleans v. Wilmot*, 31 La. Ann. 65, the court said: "The only ground on which any sum can be claimed by the front proprietors from the owners of vessels for mooring at the banks of public navigable waters, and their discharging and receiving cargoes, is that such proprietor, by the expenditure of money and labor, has constructed and maintains works which facilitate the discharging and receiving of cargoes, and afford to vessels the means of mooring and remaining in security."

In *Muscatine v. Herchey*, 18 Iowa 39, Wright, C. J., said: "A wharf implies a structure artificial in its character. A landing without more is not a

wharf, certainly not in its primary sense. We would not say that there may not be a landing so sufficient for all needful purposes in its natural state as to obviate the necessity of further guards or securities. But we suggest that it should be known and designated as a wharf, whether made or existing in its natural state, and that the city should at least provide the means for cabling and securing the craft and rafts landing at such points, before making the owner of the property, which has never been dedicated to the public use, liable for landing and drawing out his lumber thereon."

A vessel cannot be charged wharfage for landing on the natural bank of a river, though the landing be made within the wharf limits established by ordinance. *Cape Girardeau v. Campbell*, 26 Mo. App. 12.

In *Columbus v. Grey*, 2 Bush (Ky.) 476, the court, by Peters, C. J., said: "Notwithstanding the right was reserved by appellee, it does not appear that he had built wharves, improved the shore, or had made any preparations for the reception or delivery of goods, or the accommodation of vessels. And therefor, it does not appear that he was entitled to the tolls and wharfage collected by appellant from steamboats or other vessels landing at the banks."

A municipal corporation has no power to impose a tax for the mere privilege of using the banks of navigable waters for purposes of navigation. *Cannon v. New Orleans*, 20 Wall. (U. S.) 577.

3. A lease of a public wharf only entitles the lessee to the wharfage accruing thereat; the wharf still continues a public wharf, and all vessels, including those of the lessee, resorting to it, are subject to the general rules of law regulating the use of wharves, slips, and piers, and the mooring and stationing

ness resulting from a cause over which the lessor has no control, gives no right of action against the lessor.¹

6. Rates of Wharfrage—Regulation of.—The erection of a wharf by a city is presumed to be for the public benefit, rather than for revenue, and in the absence of an ordinance fixing the wharfrage dues, or providing for the payment of a compensation for the use of the wharf, no charges can be collected by the city.² When chargeable, however, such rates must in any event be reasonable.³ If the right to charge wharfrage be not expressly restricted, the rate is discretionary and cannot be interfered with, unless it be clearly unreasonable.⁴

of vessels. *Com'rs of Pilots v. Clark*, 33 N. Y. 251.

1. Thus where A leased from a city a wharf for a certain period, the city agreeing to indemnify the lessee if the "right to collect wharfrage was suspended for any period by the intervention of third parties," it was held that a diminution of trade on the river caused by the rebellion did not interfere with the right "to collect," and hence there could be no claim for indemnity from the city. *Marshall v. Vicksburg*, 15 Wall. (U. S.) 146. In this case it was further held that under the clause providing that "in case the right to collect wharfrage or rents shall be interrupted or defeated permanently through the instrumentality or with the aid of the mayor and council of the city, the city should grant certain indemnity," this right was not defeated by an ordinance reducing wharf charges which the lessee himself caused to be passed, nor by a tax other than wharfrage which the city had a right to lay, nor by a quarantine embargo laid with the lessee's consent.

The occupants of a wharf under a lease which reserved the use of the premises for the purpose of loading and unloading coal, are liable for the sinking of a canal boat occasioned by the dangerous condition of the bottom alongside the wharf, though coming to the wharf for the purpose of unloading coal for parties authorized to use the premises for that purpose. *O'Rourke v. Peck*, 40 Fed. Rep. 907.

2. *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185.

3. *Reasonable Rate.*—*Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185; *Kennedy v. Covington*, 17 B. Mon. (Ky.) 585; 1 *Dillon on Mun. Corp.* (4th ed.), § 112.

In *Parkersburg, etc., Transp. Co. v.*

Parkersburg, 107 U. S. 691, the court said: "It is an undoubted rule, of universal application, that wharfrage for the use of all public wharves must be reasonable. But then the question arises, by what law is this rule established, and by what law can it be enforced? By what law is it to be decided whether the charges imposed are, or are not, extortionate? There can be but one answer to these questions. Clearly it must be by the local municipal law, at least until some superior or paramount law has been prescribed. . . . The courts of the *United States* do not enforce the common law in municipal matters in the states because it is federal law, but because it is the law of the state."

4. 1 *Dillon on Mun. Corp.* (4th ed.), § 112; *Muscatine v. Hershey*, 18 Iowa 39.

In *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196, it is held that a city may prescribe, by ordinance, fees not unreasonable, which must be paid for the use of wharves; and such an ordinance is not unconstitutional, even though it exacts a payment from vessels moored at places where no wharves have been provided. See also *Dubuque v. Stout*, 32 Iowa 80; 7 Am. Rep. 171.

As between the lessor of a bulkhead and the lessor of the adjoining pier, evidence of the custom of the port is admissible to show how far wharfrage is collectible for the use of the bulkhead, and to what extent for the use of the pier. A written contract may be interpreted by the local customs in reference to which it was made, and it is error to exclude evidence of such customs. *Mangum v. Farrington*, 1 Daly (N. Y.) 236.

In *Municipality v. Pease*, 2 La. Ann. 538, the court said: "The government of the municipality has determined that

Though the amount of wharfage may be regulated by the legislature,¹ such regulation of rates does not confer upon the owners of them the public wharf franchise.

Extortionate wharfage charges can be prevented only by an act of legislature.² It has been held that if a wharfinger gives notice of his rates to a customer in advance, the latter, by making use of his wharf, impliedly contracts to pay such charges, and may not afterward disaffirm his contract or refuse payment upon the ground that the charges are unreasonable.³ And where one is

the rates of wharfage are due, as such; from this the state has not dissented. The responsibility of the act rests with the municipal government. The consequence of the interference of the judicial power in the details of its finances can be readily foreseen. . . . If this wharfage is a tax on commerce, or on imports or exports, it is unconstitutional however small the amount. If it be not *per se* unconstitutional, the unconstitutionality depending, according to the argument, on the unreasonableness of the amount, the action of the judiciary is brought directly in conflict with the municipal administrative power on an administrative question, over which, it must be conceded, that the city government is called upon to exercise, to a certain extent, discretionary power."

In *A Coal Float v. Jeffersonville*, 112 Ind. 15, the court said: "While the reasonableness of an ordinance is a question of law for the decision of the court, an ordinance cannot be held to be unreasonable which is expressly authorized by the legislature. The power of a court to declare an ordinance unreasonable and therefore void, is practically restricted to cases in which the legislature has enacted nothing on the subject-matter of the ordinance, and, consequently, to cases in which the ordinance was passed under the supposed incidental power of the corporation merely."

Voluntary Payment.—Where the owners of boats have paid wharfage fees collected without any authority, under protest, they cannot be recovered back in an action against the city. *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185. See also, on this point, *Northwestern Union Packet Co. v. St. Louis*, 4 Dill. (U. S.) 10; *Murphy v. Montgomery*, 11 Ala. 586; *Allnutt v. Inglis*, 12 East 527; *Baltimore v. White*, 2 Gill (Md.) 444.

1. In *Munn v. Illinois*, 94 U. S. 113,

Waite, C. J., said: "There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner. It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good."

In *Murphy v. Montgomery*, 11 Ala. 586, Ormond, J., said: "It is further urged that the city council has no right to collect toll at this wharf, because there is no provision in its charter authorizing it to do so. We infer from the deed found in the record leasing this wharf to those under whom the defendant claims, that the title to the wharf is in the city, and such being the fact, it has the same right as any other proprietor to collect wharfage from those landing goods there. This right, resulting from its proprietary interest, is not a franchise, but a right of property. It is true that as this is a matter which affects the public, the legislature may regulate its exercise, by declaring what tolls or wharfage an individual shall be allowed to receive; but this does not make the right a franchise, but is merely a restraint upon the exercise of one of the rights of property." See also *Munn v. Illinois*, 94 U. S. 113.

2. *De Bary Baya Merchants' Line v. Jacksonville, etc.*, R. Co., 40 Fed. Rep. 392.

3. *Southern Steam Ship Co. v. Sparks*, 22 Tex. 657; 75 Am. Dec. 793. See also *Jeffersonville v. Louisville, etc.*, Steam Ferry Co., 27 Ind. 100; 35 Ind. 19; 89 Am. Dec. 495; *Winnepenny v. Philadelphia*, 65 Pa. St. 135.

In *Woodruff v. Havemeyer*, 106 N. Y. 129, referring to a statute which made

authorized by law to establish, improve, and regulate a wharf, and to collect from boats using it a moderate wharfage to defray the expenses incurred, and has accordingly expended money in such improvement, one using the wharf may not resist payment of wharfage on the ground that it had not been well built, or that it needed further improvements.¹

7. Right to Distrain for Wharfage.—The owner of a wharf may distrain for wharfage any goods or chattels on board a ship or vessel which has used his wharf, although the vessel has removed from the wharf.²

X. WHARFINGER—1. Definition.—A wharfinger is one who maintains for hire a wharf for receiving goods.³

it lawful for the owners or lessees of wharves to charge and collect a certain sum per ton on all goods remaining on the same, for every day after the expiration of twenty-four hours from the time such goods were deposited thereon, Andrews, J., said: "But however this may be, we think the statute cannot be construed to prohibit the owner of a private wharf from entering into a contract for the landing and deposit of goods upon his wharf upon such terms as may be agreed upon between himself and the owner of the goods, nor can it be construed as requiring him to store goods for any period of time without compensation." See also *Bain v. The Minnie L. Gerow*, 48 Fed. Rep. 836.

1. In *Prescott v. Duquesne*, 48 Pa. St. 118, the court, by Woodward, C. J., said: "This is not the way to try the question whether municipal corporations have performed public duties. A *mandamus* would, perhaps, lie to compel the borough to provide adequate facilities of wharfage, or an injunction, at the suit of some agent of the public, to restrain them from collecting fees for inadequate performance. In either of these modes, the question would be tried once for all parties interested. But each individual customer cannot raise the question as a defense to charges he has voluntarily incurred. If he does not like the facilities furnished, he need not use them, but if he uses them he must pay for them, so long as the power of assessment vested in the borough is not abused."

The delivery of freight, however, from one wharf to another, is such a use of the wharf upon which the freight is finally deposited, as to entitle the proprietor of said wharf to claim the same wharfage, which he might have claimed had the original delivery

been at his wharf. The *J. H. Starin*, 15 Blatchf. (U. S.) 473. See also *Union Wharf Co. v. Hemingway*, 12 Conn. 293. Though in London it has been held that a wharfinger cannot claim wharfage for freight loaded into lighters from barges tied to a wharf. *Stephen v. Castor*, 3 Burr. 1408.

Wharfage may include the transportation of goods over a wharf, as well as the privilege of landing them upon it. *Ex p. Cass* (Cal. 1887), 13 Pac. Rep. 169.

That a higher rate of wharfage may be charged when freight is removed from a wharf by means of drays, carts, or cars than if removed by lighters or other vessels, in order to compensate the proprietor for extra wear and tear of his wharf, see *Soule v. San Francisco Gas Light Co.*, 54 Cal. 241.

There is no doubt that, in the absence of statute, a wharfinger has a right to make such contract as he sees fit with his customers as to his compensation. In *Southern Steamship Co. v. Sparks*, 22 Tex. 657; 75 Am. Dec. 793, *Wheeler, C. J.*, said: "It cannot be doubted that a wharfinger, no less than a common carrier, may make what contract he pleases as to his compensation."

2. *Bradby on Distress* 133; *Hale de Port Maris* 77.

In *New York*, a distress for wharfage may be made at a place different from that where the wharfage accrued, provided such place is within the jurisdiction authorizing the process. *Nicoll v. Gardner*, 13 Wend. (N. Y.) 288.

The right to distrain for wharfage was not taken away by the Act of 1846, abolishing distress for rent, nor by the Act of 1860, "in relation to the rates of wharfage," etc. *Mangum v. Farrington*, 1 Daly (N. Y.) 236.

3. *Rodgers v. Stopfel*, 32 Pa. St. 111;

2. Nature of Liability.—It is now well settled that the liability of a wharfinger for goods deposited on his wharf does not differ materially from that of a warehouseman. He is responsible only for losses which happen through his neglect to exercise reasonable and ordinary care and diligence.¹ The burden of proving negligence on the part of the wharfinger is upon the owner of the goods.² The old doctrine of Lord Mansfield, which subjected a wharfinger to the same liability as a common carrier, has been discarded in both the *United States* and in *England*.³ But if a wharfinger undertakes to convey goods from his wharf to a vessel by his own lighter, he assumes thereby the responsibility of a common carrier, and will be held liable as such in case of loss or injury to the goods.⁴

3. When Responsibility Begins.—The responsibility of a wharfinger begins when the goods are delivered at, or rather on, the wharf, and he has expressly or impliedly received them into his care and custody.⁵ A delivery of goods at a wharf is not necessarily a deliv-

72 Am. Dec. 775; *The Bark Francesco*, 9 Ben. (U. S.) 34; Story on Bailments (9th ed.), §§ 451, 452.

1. *Schmidt v. Blood*, 9 Wend. (N. Y.) 268; 24 Am. Dec. 143; *Blin v. Mayo*, 10 Vt. 56; 33 Am. Dec. 175; *Sideways v. Todd*, 2 Stark. 400; Story on Bailments (9th ed.), § 452.

The liability of a wharfinger is not distinguishable from that of a warehouseman. Both are bound only to take common and reasonable care of the commodity intrusted to them. *Foote v. Storrs*, 2 Barb. (N. Y.) 326.

In *Cox v. O'Riley*, 4 Ind. 368; 58 Am. Dec. 633, the court, by Perkins, J., said: "Wharfingers are not, like common carriers, answerable for all goods that may be intrusted to them in their line of business, except such as may be lost by the act of God or the public enemy. They are responsible for losses only which happen through a neglect to exercise reasonable and ordinary care and diligence. They are in the same category, in this particular, with warehousemen."

2. In an action against a wharfinger for the loss of goods intrusted to him, the burden is on the plaintiff to prove a want of care, and it is not sufficient to show a loss of the goods merely. *Foote v. Storrs*, 2 Barb. (N. Y.) 328; *Blin v. Mayo*, 10 Vt. 56; 33 Am. Dec. 175.

3. *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Roberts v. Turner*, 12 Johns. (N. Y.) 232; 7 Am. Dec. 311; *Garside v. Trent Nav. Co.*, 4 T. R. 581; *In re Webb*, 8 Taunt. 443; *Sideways v. Todd*, 2 Stark. 400.

In *Brown v. Denison*, 2 Wend. (N. Y.) 593, Savage, C. J., said: "The main question in the case is, whether the defendants are liable in this action for the safe transportation of the flour after it went out of their possession. I am of the opinion that simply as depositaries or forwarders they are not liable, having used ordinary diligence in forwarding the property by responsible persons."

In *Ross v. Johnson*, 5 Burr. 2825, Lord Mansfield said: "It is impossible to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger."

4. The liability of a wharfinger who undertakes to carry goods from his wharf to the vessel in his own lighters is similar to that of a carrier. *Maving v. Todd*, 1 Stark. 72.

In *Buckman v. Levi*, 3 Camp. 414, Lord Ellenborough said: "Before the defendant can be charged in the present instance, he must be put into a situation to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs; they were not booked; and no person belonging to the wharf is fixed with a privity of their being left there. The plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himself, or some person who can be proved to be his agent for the purpose of receiving them."

5. *Quiggin v. Duff*, 1 M. & W. 174; *Rodgers v. Stophel*, 32 Pa. St. 111; 72 Am. Dec. 775.

ery to the wharfinger.¹ Such a delivery, in order to be effectual, must be accompanied by notice to him, or his agent, before he can be presumed to have assumed charge of them.²

4. When Responsibility Ends.—The responsibility of a wharfinger ends when he ceases to have control of the goods intrusted to him, or as soon as that of the vessel begins.³ His control over the goods ceases when he has delivered them to the proper officers of the vessel.⁴ Actual delivery need not be proved where by usage the officers are regarded as receiving goods when assuming control of them on the wharf.⁵ Delivery to be valid must be made to the captain or to someone having authority to receive the goods.⁶ Delivery to one of the crew will not be sufficient.⁷ Usages in the vicinity may have a good deal to do with determining when the responsibility begins and ends.⁸

5. Duty to Deliver Goods to Owner.—Where the goods are demanded of a wharfinger by the proper owner, with all charges

1. In *Blin v. Mayo*, 10 Vt. 56; 33 Am. Dec. 175, the court, by Williams, C. J., said: "A mere delivery of goods at the wharf is not necessarily a delivery to the owners as wharfingers. The usages of business, in the vicinity, are of importance to show when a wharfinger acquires and when he ceases to have the custody of goods in that capacity, as in the case of common carriers."

2. *Gibson v. Inglis*, 4 Camp. 72.

In *Packard v. Getman*, 6 Cow. (N. Y.) 757; 16 Am. Dec. 475, the court, by Woodworth, J., said: "Admitting that, according to the usual custom and understanding of parties, a delivery on the dock, near a boat, is a good delivery so as to charge the carrier, it must always be accompanied with express notice; otherwise, he is not answerable."

3. *Merritt v. Old Colony, etc., R. Co.*, 11 Allen (Mass.) 80; *Gass v. New York, etc., R. Co.*, 99 Mass. 220; 96 Am. Dec. 742.

In *Cobban v. Downe*, 5 Esp. 41, Lord Ellenborough said: "Undoubtedly, where the responsibility of the ship begins, that of the wharfinger ends; and a delivery to the ship creates a liability there; but the delivery must be to an officer or person accredited on board the ship; it cannot be delivered to the crew at random; but the mate is such a recognized officer on board the ship, that delivery to him is a good delivery."

4. *Cobban v. Downe*, 5 Esp. 41.

5. In *Cobban v. Downe*, 5 Esp. 41, Lord Ellenborough said: "The defendant has proved that, by established

usage, the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them; from which time it has been considered that their responsibility is then at an end."

6. In *Leigh v. Smith*, 1 C. & P. 638; 11 E. C. L. 506, the court by Best, C. J., said: "A wharfinger must prove by distinct evidence that he delivered to the mate or an officer of the ship."

7. The goods may not be delivered to the crew at random. *Cobban v. Downe*, 5 Esp. 41.

8. In *Blin v. Mayo*, 10 Vt. 56; 33 Am. Dec. 175, the court, by Williams, C. J., said: "By the usages and customs of business is not understood to be meant such customs as, from their long continuance, have become part of the common law, but such customs and usages as are generally regarded and adopted by the persons doing business in the vicinity, and with reference to which contracts are made. The evidence of the customs and usages of the merchants, in the vicinity of the defendant's wharf, was properly received, to show that goods landed on the wharf . . . were not considered as in their custody and that they did not receive and take care of them as wharfingers."

A usage of trade may be proved to aid, in case of doubt, in construing a contract, or in determining upon the manner of discharging some duty or performing some act; but to give it controlling effect, it must be shown to be a long continued, uniform, and generally known usage. It must also be a usage relating to matters of fact, and

paid or tendered, they must be delivered,¹ although he may withhold the goods when notified that they bear spurious trade-marks, and that the sale of them will be enjoined. But a wharfinger who has illegally detained goods, which the owner has afterward agreed to accept and send for, is not liable for their destruction by fire without his fault, after the owner has had a reasonable time in which to recover them.²

6. Estoppel to Deny Bailor's Title.—It has been held that a wharfinger is not estopped to denying his bailor's title.³ But where he once acknowledges the title of the person for whom he holds, he cannot afterward dispute it.⁴

7. Wharfinger's Lien—*a.* ON GOODS—(1) *Extent of Lien.*—A wharfinger has a lien on goods intrusted to his keeping to the amount of his wharfage charges;⁵ but no lien attaches until the goods are actually landed at the wharf.⁶ The lien extends to a general balance of accounts.⁷ But the wharfinger has no lien for

not to modes of thinking as to law. *Cox v. O'Riley*, 4 Ind. 368; 58 Am. Dec. 633.

1. *Hunt v. Maniere*, 34 Beav. 157.

2. *Carnes v. Nichols*, 10 Gray. (Mass.) 369.

3. In *Thorne v. Tilbury*, 3 H. & N. 534, *Brammell, B.*, said: "The case is analogous to one where a tenant says to his landlord 'you had a title at the time when you let me into possession, but have not now.'"

In *Biddle v. Bond*, 34 L. J. Q. B. 137, the court said: "We think that the true ground upon which a bailee may set up the *jus tertii* is that indicated in *Shelbury v. Scotsford*, viz., that the estoppel ceases when the bailment upon which it is founded is determined by what is equivalent to a title paramount."

4. *Holl v. Griffin*, 3 M. & S. 732.

In *Gosling v. Birnie*, 7 Bing. 339; 20 E. C. L. 153, the court said: "I think the plaintiff is entitled to recover; and if we were to hold otherwise, we should throw doubt on the principle by which a large portion of the trade of London is regulated; namely, that if a wharfinger acknowledges the title of the person for whom he holds, he cannot afterward dispute it, and it is not material whether the acknowledgment be oral or written."

5. *Spears v. Hartly*, 3 Esp. 81; *Holderness v. Collinson*, 7 B. & C. 212; 14 E. C. L. 30; *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466; 42 Am. Dec. 254; *Scott v. Jester*, 13 Ark. 437; *Story on Bailments* (8th ed.), § 453.

This lien will prevail over legal pro-

cess against the owner of goods, if it attaches prior to the *teste* of such process. *Rex v. Humphrey*, 1 McClel. & Y. 173. Here the Crown obtained execution against one Emerson. The only goods Emerson had were in the possession of one Humphrey, a wharfinger, who had a lien on the goods for his charges. The lien was prior in time to the date of the execution. The court, in this case, said: "It is plain he has a double security: the personal security against the bankrupt and the more substantial security of actual possession of the goods. Shall it be said then that the Crown, by virtue of any privilege, shall be enabled to take from this man his better security, namely, the goods?"

The lien holds although the Statute of Limitations has run against the demand. Thus, in *Spears v. Hartly*, 3 Esp. 81, Lord Eldon said: "I am of the opinion that though the Statute of Limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien."

6. *Syeds v. Hay*, 4 T. R. 260.

In *Stephen v. Castor*, 3 Burr. 1408, Lord Mansfield said: "We are all of us clear that the plaintiffs are not entitled to recover the wharfage or crantage duty for such part of the goods as were not unloaded upon their wharf."

7. 2 Kent's Com. (12th ed.) 642; *Spears v. Hartly*, 3 Esp. 81; *Holderness v. Collinson*, 7 B. & C. 212; 14 E. C. L. 30.

In *Naylor v. Mangles*, 1 Esp. 109,

warehouse rents or for labor in landing and weighing goods in the absence of an expressed or implied agreement to that effect, though a continued and undisputed usage is evidence of such an agreement.¹

(2) *Advances for Freight*.—A wharfinger has a lien for advances made for freight.²

an owner of twenty-five hogsheads of sugar stored with a wharfinger, sold them, but the wharfinger refused to deliver them until his account against the seller for wharfage and advances on other goods had been settled. Lord Kenyon said: "A lien from usage was matter of evidence. The usage in the present case has been proved so often, it should be considered as a settled point that wharfingers had the lien contended for."

Lenckhart v. Cooper, 3 Bing. (N. Cas.) 99; 32 E. C. L. 55, turns upon the invalidity of a custom to extend the lien of a wharfinger to all claims he may have against the bailor other than for mere wharfage. *Dresser v. Bosanquet*, 4 B. & S. 460, involves the question of the construction and effect of certain statutes claimed to give a lien.

In *Richardson v. Goss*, 3 B. & P. 119, R. shipped goods to W.'s order. Before the arrival of the goods W. countermanded the order. Subsequently the goods arrived and were cared for by W.'s wharfinger. R. demanded the goods upon payment of the wharfage charge, but the wharfinger refused to give them up unless R. paid a general account which existed between him and W. The court, in this case, said: "Here the wharfinger had no right to detain the goods against R., who was no creditor in respect of anything but what had been laid out upon them, though if W. had demanded the goods, the wharfinger would have had a right founded on custom to retain for his general balance."

In *Grant v. Humphrey*, 3 F. & F. 162, a lien was held not to exist under the following circumstances: Certain oil, while under the care of a wharfinger, took fire, part being entirely consumed and the remainder only partially so. But the identity of all but a small part was lost in the fire. The unidentified oil had been delivered without payment of wharfage charge upon the same. When the owner of the identified oil demanded it, the wharfinger refused to give it up unless

the wharfage charges due on all the oil was paid. The court said: "The lien would be on all the oil, and they would have a right to detain all; or, as to each portion of it, they could claim the lien *pro rata*, but they could not let all the rest go free, and then claim the lien, as to this last lot, for the charge on all the rest."

1. In *Holderness v. Collinson*, 7 B. & C. 212, Bailey, J., said: "There may be an usage in one place varying from that which prevails in another. Where the usage is general, and prevails to such an extent that a party contracting with a wharfinger must be supposed consensant of it, then he will be bound by terms of that usage. But then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for anything beyond the mere wharfage." In this case the court sustained the claim of general lien for wharfage, but refused to allow the lien for warehouse rent and labor in landing and weighing, as the custom to allow a lien for these matters was not sufficiently proved. As to such charges, the lien is specific, applying only to the particular goods on which the services were rendered.

2. In *Sage v. Gittner*, 11 Barb. (N.Y.) 120, the court, by Shankland, J., said: "By the custom of warehousemen, known and established, they have a right to receive goods from the carrier, if in apparently good order, and advance to the latter his reasonable charges for carriage of them, and to hold them subject to the lien of the carrier for the amount thus advanced."

But no lien exists under the following circumstances: A imported certain iron which upon its arrival was landed at B's wharf. On the day after its arrival it was sold to C. The greater part of it was delivered to C when A became bankrupt. It was understood

(3) *Termination of Bailor's Liability*.—If the owner of goods deposited at a wharf sells them, and gives notice to the wharfinger of such sale, on tendering the wharfage then due, he is discharged from liability for future wharfage.¹ Such notice may be given either verbally or by a delivery order.²

b. ON VESSEL—(1) *For Wharfage Charges*.—Contracts for wharfage are recognized both in *England* and the *United States* as maritime contracts,³ and as such are cognizable in admiralty.⁴ By virtue of such contracts, a maritime lien arises in favor of the proprietors of a wharf against the vessel using it for the payment of reasonable wharfage charges,⁵ and no distinction is made in this respect

between A and B that wharfage charges should not be payable until some future date. B refused to deliver to C the remainder of the iron, unless he paid A's wharfage charges, which C refused to do. The court observed: "There was, therefore, in this case, no original right of lien in respect of these charges, and I am not aware of any case where it has been decided that a subsequent default in payment can give such a right where it did not originally exist." *Crawshaw v. Homfray*, 4 B. & Ald. 50; 6 E. C. L. 385.

1. In *Wooster v. Blossom*, 5 Jones (N. Car.) 244; 72 Am. Dec. 549, the court, by Pearson, J., said: "If the owner sells and a delivery order is handed to the wharfinger, with a tender of the wharfage, there is no further claim on the vendor, and the personal lien attaches to the vendor, on the ground that the wharfinger is no longer liable to the vendor for the safe-keeping of the article, and, of course, has no further claim on him, but the wharfinger's liability, and his corresponding claim passes over to the vendee."

In *Barry v. Longmore*, 12 A. & E. 639; 40 E. C. L. 144, the court said: "The defendant could not claim more; for, although no delivery order had been served, yet, as the rate had been notified to the defendant, he had notice of the change of property, and could not allege any further lien."

2. *Wooster v. Blossom*, 5 Jones (N. Car.) 244; 72 Am. Dec. 549.

3. *The Canal Boat Kate Tremaine*, 5 Ben. (U. S.) 60; *Johnson v. McDonough, Gilp.* (U. S.) 101; *The Maggie Hammond*, 9 Wall. (U. S.) 435; *De Lovio v. Boit*, 2 Gall. (U. S.) 398; *The Robert J. Mercer*, 1 Sprague (U. S.) 284; *Gardiner v. Ship New Jersey*, 1 Pet. Adm. 223.

In *Ex p. Easton*, 95 U. S. 68, the

court, by Clifford, J., said: "Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel, is a maritime contract and, as such, that it is cognizable in admiralty."

4. *Ex p. Easton*, 95 U. S. 68; and cases cited in preceding note.

5. In *Ex p. Easton*, 95 U. S. 68, a question arose whether a maritime lien existed for wharfage charges. In the course of the decision the court said: "Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and water craft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable ships, vessels and all sorts of water craft to lie in port in safety, and to facilitate their operation in loading and unloading cargo, and in receiving and landing passengers. Piers or wharves are a necessary incident to every well-regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay and constant peril. Conveniences of the kind are wanted both at the port of departure and at the place of destination, and the expenses paid at both are everywhere regarded as properly chargeable as expenses of the voyage."

... Such erections are indispensably necessary for the safety and convenience of commerce and navigation, and those who take berth alongside them to secure those objects derive great benefit from their use. All experience supports the proposition, and shows to a demonstration, that the contract of the wharfinger appertains to the pursuit of commerce and navigation.

... Standard authorities, as well as

between a foreign and domestic vessel.¹ But the contract must be made by some person having authority to pledge the vessel to the performance of it, before a lien can be created.²

(2) *Priority*.—A maritime lien for dockage has been given priority over a bottomry lien;³ but a mortgage placed on a vessel

reason, principle, and the necessities of commerce, support the theory that the contract for wharfage is a maritime contract, which, in the case supposed, gives to the proprietor of the wharf a maritime lien on the ship or vessel for his security. . . . Viewed in the light of these considerations, it is clear that a contract for the use of a wharf, by the master or owner of a ship or vessel, is a maritime contract, and, as such, that it is cognizable in the admiralty; that such a contract, being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner."

But when a vessel is under arrest on legal process, and in the custody of the law, a wharfinger cannot enforce his lien by a detention of the vessel; he must apply to the court for its allowance, and it will be ordered to be paid in concurrence with other liens standing in the same rank of privilege. *The Phebe, Ware* (U. S.) 354.

In an action by a lessee of public wharves for the wharfage of a boat, constructed simply as a depository for oysters brought to the city for sale, being mostly boarded up at the sides, and square at both ends, with one end made fast to the bulkhead, midway between two piers which formed a slip, and connected with the bulkhead by gang planks, over which oysters received at the other end were generally discharged directly upon the wharf or street, the court held that, under the act of the legislature and the ordinances of the corporation of *New York*, the boat was liable for full wharfage, it being conceded that the bulkhead was a "wharf," and the boat a "vessel." *Decker v. Jaques*, 1 E. D. Smith (N. Y.) 80.

The fact that a vessel is a mere barge, not fitted with any means of propulsion,

but dependent on towing, does not prevent a lien from attaching. *Ex p. Easton*, 95 U. S. 68. A lien also attaches for the wharfage of a floating boathouse, although never used in the transportation of passengers or freight. *Woodruff v. One Covered Scow*, 30 Fed. Rep. 269.

But a libel for a balance of an account between a wharfinger and a steamboat, most of the items of which were not maritime, was held not to be maintainable. *The Saginaw*, 32 Fed. Rep. 176.

Where a marshal, however, levied on, but did not keep actual possession of, a vessel which had been removed from a wharf without the knowledge of the wharfinger, and which was afterward returned to the same wharf, it was held that the lien of the wharfinger was revived, and that he was to be paid his previous wharfage out of the proceeds of a sale under the execution made after her return. *Johnson v. Schooner M'Donough, Gilp.* (U. S.) 101.

A floating structure moored alongside a wharf, so that carts containing refuse to be dumped into boats can be driven over it from the wharf, is not a vessel within the meaning of the maritime law, and no lien for wharfage attaches to it under that law. *Ruddiman v. A Scow Platform*, 38 Fed. Rep. 158.

A steamboat owned by a city and employed in the transportation of the harbor police, is exempt from liability to seizure to enforce a claim in admiralty for wharfage. *The Police Boat Seneca*, 8 Ben. (U. S.) 509.

1. In respect to awarding a maritime lien upon a vessel for wharfage, no distinction should be made between foreign and domestic vessels. *The Canal Boat Kate Tremaine*, 5 Ben. (U. S.) 60. See also *Banta v. McNeil*, 5 Ben. (U. S.) 74.

2. *The Mary K. Campbell*, 31 Fed. Rep. 840.

3. In *Ex p. Lewis*, 2 Gall. (U. S.) 483, the court, by Story, J., said: "If the dockage be a lien, is it a privileged lien, having priority over a bottomry interest? It being indispensable for the preservation of the vessel, it seems

prior to its arrival at the wharf under an attachment, may take precedence of the wharfinger's lien.¹

(3) *Enforcement*.—A wharfinger may enforce his lien either by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner.²

c. LIEN UNDER STATUTE.—All questions affecting liens under statutes can be determined only by referring in each case to the statutes of the state under which the question arises.³

8. *Wharfinger's Interest an Insurable One*.—A wharfinger has an insurable interest in all goods intrusted to his care, and such interest will be included in a policy covering "goods in trust."⁴ In

to me that it must necessarily be so considered."

1. The *Mary K. Campbell*, 31 Fed. Rep. 840.

2. *Ex p. Easton*, 95 U. S. 68.

An action to recover wharfage is not an action for the recovery of real or personal property; and persons claiming to own the wharf are not necessary parties to an action for wharfage. *Kelsey v. Murray*, 18 Abb. Pr. (N. Y. Supreme Ct.) 294; 28 How. Pr. 243.

A wharfinger cannot maintain an action in his own name to recover money due for dockage and wharfage, although by statute the dockage and wharfage is directed to be paid to him, and he is required to collect the same. *Buckbee v. Brown*, 21 Wend. (N. Y.) 110.

Distress, and not an action, is the proper remedy for the collection of wharfage under the *New York Laws* 1860, ch. 254, § 7. *Warren v. McDiarmid*, 34 How. Pr. (N. Y. Supreme Ct.) 304.

A wharfinger in Charleston may recover wharfage from the owner of goods shipped by a factor to his customer in the country, if it is not paid by the factor, although it is shown to be the custom in that city for the factors to pay the wharfage in such cases. *Fitzsimons v. Milner*, 2 Rich. (S. Car.) 370.

Where a city ordinance fixed wharfage rates, it was held that it was not necessary, in order to enforce a lien for delinquent wharfage, that the ordinance should provide for such enforcement, as the provisions of the general statute might be invoked. *A Coal-Float v. Jeffersonville*, 112 Ind. 15.

3. *The Lottawanna*, 21 Wall. (U. S.) 558; *The Steamer St. Lawrence*, 1 Black (U. S.) 529.

Under *New York Laws* 1875, p. 482,

fixing the rates of wharfage, a vessel which makes fast to two distinct landing places must pay accordingly. If she leaves a wharf without paying the wharfage due, she becomes liable, under the said statute, to pay double the rates established by the statute. The added amount is not a penalty, but is a wharfage rate; and the statute gives a lien on the vessel for the entire sum. *The Virginia Rulon*, 13 Blatchf. (U. S.) 519.

Indiana Rev. Stat., § 3106, provides that a city may have a lien against a boat, vessel, or water craft for landing, wharfage, or dockage, where the claim has been contracted on behalf of the boat, vessel, or water craft by the owner, master, clerk, or consignee; it is not necessary that an ordinance regulating the rates of wharfage shall declare the claim therefor to be a lien on the vessel "contracting the same," as such lien attaches by operation of law. *A Coal-Float v. Jeffersonville*, 112 Ind. 15.

For the statutes of various states upon this subject, see *Stimson's American Statute Law*, § 4643.

4. See *WAREHOUSEMAN*, vol. 28, p. 636; *Ex p. Bateman*, 8 De G. M. & G. 263.

In *Waters v. Monarch F., etc., Assur. Co.*, 5 El. & Bl. 870; 85 E. C. L. 868, Lord Campbell, C. J., said: "The first question is whether, upon the construction of the contract, these goods were intended to be covered by the policy. I think in either policy the description is such as to include them. What is meant in those policies by the words 'goods in trust?' I think that means goods with which the assured were intrusted; not goods held in trust in the strict technical sense . . . but goods with which they were intrusted in the ordinary sense of the

case of loss he can recover the full amount of the insurance; but is liable to pay over to the owner all in excess of his charges.¹ He may, at his own expense and without notice to the owner, keep a floating policy for the benefit of all who may become his customers.²

WHEN.—The ordinary meaning of the adverb “when” is at that time.³

word. They were so intrusted with the goods deposited on their wharves. I cannot doubt the policy was intended to protect such goods; and it would be very inconvenient if wharfingers could not protect such goods by a floating policy.”

1. In *Waters v. Monarch F., etc., Assur. Co.*, 5 El. & Bl. 870; 85 E. C. L. 868, Lord Campbell, C. J., said: “The last point that arises is, to what extent does the policy protect those goods. The defendants say that it was only the plaintiffs’ personal interest. But the policies are in terms contracts to make good ‘all such damage and loss as may happen by fire to the property hereinbefore mentioned.’ That is a valid contract; and, as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs.”

2. In *Waters v. Monarch F., etc., Assur. Co.*, 5 El. & Bl. 870; 85 E. C. L. 868, the court said: “And I think that a person intrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy.”

3. Webster’s Dict. This definition was adopted in *St. Louis v. Withams*, 90 Mo. 646, where it was held that, in the construction of a city ordinance, words are to be taken in their ordinary sense; hence, the word “when” cannot be converted into “while” where the effect would be to turn special sessions into general ones, as in the phrase “when assembled.” The court said: “The case hinges on the proper interpretation of the words ‘when assembled.’ Words are to be taken in their ordinary sense. The ordinary meaning of the adverb ‘when’ is ‘at the time that.’ (Webst. Dict.) The meaning for which the city contends would convert ‘when’ into ‘while,’ the effect of which would be to turn special sessions into general ones in open repugnance to charter provisions. If this conclusion is correct, then such conclusion is not in the least affected by the conclud-

ing words of the mayor’s message to the special session: ‘I am not adverse to submitting for your consideration any measure, if satisfied that the public interests demand it shall be heard.’ Because the mayor, being required by the charter to specially state to the municipal assembly the objects for which they have been convened, could not ‘reserve the right to submit other measures if the public interest demanded a hearing for them.’ Such a reservation is unknown to the charter, and, besides, does not ‘specially state’ the objects for which the assembly have been convened. A special statement is a very different sort of thing from a right reserved to make a special statement at some subsequent period.”

“When” in the Sense of “If.”—In *State v. Haberle*, 72 Iowa 140, the court held it to be no error in an instruction that “when” was used in the sense of “if.” The court said: “The court further instructed the jury as follows: ‘When it is successfully proven that the general reputation of a witness for general moral character is bad, the witness is impeached, and the jury will be warranted in disregarding the testimony of such witness, as unworthy of belief. The defendants have been witnesses in their own behalf, and are subject to be impeached, the same as any other witness.’ This instruction is claimed to be erroneous, because it assumes that the defendants were impeached. We do not think it is vulnerable to this objection. The use of the expression, ‘when it is successfully proven,’ etc., is equivalent to saying, ‘If it be successfully proven,’ etc.”

Agreement to Discharge Defendant
“When” a Certain Sum Shall Be Paid.—In such an agreement “when” was held to be equivalent to “at a time after.” *Kirtz v. Peck*, 113 N. Y. 222. The court said: “There is no language in the contract providing for any specific time for the delivery of the release and discharge, but it may be required at any time after payment. Its language is,

WHENEVER.—The word “whenever,” though often used as equivalent to “as soon as,” is sometimes used where the time intended by it is, and will be, until its arrival, or for some uncertain period at least, indeterminate.¹

WHISKY.—See note 2.

‘when’ the money is paid, the said Jane A. Bush and her husband shall release and discharge the party of the first part from all claims, dues, and demands which they or either of them may have against him. *Morris v. Sliter*, 1 Den. (N. Y.) 59. The word ‘when’ is used in the sense ascribed to it by lexicographers, as ‘at a time after,’ and as thus used the case of *Morris v. Sliter*, 1 Den. (N. Y.) 59, is precisely in point.”

In a Will.—“When” in a testamentary gift usually has the sense of “if” and implies a condition. *Guyther v. Taylor*, 3 Med. Eq. 323; *Jolly v. Hancock*, 22 L. J. Exch. 38; 7 Exch. 820; *Hanson v. Graham*, 6 Ves. Jr. 239.

But circumstances, even though slight in the context, may be sufficient to show that a condition was not intended, and in such cases the gift will be held vested. *Fisher v. Johnson*, 38 N. J. Eq. 47; *Mennig v. Batdorff*, 5 Pa. St. 503; *Letchworth's Appeal*, 30 Pa. St. 175.

“When” usually creates a condition precedent. *Jolly v. Hancock*, 22 L. J. Exch. 38; 7 Exch. 820.

Where there is a testamentary gift to A, “if,” or “when,” or “provided,” or “in case,” or “so soon as” (phrases which are synonymous, *Shrimpton v. Shrimpton*, 31 Beav. 425), a certain event happens—*e. g.*, attaining a stated age—such a gift, standing unaffected by the context, confers only a contingent interest, and requires the happening of the event to give it validity. But with the aid of a context such words may, without difficulty, not defer the vesting of the subject-matter of the gift, but merely refer to the futurity of its possession. 1 Jarm. on Wills (6th ed.) 805, 809, 816, 842, 854–960; *Boraston's Case*, 3 Rep. 19 a; *Phipps v. Ackers*, 3 C. & F. 703; nom. *Phipps v. Williams*, 5 Sim. 44; *Scotney v. Lomer*, 54 L. J. Ch. 558; 55 L. J. Ch. 443; 29 Ch. Div. 535; 31 Ch. Div. 380; *In re Wrey*, 54 L. J. Ch. 1098; 30 Ch. Div. 507. It has also been said that “‘when’ cannot be considered as so strongly indicating contingency as ‘provided,’ and ‘if.’” *Watson Eq.* 1217.

Where the gift is to a class “who,” or “as,” shall attain a certain age, the

rule (nearly universally applied) is to regard the attainment of the age as part of the description of the beneficiary, and to construe the gift as contingent, “upon the ground that no one could claim who could not predicate of himself that he was of the age required.” Per *Wigram, V. C.*, in *Bull v. Pritchard*, 16 L. J. Ch. 186; 5 Hare 567. See also 1 Jarm. on Wills (6th ed.) 817, 818, 854, 860. But even this construction may yield to a context. *Muskett v. Eaton*, 45 L. J. Ch. 22; 1 Ch. Div. 435; 1 Jarm. on Wills (6th ed.) 819, 855–860.

The word “when,” like the words “at” and “if,” applied to a bequest of personalty, makes the gift contingent; but the addition of the words “equally to be divided,” in a case where there are several legatees, shows that the words “when,” etc., were only used to designate the time when the enjoyment of the legacy was to commence, and would not prevent it from vesting. *Sims v. Smith*, 6 Jones Eq. (N. Car.) 347.

1. *Robinson v. Greene*, 14 R. I. 188.

The word “whenever” and its synonyms, referring to the time when property is to be enjoyed, are among the most ordinary words used in creating a vested remainder, and cannot be relied on as a test of a contingent one. *Manderson v. Lukens*, 23 Pa. St. 31.

2. The selling of a compound in which whisky is the predominant ingredient is selling whisky. Thus, in *Galloway v. State*, 23 Tex. App. 398, where an indictment charged the offense as selling “whisky,” and the evidence showed that the article sold was “whisky cocktail,” it was held that there was no variation between the allegation and proof. The court said: “It is in proof that what is called ‘whisky cocktail,’ is only a mode of preparing whisky as a beverage. Whisky is the predominant ingredient. In selling the compound, the accused undoubtedly sold whisky, which was a component part of the article sold, and the main ingredient designed and desired in the sale and purchase. If whisky be present as the predominant

WHISTLING.—See note 1.

WHITE.—See note 2.

WHITE PERSON.—(See also *MULATTO*, vol. 15, p. 946; *NEGRO*, vol. 16, p. 484).—These words, as ordinarily used in the *United States* and in their well settled and popular meaning, include only persons of the Caucasian race, so the words used in the naturalization laws of the *United States* do not include individuals of the Mongolian race;³ nor persons of half white and half Indian

element in the mixture, it is immaterial that bitters and tonics be used to qualify or render it more palatable as a beverage. (*Wall v. State* (Ala. 1886) 8 Crim. L. Mag. 202). Mr. Wharton says: 'If pretexts such as these are sustained, the worst vendors of the worst liquors would be the best protected by law.' (2 Whart. Crim. L. (8th ed.,) § 1507.) We have found no error in the conviction in this case, and the judgment is affirmed." See also *INTOXICATING LIQUORS*, vol. 11, p. 582.

1. In *Moore v. Haviland*, 61 Vt. 58, the court said: "The plaintiff was allowed to show by expert witnesses what whistling in horses is, and how it affects them, but was precluded from showing by this class of witnesses that whistling in horses was an unsoundness, and that it was so universally considered among horsemen. The court instructed the jury in a manner not expected to in regard to what facts would amount to a legal unsoundness in a horse, and submitted to the jury to determine whether they found such facts established. We think there was no error in the action of the county court on this subject. The proposition of the plaintiff would substitute the expert witnesses in the place of the court and jury to determine what constitutes an unsoundness. This is never allowable. Witnesses, expert or non-expert, are never legally allowed to assume the province of both the court and jury. Interrogatory 8, in the deposition of Albert Way, was: 'State whether there was any unsoundness of any kind about the horse,' and the answer: 'He was perfectly sound, with the exception that he was inclined to be flat-footed.' This question and answer, if they stand alone, were a clear invasion of the principle which we have just laid down, that a witness, expert or non-expert, is never allowed to assume the office of both the court and jury in determining the vital question in issue. But by the

two preceding questions the witness had been particularly called upon to state whether during the summer of 1886, at any time while he knew the horse, there had been any defect about his breathing, or if he had noticed any inclination or appearance of his being what is called a 'whistler.' These questions the witness had answered in the negative. They covered fully the only point in issue on this subject between the parties. In this state of the witness's testimony, interrogatory 8 and its answer were wholly immaterial. They added nothing to the force of the witness's testimony, properly drawn out, in the case. It would have been wiser, perhaps, to have excluded the interrogatory and its answer; yet it is quite manifest that, following the witness's testimony, properly drawn out on the vital question in the case, it added nothing to the force of that testimony, and was directed to a phase of the case which might have been, but was not, in issue, and so it was wholly irrelevant and immaterial, and could have wrought the plaintiff no injury." See also *HORSSES*, vol. 9, p. 766.

2. **White Paper Ballots.**—Ballots upon paper tinged with blue, which has ruled lines, not placed there as marks to distinguish the ballots, are upon white paper within the meaning of a statute providing "that no ballot shall be received, or counted, unless the same is written or printed upon white paper, without any marks or figures thereon, intended to distinguish one ballot from another." *People v. Kilduff*, 15 Ill. 493.

3. *In re Ah Yup*, 5 Sawy. (U. S.) 155. In this case Sawyer, J., reviewing the history of the legislation, said: "Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color,

blood; who are therefore not entitled to be admitted to citizenship.¹

The distinction between white persons and persons not white does not depend upon the predomination of white blood over negro blood. The classes are to be understood as embracing those persons commonly understood to belong to the white or colored population respectively.² So the words "white" and

notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. I am not aware that the term 'white person,' as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that Congress intended to include in the term 'white person' any other than an individual of the Caucasian race, I do find much in the proceedings of Congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolians. At the time of the amendment, in 1870, extending the naturalization laws to the African race, Mr. Sumner made repeated and strenuous efforts to strike the word 'white' from the naturalization laws, or to accomplish the same object by other language. It was opposed on the sole ground that the effect would be to authorize the admission of Chinese to citizenship. Every Senator, who spoke upon the subject, assumed that they were then excluded by the term 'white person,' and that the amendment would admit them, and the amendment was advocated on the one hand, and opposed on the other, upon that single idea."

Hawaiians.—U. S. Rev. Stat. 1878, § 2169, allowing only persons of the white and African races to become citizens, is not modified by 22 U. S. Stat. at L., p. 61, § 14, which provides that "hereafter no state court, or court of the *United States* shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed," as the purpose of the latter act was to remove all doubt as to the eligibility of Chinese to citizenship, and therefore a native of the Hawaiian Islands may not be naturalized, as he belongs to neither of the races mentioned. *In re Kanaka Nian*, 6 Utah 259.

The court said: "There is a general rule of construction of statutes that if a portion of a number of classes are included by name such a rule of construction for this section would admit to citizenship the aliens of all other races, an effect that Congress unquestionably never intended. Some courts had admitted Chinese to citizenship, and this section was evidently made to prevent such naturalization and to remove all doubt. We are of opinion that the laws authorize the naturalization of aliens of the Caucasian or white races and of the African races only, and all other races, among which are the Hawaiians, are excluded."

Liability of United States for Property of Friendly Indians Destroyed by a "White Person."—U. S. Rev. Stat., § 2154, making the *United States* liable, under certain circumstances, for the property of friendly Indians, which is taken, injured or destroyed by a "white person," does not apply where the offender is a negro. *U. S. v. Prettyman*, 100 U. S. 235.

1. *In re Camille*, 6 Fed. Rep. 256.

2. *Duval v. Johnson*, 39 Ark. 182.

In *People v. Dean*, 14 Mich. 406, Campbell, J., said: "As the decisions now stand, so far as I have been able to follow them out, there is not a court in the *United States* which holds that a 'colored person,' in the popular acceptance, although lighter than a mulatto, can be called 'white' without doing violence to language. In this state, both before and since the constitution now under consideration, the population of African descent has always been divided into black, mulatto, and 'other persons of color,' under statutes designed to protect them from illegal bondage; and every one must admit that statutes which protected none of a lighter shade than mulatto would have been of comparatively small service in that direction. (See Rev. Stat. 1838, p. 624; 2 Comp. L., § 5735; L. 1859, p. 526.) The term, 'persons of color,' was used in a very broad sense,

"colored," as used in statutes providing for the maintenance of schools, are held to be used in their ordinary acceptation.¹

WHOEVER.—See note 2.

WHOLESALE.—(See also INTOXICATING LIQUORS, vol. 11, pp.

and in conformity with popular usage, or it was senseless altogether."

The division line is generally recognized to be that of one-quarter blood, as in *Virginia*, see *Dean v. Com.*, 4 Gratt. (Va.) 541; and in *Kentucky*, *Gentry v. McMinis*, 3 Dana (Ky.) 382.

In *Louisiana*, if the proportion of African blood did not exceed one-eighth the person was deemed white; as was the rule in the colonial *code noir* of *France*. 2 Kent's Com. 72.

1. *Van Camp v. Board of Education*, 9 Ohio St. 407. In this case Peck, J., said: "In determining what is to be understood by the terms 'white' and 'colored,' as used in this act, we may look to the state of things existing at the time, the evils complained of, and the remedies sought to be applied. For nearly two generations, blacks and mulattoes had been a proscribed and degraded race in *Ohio*. They were debarred from the elective franchise and prohibited from immigration and settlement within our borders, except under severe restrictions. They were also excluded from our common schools and all means of public instruction—incapacitated from serving upon juries, and denied the privilege of testifying in cases where a white person was a party. It would be strange, indeed, if such a state of things had not increased, in the present generation, the natural repugnance of the white race to communion and fellowship with them. Whether consistent with true philanthropy or not, it is nevertheless true, that in many portions, if not throughout the state, there was and still is an almost invincible repugnance to such communion and fellowship. . . . Our standard philologist, Webster, defines 'colored people' to be 'black people, Africans or their descendants, mixed or unmixed.' Such is also the common understanding of the term. A person who has any perceptible admixture of African blood, is generally called a colored person. In affixing the epithet 'colored,' we do not ordinarily stop to estimate the precise shade, whether light or dark, though, where

precision is desired, they are sometimes called 'light colored,' or 'dark colored,' as the case may be. If we look at the evils the law was intended to remedy, we shall arrive at the same result. One of the evils undoubtedly was the repugnance felt by many of the white youths and their parents to mingling, socially and on equal terms, with those who had any perceptible admixture of African blood. This feeling or prejudice, if it be one, had been fostered by long years of hostile legislation and social exclusion. The general assembly, legislating for the people as they were, rather than as, perhaps, they ought to have been, while providing for the education and consequent ultimate elevation of a long degraded class, yielded for the time to a deep-seated prejudice, which could not be eradicated suddenly, if at all. Such an arrangement, in the present state of public feeling, is far better for both parties—for the colored youth as well as those entirely white. If those a shade more white than black were to be forced upon the white youth against their consent, the whole policy of the law would be defeated. The prejudice and antagonism of the whites would be aroused, bickerings and contentions become the order of the day, and the moral and mental improvement of both classes retarded. It would seem, then, from this examination of the law of 1853, and the circumstances under which it was passed, that the words 'white' and 'colored,' as used in that act, were both used in their ordinary and common acceptation, and that any other construction would do violence to the legislative intent, and perpetuate the very evils that act was intended to remedy." See also *SCHOOLS*, vol. 21, p. 766.

2. In *Palmer v. Wakefield*, 102 Mass. 214, it was held that the provision of a statute subjecting to a penalty "whoever" brings a pauper into any town in the state where he is not lawfully settled, knowing him to be poor and indigent, etc., applies to public officers as well as to private persons.

669-670; RETAIL, vol. 21, p. 296).—A term frequently used in statutes regulating the sale of intoxicating liquors.¹

1. Commission Merchant.—Under the seventy-ninth section of the Internal Revenue Act of 1864, as amended by the act of July 13th, 1866 (14 Stat. at L.), persons who sell goods in their own name at their own store, on commission, and have possession of the goods as soon as the sales are made, and who deliver and send them off to their customers—such sales being to an extent exceeding twenty-five thousand dollars per annum—are to be taxed as “wholesale dealers,” not less than persons who sell to that amount on their own account. *Slack v. Tucker*, 23 Wall. (U. S.) 321.

Intoxicating Liquors.—By *Wisconsin Session Laws* (1850) ch. 139, § 5, all notes or accounts or evidences of debt given for retail liquor bills are absolutely void. The term “wholesale” implies the selling in or by unbroken parcels, as by the barrel, pipe, or cask, etc., while the term “retail” implies the cutting up or dividing such pieces, or parcels, or casks, into smaller quantities, and selling to customers in such manner. The purchase of liquors from time to time, in six or ten gallon kegs of different kinds, cannot, in any proper use of language, be called “selling by wholesale,” if the casks are taken from a large bulk. *Gorsuth v. Butterfield*, 2 Wis. 237.

Wholesale Liquor Dealer.—A manufacturer of liquor, selling in unbroken packages at his place of business to dealers, is not a “wholesale liquor dealer,” liable to taxation as other merchants. *Taylor v. Vincent*, 12 Lea (Tenn.) 282; 47 Am. Rep. 338; *Pearce v. Com.*, 6 Ky. 113.

The mere fact that a liquor dealer sold by the quart, and in larger quantities, not drunk or intended to be drunk on the premises, is not enough to constitute him a “wholesale dealer.” *State v. Lowenhaupt*, 11 Lea (Tenn.) 14. Here the court said: “We have no definition in terms in any of our statutes of a wholesale dealer in liquor, nor of a retail dealer. It is clear that the occupation and business of a wholesale dealer by 46th section of Act of 1882, is a privilege and is forbidden to be followed without a license; but does this presentment charge the party guilty of doing this? We cannot so understand it. Mr. Bouvier (Law

Dict., vol. 2, p. 473), defines retail ‘to sell by small parcels, and not in gross.’ Retailer of merchandise as ‘one who deals in merchandise in smaller quantities than he buys—generally with a view to profit.’ These definitions are not clear nor full, and do not add much to a distinct conception of the things attempted to be defined. We take it, what is meant by retailing is selling by small quantities, to suit customers, articles which are bought in larger amounts generally. Now one who sells in this way, or whose business is so to sell, is a retail dealer; one who sells by the nature of his business in gross, and not by the small quantity or parcel to consumers, is a wholesale dealer. While these definitions may not include all the elements in detail of either character of dealer, they go far enough for the decision of this case. It is not averred that the defendant is a wholesale dealer, or that he sells or did sell to this party by the wholesale, to be by him retailed, or as a retail dealer, nor in fact is there any fact averred from which the party’s character as wholesale dealer can be made out except that he ‘sold by the quart and in larger quantities, not drunk or intended to be drunk on the premises.’ It may have been a gallon sold in a jug on the order of a customer. It would be an abuse of language to hold this would constitute a wholesale dealer in liquors, intended to be provided for by the statute.”

The board of aldermen of P. granted a license to H. to sell liquor at retail only, and H. gave bond to comply with the conditions of the license. Before it was granted, the board had passed a resolution that a sale of liquor in quantities over three gallons should be a sale at wholesale; but this resolution was not stated in the license, or recited or referred to in the bond, or stated or referred to in the grant of license, as recorded. In an action on H.’s bond for a breach thereof, in selling ten gallons of liquor, drawn from a cask containing a much larger quantity, it was held that the sale, being in the ordinary sense a sale at retail, was not affected by the resolution of the board, and was no breach of the condition of the bond. *Tripp v. Hennessy*, 10 R. I. 131. In this case the court, by Brayton, C. J., said: “It is not seriously

WHOLLY DESTROYED.—See note 1.

contended that a sale in this quantity is, according to the common and popular import of the term, a sale at wholesale. In that common and popular sense the words wholesale and retail must be taken to have been used in the statute. The sale here involves the idea of breaking up and dividing, and parceling out the goods which are held by the seller in larger parcels or packages in which he has purchased, and excludes the idea of selling a thing whole and unbroken. It is not insisted that, within the meaning of the act as it stands, the sale made by the defendant, Hennessy, is one at wholesale. It has been decided that such a sale is not one at wholesale, but is such as a retailer may and does make. *State v. Wilson*, 2 Wis. 237. But it is claimed that it is such by virtue of a resolution of the board of aldermen. Before granting any licenses under chapter 757, which requires the licensees to state whether the licensee should sell by wholesale or at retail, the board of aldermen, in order to define the meaning of those terms and to settle the line of distinction between them, resolved, that a sale at retail should be a sale in quantities not exceeding three gallons; a sale in quantities greater than three gallons, a sale at wholesale. This resolution was, however, not stated in the license which was required to be given the person licensed, and was also required to be posted up in the place licensed. The license was simply to sell at retail; neither was the resolution recited or referred to in the bond, nor was it stated or referred to in the grant of the license as recorded. The grant did not limit or define the term 'at retail.' "

1. *Fire Insurance.*—In *Oshkosh Packing, etc., Co. v. Mercantile Ins. Co.*, 31 Fed. Rep. 204, the court, by Dyer, J., said: "In this state, *Wisconsin*, we have a statute which provides that 'whenever any policy of insurance shall be written to insure any real property, and the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed.' The expression 'wholly destroyed' in this statute

is equivalent to total loss; and total loss, as applicable to a building (for this statute relates only to real property), means, not that the materials of which it is composed were all utterly destroyed or obliterated, but that the building, though some part of it may remain standing, has lost its identity and specified character as a building, and instead thereof has become a broken mass, or so far in that condition that it cannot be properly any longer designated a building. When that has occurred, then there is a total destruction or loss. *May, Ins.*, § 421a. Or, as it is said in one of the authorities which treats of this question, a total loss does not mean an absolute extinction. The question is not whether all the parts and material composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building. 1 *Wood, Ins.*, § 107."

The words "wholly destroyed," as used in the statute, are equivalent to "total loss," and mean that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and has become a disintegrated mass that cannot be properly designated as a building, and the court properly instructed the jury that, in order to aid the defendant, the standing wall must be believed to be of material value "as a building or a part of a building," and also properly refused to instruct that, if such wall were of any material value, it would avail the defendant. *Barnard v. National F. Ins. Co.*, 38 Mo. App. 107.

The words "wholly destroyed," as used in the statute, have a technical meaning, different from their ordinary meaning in common usage, which would apply the words to any material change of form or substance. But, under the statute, a building is wholly destroyed, only when no part of it remains intact or substantially uninjured, so that it can be utilized in effectually restoring the structure to its entirety. The trial court erred in submitting to the jury, without proper definition, the meaning of the words, as well as their application to the facts in evidence. *Ampleman v. Citizens Ins. Co.*, 35 Mo. App. 308.

In *Seyk v. Millers Nat. Ins. Co.*, 74 Wis. 67, the court said: "Were the

WIDOW—(See also **DOWER**, vol. 5, p. 884; **HUSBAND AND WIFE**, vol. 9, p. 789).—In technical as well as ordinary use, the term widow has reference to a woman who has lost her husband by death,¹ the condition of widowhood being terminated by subsequent marriage.² A divorced woman is not a widow upon the death of her former husband, and can claim no rights as such.³

insured buildings wholly destroyed within the meaning of section 1943? The evidence is that all the combustible material in the structures was destroyed, and, although portions of the brick walls were left standing, yet they were useless as walls, and many, perhaps most, of the bricks therein were spoiled by the heat. It cannot be doubted that the identity and specific character of the insured buildings were destroyed by the fire, although there was not an absolute extinction of all the parts thereof. This was an entire destruction of the buildings, within the meaning of the statute. 1 Wood, Ins., § 107." See also **FIRE INSURANCE**, vol. 7, p. 1002.

1. Webster's Dict.; *Whitsell v. Mills*, 6 Ind. 229.

2. *Alexandria Bank v. Hoof*, 4 Cranch (C. C.) 323; *Cooper v. Pogue*, 92 Pa. St. 254.

In *Com. v. Powell*, 51 Pa. St. 440, Thompson, J., said: "In common parlance, we know the term 'widow' means an unmarried woman, and unless it be shown, which has not been attempted, that there is a technical sense to which it is to be referred for exposition, this is the sense in which we must regard it as used by the legislature. Our law dictionaries agree in their definitions of the usual acceptance of the meaning of the word 'widow': A woman whose husband is dead. Whart. 'Widow,' an unmarried woman whose husband is dead. Bouvier. Worcester defines the word thus, 'A woman whose husband is dead and who remains unmarried;' and Webster, in the unabridged edition of 1844, 'A woman who has lost her husband by death and has not taken another—one long bereaved of a husband.' The word is so entirely and exclusively descriptive of an unmarried condition, having once been married, that any other sense would be figurative."

The right, however, which is given to a widow to sue for the homicide of her husband, is not divested by her

subsequent marriage. *Georgia R., etc., Co. v. Garr*, 57 Ga. 277.

3. Claim of Burr, 11 Op. Atty. Gen'l 1; *Whitsell v. Mills*, 6 Ind. 229; *Schonfield v. Turner*, 75 Tex. 324. In *Matter of Ensign's Estate*, 103 N. Y. 284, Finch, J., said: "The divorced wife is not 'the widow.' She may be the lawful wife of another man, and the deceased may have lawfully remarried in another state, or by permission of the court in this, and it would follow, if the appellant is right, that a woman may be a widow although her lawful husband is living, and that an intestate may leave two widows with equal rights to administration and distribution. Suppose that, with unusual activity, he should leave four, how would each get one-third of the personalty? and were the children of any account in the scheme of distribution? In one event 'the widow' is entitled to the whole surplus. The appellant's counsel solves the struggle for priority by applying to the later wives, with a sort of grim humor, the maxim *caveat emptor*, but the suggestion is not quite adequate to unsettle the law and unite at desired points a severed bond. When the court dissolves the marriage contract at the suit of the innocent wife, it is authorized to decree the payment to her of a suitable allowance. And why is that? If any marital right continues after the divorce, the wife remains entitled to her support and may enforce it in the ordinary way. On the contrary, the statute recognizes that when the marriage tie is broken, and the relation ended, no future rights will remain to the wife, and no future obligations bind the husband which have their root in the marriage relation."

"Widow" Interpreted "Husbandless."
—In *Rittenhouse v. Hicks*, 23 Wkly. L. Bull. (Ohio) 269, under the circumstances recited, the word widow as used in a will was held to mean husbandless. By a will property was left in trust for the plaintiff, who was to receive the income during her natural life and after her death the trust to end and

The word widow, as used in the insurance policy in a beneficial society, was held to mean only the legal widow, and not the putative wife of the deceased husband.¹

A devise or bequest to the widow of a certain person is held to have reference not necessarily to the wife at the time of the making of the will, but to the wife who might survive the person designated.²

the property to belong to her children. At the time of the will the plaintiff had a husband whose habits were dissipated. It was further provided that if the plaintiff "should become a widow" the trust should cease and the property be turned over to her absolutely after the death. After the death of testator, the plaintiff procured a divorce and claimed that she was a widow within the terms of the will. The court said: "While technically the word widow means a woman whose husband has died while she was still married to him, yet, as in construing wills, the courts will always disregard the technical meaning of a word in the face of a plain intention on the part of a testator to use the word in a different and more liberal sense. The question here presented is whether this testatrix meant the word widow to be understood in its technical sense or not. From a careful consideration of the whole context of the will, as well as the evidence furnished by the circumstances which surrounded the testatrix at the time of its execution, it is certain that the only object of the creation of the trust was to keep this property from the control of this particular husband, and that the testatrix used the word widow simply as a term designating a husbandless condition; wherefore, the divorce having had the effect of severing the daughter's married relation with this husband and of putting her property as completely beyond his control as his death would have done, the conclusion, the court thought, was inevitable that the event named for terminating the trust occurred by the granting of the divorce. Authority for this conclusion is found in numerous cases where the word 'unmarried,' which technically means 'never having been married,' has been decided to mean 'wifeless' as coming within the testator's intention."

¹ Schnook v. Independent Order, etc., 53 N. Y. Super. Ct. 181.

In Bolton v. Bolton, 73 Me. 299, the

husband insured his life, payable to his widow, while living with a woman who for years had passed as his wife. Upon his death the money was passed to his supposed widow, but, afterward, upon his lawful widow appearing and claiming the insurance, the court held that the latter was properly entitled thereto. And in *Grand Lodge, etc. v. Elsner*, 26 Mo. App. 108, it was held that the deceased having been lawfully married, in a foreign country, his abandonment of his wife, without a legal severance of the marital bond, his cohabitation, in this state, with another woman, as his wife, and rearing a large family by her, does not entitle the latter woman, as against the former, to the benefits of the fund, and his intention in effecting the insurance, and her good faith in considering herself his wife, are immaterial.

2. Widow Not Necessarily Wife at Time of Making Will.—Under a testamentary direction "that if either of testator's sons should die without leaving lawful issue, the widow of the decedent should receive one-third of the rents of the real estate devised to him by the will," it was held that the benefit of the provision not being restricted to a wife living at the time of the making of the will, or at the testator's death, the person who was the wife at the time of the son's death was entitled to the rents. *Swallow v. Swallow*, 27 N. J. Eq. 278. So in *Schettler v. Smith*, 41 N. Y. 328, the court held that the word "widow," as used in the will, plainly included any wife who might survive him.

But in *Van Brunt v. Van Brunt*, 111 N. Y. 178, affirming 48 Hun (N. Y.) 614, where the testatrix, at the time of the making of her will and at her death, had eight children, seven of whom were married and had issue, and she devised the residuum of her estate to her executors, in trust, to pay the income to her children in equal portions during their lives, and "after their deaths to their respective husbands or wives," and provided that if a child

WIFE—(See also **HUSBAND AND WIFE**, vol. 9, pp. 789, 790; **WIDOW**; **WILLS**).—The correlative of husband; a woman who is united to a man in the lawful bonds of wedlock.¹ The word wife has been held to include widow.²

A devise or bequest to the wife of the testator, or the wife of some other person, is held to be confined to the wife at the date of the will, if there be one at that time.³

should die without issue, "or without leaving a husband or wife," his or her share was to go to the survivors "after the decease or remarriage of said husband or wife," it was held that the husband or wife intended was one living at testatrix's death, and not one becoming such by a marriage thereafter, and that, therefore, the devise did not restrain alienation for more than two lives in being at the testatrix's death.

1. *Webst. Dict.*

In *People v. Hovey*, 5 Barb. (N. Y.) 118, the court said: "The terms husband and wife have a very definite and precise meaning. They are descriptive of persons who are connected together by the marriage tie, and are significant of those mutual rights and obligations which flow from the marriage contract. Until those obligations are assumed there is no wife, and the term is then applied, not merely to describe a woman who has been married, but as expressive of the relations existing between her and her husband. So long as that relation continues, she is properly a wife; when that ceases, the term is no longer applicable. The decree dissolves the marriage, and declares that each party is freed from its obligations. The marriage contract therefore is at an end; not only the complainant in the chancery suit but the defendant, also, is absolved from all the obligations arising out of that contract. The relation of the parties, consisting in their mutual rights and duties, no longer exists; and it would seem to follow that the words husband and wife, used to describe that relation, have ceased to be applicable. Certainly the former wife, as to whom the dissolution of the marriage is entirely unlimited, cannot be said after this decree to have had a husband living; for she might marry again, and thus, if that were so, have two lawful husbands at the same time. The husband and wife are correlative terms, so defined by lexicographers, which implies that whenever one can be properly applied,

there must be a person to whom the corresponding term is applicable. If, therefore, the defendant is no longer the husband of his former wife, then she is no longer his wife."

"Wife" in *Statutes Allowing Alimony*.—Where the words of the statute were "the wife may file her petition for alimony alone," it was held that the word "wife," as used, included a divorced woman. *Woods v. Waddles*, 44 Ohio St. 449; *McGill v. Deming*, 44 Ohio St. 645.

2. *Guardians, etc., of Reigate Union v. Guardians of Croyden*, 61 L. T. N. S. 733; *Medway v. Bedminster*, 53 J. P. 580.

3. *Garratt v. Niblock*, 1 Russ. & M. 629; *Bryan's Trust*, 2 Sim. N. S. 103.

In *Johnson v. Johnson*, 1 Tenn. Ch. 621, it was held that a devise by a husband to his "dear wife," not mentioning her name, applied exclusively to the individual who answers the description at the date of the will, and not to an after-taken wife. The Chancellor said: "The original intent of the testator, every one will concede at once, was to give the property devised to his then existing wife. The words 'my dear wife' point to a person then existing, the qualifying adjective necessarily implying affection for an individual. Such affection being, of course, inconceivable of a person not then occupying the designated relation. To substitute another object of the testator's bounty, would be to violate his intent and to make a will for him. In the absence of all authority, I should consider it too plain for argument that the will does effectually designate the wife existing at the date of the will as the object of the testator's bounty as if she had been mentioned by her Christian name."

In *Borcham v. Bagnall*, 8 Hare 131, a devise to the testator's wife and nephew and to the survivor, was held to apply exclusively to the wife living at the date of the will and death of the testator, and not to a subsequently married wife.

A divorced wife is not a wife, within a general bequest or limitation;¹ nor is a woman who through bigamy becomes a supposed wife.²

WILLFUL—(See also KNOW, vol. 12, p. 522, and references in note below).—"Willful is a word of familiar use in every branch of law, and although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or de-

"The distinctions upon the subject deducible from general principles, and the authorities just referred to, appear to be the following: First, that a devise or bequest to the wife of A, who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under all circumstances confined to her; but that, secondly, if A have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator; and, thirdly, if there be no such person either at the date of the will or at the death of the testator, it applies to the woman who shall first answer the description of wife, at any subsequent period." Jarm. on Wills (6th ed.), vol. 1, p. 303.

As Descriptive.—When the word wife is used as a mere word of description, the rights of the claimant are not affected by divorce. *Bullock v. Zilley*, 1 N. J. Eq. 492. So in *Anshutz v. Miller*, 81 Pa. St. 212, it was held that where an estate is given to a person described by relation either to the testator or other devisees, on a contingency which may or may not happen, and at the execution of the will there is a person to whom, upon the happening of the contingency, the description would apply, as a general rule such person is intended to be the devisee.

Son's Surviving Wife.—In *Re Lyne's Trust*, L. R., 8 Eq. Cas. 67, where a testator gave £500 to trustees to pay the dividends to his son for life, and after his decease to transfer the capital unto and equally between and amongst the wife of his son (in case she should survive him) and all and every the child and children of his son equally upon their attaining twenty-one, at which period the shares of such children were to be vested in them; and at the date of the will the son had a wife and one

child, but the wife died before the testator; and after the testator's death his son married again and died, leaving a widow, who now claimed to be entitled to a moiety of the fund equally with the only child of the son, it was held that the gift was to a class, consisting of all the children and any wife of the son who survived him. Sir R. Malins, V. C., said: "It is impossible to say what the testator would have done if he had been asked whether he intended any future wife to take. It is said that the intention was to benefit the wife of the son who was known to the testator, and not a stranger who was unknown to him; but, on the other hand, the children of the son who should come into *esse* after the death of the testator, and whom he could not know, were intended to take equally with the child whom he did know. Then the gift is to the children because they are the children of his son and his own grandchildren, and why should not the gift to the son's wife be equally a gift to her because she was the wife of his son, and because she might be the mother of those children who were to take? I think he meant to constitute a class—that is, children of his son and wife of his son, if a wife should survive him. The only condition is, that the wife should survive the son, and the class must be ascertained at one and the same time, which is the death of the son. Considering, therefore, that the second wife might have been the mother of the son's children who were to take, and that she would equally require a provision for her support, whether she was the wife existing at the date of his will, or a future wife, I think there is quite as much to be said in favor of the intention being to benefit a future wife as an existing wife."

1. *Hutchins v. Morrison*, 58 L. J. Ch. 80.

2. *Wilkinson v. Joughin*, 35 L. J. Ch. 684.

fault the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."¹

But in penal statutes, the word, as ordinarily used, means not merely voluntarily, but with a bad purpose.²

1. *In re Young*, 31 Ch. Div. 174; *State v. Clark*, 29 N. J. L. 98; *Highway Com'rs v. Ely*, 54 Mich. 181; *Newell v. Whittingham*, 58 Vt. 341.

In *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 204, the court said: "It is said by defendant's counsel that the word 'willfully' implies the idea of malice of a mild kind, an evil intent without excuse. Such may be its meaning in indictments and criminal statutes, but it is not to be so understood here. The word means 'obstinately, stubbornly; with design; with a set purpose,' and this definition must be applied to it where it occurs in the statute under consideration."

It is not error to instruct the jury that an act is willful when done with deliberation, and not through surprise or confusion, or a *bona fide* mistake. *People v. Sheldon*, 68 Cal. 434.

2. *Felton v. U. S.*, 96 U. S. 699; *North Carolina v. Vanderford*, 35 Fed. Rep. 287; *Com. v. Kneeland*, 20 Pick. (Mass.) 220; *Com. v. Bradford*, 9 Met. (Mass.) 270; *State v. Clark*, 29 N. J. L. 98; *Savage v. Tullar, Brayt. (Vt.)* 223; *State v. Preston*, 34 Wis. 675; *Chicago, etc., R. Co. v. Nash* (Ind. 1890), 24 N. E. Rep. 884; *Wales v. Miner*, 89 Ind. 118; *State v. Abram*, 10 Ala. 928; *McManus v. State*, 36 Ala. 285; *U. S. v. Three Railroad Cars*, 1 Abb. (U. S.) 196; *Yoakum v. State*, 21 Tex. App. 260; *Thomas v. State*, 14 Tex. App. 200.

A willful act is one committed with an evil intent, with a legal malice, without reasonable ground for believing the act to be lawful, and without legal justification. *Bowers v. State*, 24 Tex. App. 542; *Chicago, etc., R. Co. v. Nash* (Ind. 1890), 24 N. E. Rep. 884.

In *State v. Preston*, 34 Wis. 682, *Dixon, C. J.*, said: "This is an action to recover a penalty alleged to have been incurred by the defendant under section 101, ch. 19, Rev. Stat. (1 Tay. Stats., 508, § 137), which reads as follows: 'Whoever shall willfully obstruct any highway, or fill up, or place any obstruction in, any ditch constructed for draining the water from any highway,

shall forfeit for such offense a sum not exceeding twenty-five dollars; and the overseer of the proper district shall cause such obstruction immediately to be removed.' The principal question to be considered in the case is as to the meaning and effect of the word 'willfully' above used, and arises upon an offer of proof made by the defendant on the trial, which was rejected by the court. Having shown by the witness, one of the supervisors, that an application was made to the supervisors to take up the road in question, the defendant then offered to prove by him 'that the supervisors of the town of Koshkonong, in the year 1871, and prior to the alleged act of the defendant in obstructing this road, upon proper application made to them to take up and discontinue the same, upon due notice given, met to decide such application, viewed the premises in question and determined that there was no highway there, and so informed the defendant, and instructed him to place the fence where he did.' The offer was objected to by the plaintiff, and rejected by the court; and exception was taken by the defendant. The question thus presented might have been considered in other cases which have come before this court, and particularly in *State v. Hayden*, 32 Wis. 663, but as the point has never been taken, it has not hitherto been considered or decided. It is still an open question, and is now to be determined for the first time. For the plaintiff it is contended that the term willfully, as here used, signifies no more than voluntarily or purposely — thus distinguishing the act of obstructing made penal, from one which may be said to have been accidental, which last alone it was the design of the statute not to punish. The word willfully, as used to denote the intent with which an act is done, is undoubtedly susceptible of different shades of meaning or degrees of intensity according to the context and evident purpose of the writer. It is sometimes so modified and reduced

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as to mean little more than plain intentionally, or designedly. Such is not, however, its ordinary signification when used in criminal law and penal statutes. It is there most frequently understood not in so mild a sense, but as conveying the idea of legal malice in greater or less degree, that is, as implying an evil intent without justifiable excuse. 1 Bishop on Criminal Law, § 421. Thus, in *State v. Abram*, 10 Ala. 928, where the mutilation, by a slave, of any of the members of a white person, when 'willfully' committed, was declared by the statutes to be mayhem, and so punishable, it was held that a mutilation could not be regarded as willfully done, unless under the circumstances it could be considered as having been wantonly done, when it would be deemed willful within the meaning of the act. The court say 'that it was not intended by the term willful to exclude those acts only which were purely accidental and without blame of any kind.' In *McManus v. State*, 36 Ala. 285, speaking of the word willful as employed in statutory murder, the court say: 'Willful is not the synonym of voluntary. In truth, they express no idea which is common to both. The former is a word of much greater strength than the latter. Willful, in this connection, denotes "governed by the will; without yielding to reason; obstinate; stubborn; perverse; inflexible." Voluntary, in this connection means "willing; acting with willingness." It is the antithesis of involuntary.' And see also *Harrison v. State*, 37 Ala. 154, where the word willful, employed in a statute imposing a penalty for the disturbance of religious worship, was understood in a milder sense. And in *Com. v. Kneeland*, 20 Pick. (Mass.) 220, indictment under the statute against blasphemy, Chief Justice Shaw says: 'The statute makes it penal willfully to blaspheme the holy name of God, etc. The word "willfully" in the ordinary sense in which it is used in statutes, means not merely "voluntarily" but with a bad purpose, and in this statute must be construed to imply an intended design to calumniate and disparage the Supreme Being, and to destroy the veneration due to Him.' In *Com. v. Bradford*, 9 Met., (Mass.) 268, where the defendant was indicted on the statute for willfully giving in a vote at an election, knowing himself not to be a qualified voter, it was held that evidence that he had consulted

counsel as to his right to vote, and submitted to them the facts of his case, and was advised by them that he had the right, was admissible in his favor as tending to show that he did not know that he was not a qualified voter. But the fullest and most satisfactory discussion we have found in any case is in *U. S. v. Three Railroad Cars*, 1 Abb. (U. S.) 196, which arose in the district court of the *United States* for the northern district of *New York*. The question there was as to the proof necessary to authorize a conviction under a penal statute of the *United States* prescribing a punishment for 'willfully' removing an official seal from property which had been sealed up by officers of the customs; and the court decided that it must appear that the party not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removed such a seal in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, was held not liable to punishment under the statute, for the reason that he could not be deemed to have acted willfully. Speaking of the words knowingly, willfully and maliciously, as used in criminal and penal statutes, the court says: The first of these words does not, in common parlance, or in legal construction, necessarily and *per se*, imply a wicked purpose or perverse disposition, or indeed any evil or improper motive, intent or feeling; but the second is ordinarily used in a bad sense, to express something of that kind, or to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty.' Further citations might be made, but the foregoing are enough, we think, to justify the conclusion at which we have arrived, which is, that the evidence offered should have been received for the purpose of showing that the obstruction in question was not willful. Assuming the facts to have been as stated in the offer, it is clear that the defendant was not guilty of the offense charged, and for which a penalty has been assessed against him in this action. The word willfully, employed in the statute to characterize the offense, cannot be construed, as counsel for the plaintiff contends, so as to embrace an obstruction erected in the most perfect good faith by the landowner, believing

Definition.

that no highway existed at the place, and acting under the advice and direction of the proper public officers charged by law with the general supervision and control of all the roads and highways in the town." *Compare* *State v. Smith*, 52 Wis. 136.

Willful and Reckless Distinguished.

On a prosecution for disturbing religious worship (*Alabama Code*, § 4038), the evidence showing that the defendant, while under the influence of liquor, went into a church after the services had begun, talked loud enough to attract attention, used profane language, and said that he could pray as well as the preacher and would do it, a charge instructing the jury that they must find him not guilty, "if they believe from the evidence that what he said and did was said and done heedlessly, or recklessly—that is, carelessly, without thinking of the probable consequences"—is properly refused. *Johnson v. State*, 92 Ala. 82. The court in this case said: "Defendant requested the court to charge the jury, 'that if they believed from the evidence that what the defendant did and said in the church, on the night on which he is charged with having disturbed religious worship, was done and said heedlessly, or recklessly—that is, carelessly—without thinking of the probable consequences of what he said and did, they will find the defendant not guilty.' This charge was refused, and defendant excepted. We suspect this charge was asked on the supposed authority of *Harrison v. State*, 37 Ala. 154, and the note appended to section 4033 of the Code. This is a misapprehension of this court's ruling. The trial court, in that case, had instructed the jury that they could convict, if the disturbance was either willfully or recklessly done. This court ruled that the circuit court erred in giving that charge, because the statute punished only a willful disturbance. We drew a distinction between the words willful and reckless, and held that recklessness did not necessarily imply willfulness. A grossly careless act may be characterized as reckless, and serious consequences may result from it. Yet, such consequences would not necessarily be willfully brought about. We, in *Harrison's* case, simply asserted that the word reckless is not the synonym of the statutory word willful, and therefore, the circuit court erred in asserting disjunctively that it was enough if the

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disturbance was willfully or recklessly done. We decided that there might be recklessness without willfulness. We are now asked to declare that, if there is recklessness, there cannot be willfulness. We cannot assent to this. An act may be careless, heedless, rash, reckless, and still be willful."

Willful Distinguished from Malicious.

—In *Anderson v. How*, 116 N. Y. 336, the court said: "Bishop, in his work upon Criminal Law, says: '*A Massachusetts* case decides that the word "maliciously" in the statute against malicious mischief, is not sufficiently defined as "the willfully doing of any act prohibited by law, and for which the defendant has no lawful excuse," but it means more.' *Com. v. Walden*, 3 Cush. (Mass.) 558. The same author says: 'The words "willful" and "malicious" cover together a broader meaning than the word "willful" alone.' Section 429. "Willfully" sometimes means little more than plain "intentionally," or "designedly." Section 428. *Colt, J.*, in *Com. v. Williams*, 110 Mass. 401, in discussing the difference in the meaning of 'willful' and 'malicious,' says: 'The injury must not only be willful—that is, intentional and by design, as distinguished from that which is thoughtless or accidental, but it must, in addition, be malicious in the sense above given, that is, an act or injury done, either out of a spirit of wanton cruelty, or black or diabolical revenge.' Willfulness is implied in maliciousness, but maliciousness is not implied in willfulness. 'To make "willful" imply both a wrong and malice is to give to it a force and effect beyond what it will bear, or what can be maintained, either in common acceptance or its legal import.' *Com. v. Kneeland*, 20 Pick. (Mass.) 245." *State v. Massey*, 97 N. Car. 465.

In a prosecution for obstructing a street, the court instructed the jury that it was not necessary that they should find that the defendant or its employees acted maliciously, in order to find the defendant guilty, but that it was sufficient if the street was "willfully" obstructed; and that to act willfully means to act "intentionally or knowingly." This was held to be not objectionable when considered in connection with another portion of the charge, which expressly directed that to justify a conviction they must find that the obstruction complained of was

"unreasonable." *State v. Chicago*, etc., R. Co., 77 Iowa 442.

Malice Implies Willfulness.—See *MALICE*, vol. 14, p. 5; *MALICIOUSLY*, vol. 14, p. 8; *State v. Robbins*, 66 Me. 324.

Distinguished from Corruptly—*Perjury*.—An indictment for perjury under *United States Rev. Stat.*, § 5392, must allege, among other things, that the false oath was taken willfully, and an allegation that it was corruptly taken does not embrace the element of willfulness. *U. S. v. Edwards*, 43 Fed. Rep. 67. The court said: "To constitute perjury it is essential that the oath was administered in the manner prescribed by law, and by some person duly authorized to administer the same, in the matter wherein it was taken. The false statement must be material to the issue in the case in which it was made, and it must be willfully made. *U. S. v. Stanley*, 6 McLean (U. S.) 409. Perjury cannot be committed unless the person taking the oath not only swears to what is false or what he does not believe to be true, but does so willfully. *U. S. v. Dennee*, 3 Woods (U. S.) 39; *U. S. v. Evans*, 19 Fed. Rep. 912; 3 Greenl. Ev. (14th ed.), § 189; 2 Bish. Crim. Law (8th ed.), §§ 1017-1046; *U. S. v. Hearing*, 26 Fed. Rep. 744. Rash or reckless statements on oath are not perjury, but the oath must be willfully corrupt. Authorities *supra* and *U. S. v. Moore*, 2 Low. (U. S.) 232. The Revised Statutes of the *United States*, § 5392, under which this indictment is found, makes out of the essence of the offense of perjury that it be committed willfully. *U. S. v. Shellmire*, Baldw. (U. S.) 378. But it is contended by the district attorney that the word 'corruptly,' used in the indictment, is the equivalent of 'willfully.' The understanding of the court is that the two words have an entirely different meaning. 'Corruptly' means viciously, wickedly. 'Willfully' means with design, with some degree of deliberation. To say that testimony was corrupt is to say that it was wicked or vicious, whereas, to say that it was willful is to aver that it was given with some degree of deliberation; that it was not due to surprise, inadvertence, or mistake, but to design. The statute used the word 'willfully' and makes it of the essence of the offense; and the court is not persuaded that the averment that a false oath was corruptly taken is of the same import as the averment that it was

willfully taken. The court being of the opinion that willfulness is an essential ingredient for the offense of perjury, under section 5392, of the *United States Revised Statutes*, it must be charged in the indictment, or the indictment will be bad. The first count in the indictment under consideration does not aver with distinctness before what tribunal, officer, or person the oath was made, or by whom it was administered; and it fails to aver that the matter subscribed and stated by the defendant was so subscribed and stated by him willfully, and contrary to such oath. And the second count in the indictment also fails to aver that the defendant willfully, and contrary to the oath taken by him, stated and testified to matter which he did not believe to be true. The demurrers to the indictment on the grounds stated are well taken, and they are sustained."

In Indictment.—See *INDICTMENT*, vol. 10, p. 597-99.

Embezzlement—Willfully Misapplied.—See *EMBEZZLEMENT*, vol. 6, p. 4984.

Willful Negligence.—See *NEGLECT*, vol. 16, p. 394.

In the Law of Mayhem.—See *MAYHEM*, vol. 14, p. 995.

Willful Malpractice.—See *MALPRACTICE*, vol. 14, p. 77.

Unlawful Distinguished from Willful.

—Many of the statutes provide that if anyone "willfully" beats or kills (or the like) a dumb animal, he may be punished. When the word "willful" is thus used, it means more than its import in common parlance. It means with evil intent or legal malice, or without reasonable ground to believe the act to be lawful. Where such a statute is in force, it should be defined in instructions to the jury. *Thomas v. State*, 14 Tex. App. 200. But in such an instance it is error to say that the jury may convict if the killing or injury was "unlawful," for many acts are unlawful in a civil that are not so in a criminal sense. The court said: "The indictment sufficiently charges the offense of willfully and wantonly killing a dumb animal, but an inspection of the charge of the court reveals a fundamental error. The jury were instructed that if they believed that the defendant unlawfully killed the animal as charged, they should convict. The killing might have been unlawful, and yet not willful and wanton." *Jones v. State*, 9 Tex. App. 178. See also *UNLAWFULLY*, vol. 27, p. 696.

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- 34. *Executor's Trusts* (See *TRUSTS AND TRUSTEES*, vol. 27, p. 1), 515.

I. DEFINITION.—A “will,” “last will,” or more accurately, “last will and testament,” may be defined, in the present condition of the common and statute law, as the legal declaration of a man’s intention which he wills to be performed after his death, touching either the disposition of his property, the guardianship of his children, or the administration of his estate.¹

1. A will is defined by Blackstone to be “the legal declaration of a man’s intention which he wills to be performed after his death.” 2 Bl. Com. 499, cited with approval in *Colton v. Colton*, 127 U. S. 309; *Frew v. Clarke*, 80 Pa. St. 178. The characteristic features of this, as well as of the definition in the text, are, that the dec-

laration must be legal, *i. e.*, if oral it must be as prescribed by the rules regulating nuncupative wills, as to which see *NUNCUPATIVE WILLS*, vol. 16, p. 1006; and that if written it must conform to the requirements of the governing statute. Hence, it has been said that the word “will” has a technical meaning and implies an instrument

II. HISTORY AND ORIGIN.—The right of testamentary disposition, as an incident of the right of property, seems to have been recognized in some form or other, by almost all races who have

executed with prescribed formalities, to take effect after death, subject to alteration, cancellation, or revocation at the volition of the maker. See 1 Jarm. on Wills (5th ed.) 16, notes by Randolph & Talcott. See *infra*, this title, *What Constitutes a Will—Distinguishing Characteristics*.

A will has also been defined to be "any instrument whereby a person makes a disposition of his property to take effect after his death." *Cover v. Stem*, 67 Md. 449; *Carey v. Dennis*, 13 Md. 1.

This view is also adopted by Redfield, who says that testamentary power for all practical purposes is confined in most American states to the disposition of property and the accidental control of the donees, consequent upon the conditions and limitations annexed to the bequest. 1 Redf. on Wills (4th ed.) 5. Now while it is undoubtedly true that any instrument intended to dispose of the testator's property after death, provided the statutory formalities are observed, may operate as a will (Lawson's Rights, Remedies and Practice 3139, *citing* Wall v. Wall, 30 Miss. 91; 64 Am. Dec. 147; *Babb v. Harrison*, 9 Rich. Eq. (S. Car.) 111; 70 Am. Dec. 203), yet it seems clear that the term today applies equally to instruments framed exclusively with a view to appointing executors, leaving the property to pass under the Statute of Distributions as though no will had been made, *Schouler on Wills* (2d ed.), § 1, note 2; *Barber v. Barber*, 17 Hun (N. Y.) 72; *Miller v. Miller*, 32 La. Ann. 437; as well as to testamentary instruments appointing guardians. *Wardwell v. Wardwell*, 9 Allen (Mass.) 518; *Ex p. Ilchester*, 7 Ves. 367. Such also seems to be the meaning of the term under 1 Vict., ch. 26. See *Schouler on Wills* (2d ed.), § 8, note 3, and appendix.

Merely Disinheriting Son.—An instrument which appoints no executor, and merely excludes one of testator's sons from participation in the estate, without making any other disposition of the property, has been held not entitled to probate. *Coffman v. Coffman*, 85 Va. 459.

Informal Revocation.—It should also be observed that it has been held that

an informal writing, letter or memorandum, which merely revokes a former testamentary disposition, is not entitled to probate. *Goods of Fraser*, L. R., 2 P. & M. 40. But compare *Goods of Hicks*, L. R., 1 P. & M. 683; *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Goods of Durance*, L. R., 2 P. & M. 406; *Brenchley v. Still*, 2 Rob. 162.

On the other hand, a codicil not containing any disposition of property has been held entitled to probate. *Brenchley v. Still*, 2 Rob. 162.

Synonymy of "Will," "Testament," "Last Will and Testament."—At the present day these terms are practically synonymous. *Schouler on Wills* (2d ed.), § 2.

Distinction Between "Testament" and "Devise."—"Testament" has sometimes been confined to dispositions of personalty by will; while "devise" has been the attributed denomination of similar dispositions of realty. This distinction, however, might now be ignored, without serious lack of precision. See 4 Kent's Com. (13th ed.) 501; Redf. on Wills (4th ed.), p. 6.

"Will" Includes "Codicils."—The word "will," in modern legislation, includes codicils as the generic term, the specific and statutory provisions in regard to the mode of executing wills, and personal capacity of testator, apply to codicils. *Schouler on Wills* (2d ed.), § 8; *Bayley v. Bailey*, 5 Cush. (Mass.) 245; *Deering's Pol. Code Cal.*, § 17, p. 5; *California Civ. Code*, § 14, p. 5.

Second Will Destroyed by Mistake.—Where the subsequent will is destroyed under a mistaken impression that the former will is thereby revived, it would seem that the contents of the second will might be proved, and as proved have effect. *Powell v. Powell*, L. R., 1 P. & M. 209; *Brown v. Brown*, 8 El. & Bl. 876; *Wood v. Wood*, L. R., 1 P. & M. 309.

It is held that the contents of such will, destroyed under the misconception that a former will is revived by the act of destruction, as established by evidence, must show clearly that the first will was thereby revoked. See *Cutto v. Gilbert*, 9 Moo. P. C. C. 131. This seems slightly inconsistent with the principle of "intent."

advanced above the savage stage of development.¹ In *England*, the right of bequeathing chattels, real and personal, seems to have existed from the earliest times,² although the power, unless the testator died without either wife or issue, was subject to their right to "reasonable parts;" for by the common law, as it stood according to Glanvil in the reign of Henry II., a man's goods were divided into three equal parts; one of which went to his issue or lineal descendants, another to his wife, and the third was at his own disposal; if he died without a wife he might then dispose of one moiety and the other went to his children, and so *e converso*; if he had no children, the wife was entitled to one moiety and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and issue were called "reasonable parts," and the writ *de rationabili parte bonorum* was given to recover them from the executors.³ Early legislation led gradually to the abolition of the doctrine of reasonable parts in various countries,⁴ until finally the Statute of 1 Vict., ch. 26 (A. D. 1837), removed all restraints from the testamentary disposition of personalty.⁵

After the introduction of feuds into *England*, and prior to the passage of the Statute of Wills, 32 Hen. VIII., there was no power, but in a few exceptional cases, to devise real estate save through the medium of a devise to uses enforced in chancery,⁶ and hence when the Statute of Uses was passed, 27 Hen. VIII., ch. 10, which converted all uses into legal estates, real estate became again incapable of being devised. To remedy this the Statute of Wills, 32 Hen. VIII., ch. 1 (explained by 32 Hen. VIII., ch. 5),

1. See Schouler on Wills (2d ed.), §§ 12, 13.

2. 2 Bl. Com. 491.

3. 1 Wm. on Exrs. (9th ed.) 2; 2 Bl. Com. 491, 492; Schouler on Wills (2d ed.), § 14.

"It must indeed be remarked that there has been a controversy whether this was the general law of the land, or only such as obtained by custom in particular places. Fitzherbert, in his commentary on the writ *de rationabili parte bonorum*, contends that the distribution, which excludes the testamentary power from a certain portion of the personal estate, was in his time the common law of the land, and therefore needed not a special custom to support it. Co. Litt. 176 b, note (6), by Hargrave. And Mr. Justice Blackstone, 2 Bl. Com. 492, expresses a strong opinion to the same effect, citing Glanvil, Bracton, Magna Charta, the Year Books, and a passage from Sir Henry Finch; the last of which authorities expressly lays it down, in the reign of

Charles I., to be the general law of the land. But, on the other hand, Lord Coke says that it appears by the Register, and many of our books, that there must be a custom, alleged in some county, etc., to entitle the wife and children to the writ *de rationabili parte bonorum*, and that so it had been resolved in Parliament." 1 Wms. on Exrs. (8th ed.), bk. 1, ch. 1.

4. 2 Bl. Com. 492, 493.

5. "And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator." 1 Vict., ch. 26.

6. REMAINDERS, vol. 20, p. 908.

was passed, which enabled a testator to devise all his lands held in free and common socage and two-thirds of that held in Knight's Service; and by the passage of Statute 12 Car. 2, ch. 24, which converted nearly all lands into free and common socage tenure, lands held in Knight's Service became devisable without restriction.¹

In the *United States*, as neither feudal tenure nor the doctrine of reasonable parts has ever distinctly obtained, the rule is that one may dispose of all his real and personal property by will duly executed with prescribed formalities.²

III. BY WHAT LAW REGULATED.—See CONFLICT OF LAWS, vol. 3, p. 630.

IV. CLASSIFICATION.—All testamentary dispositions may be classified as follows:

1. **Written Testaments or Ordinary Wills.**—These present the characteristics of the above definition and no others.

2. **Nuncupative Wills.**—See NUNCUPATIVE WILLS, vol. 16, p. 1006.

3. **Mystic Testaments.**—A mystic testament consists of a written testament inclosed and sealed in the presence of witnesses. Under the law of *Louisiana*, much of which is derived from the civil law from French and Spanish sources, such instruments have peculiar efficacy.³

4. **Holographic or Olographic Testaments.**—A holographic or olographic will is one written, dated, and signed entirely by the testator's own hand, and, for this reason, certain formalities which must attend the execution of a will not so prepared, the chief of which is attestation by witness, are dispensed with.⁴ The attes-

1. Bl. Com. 152; Schouler on Wills (2d ed.), § 15.

2. Schouler on Wills (2d ed.), § 16.

3. The following are the provisions of the *Louisiana Civil Code* on the subject. "The mystic or secret testament, otherwise called the close testament, is made in the following manner: The testator must sign his dispositions, whether he has written them himself, or has caused them to be written by another person. The paper containing these dispositions, or the paper serving as their envelope, must be closed and sealed. The testator shall present it thus closed and sealed to the notary and to seven witnesses, or he shall cause it to be closed and sealed in their presence; then he shall declare to the notary in the presence of the witnesses that that paper contains his testament written by himself, or by another by his direction, and signed by him, the testator. The notary shall then draw up the act of superscription, which shall be written on that paper, or on

the sheet that serves as its envelope, and that act shall be signed by the testator and by the notary and the witnesses. All that is above prescribed shall be done without interruption or turning aside to other acts; and in case the testator, by reason of any hindrance that has happened since the signing of the testament, cannot sign the act of superscription, mention shall be made of the declaration made by him thereof, without its being necessary in that case to increase the number of witnesses. Those who know not how or are not able to write, and those who know not how, or are not able to sign their names, cannot make dispositions in the form of the mystic will. If any one of the witnesses to the act of superscription knows not how to sign, express mention shall be made thereof. In all cases the act must be signed by at least two witnesses." *Louisiana Civ. Code*, art. 1584-1588.

4. 2 Bouv. Law Dict. "Testament" (15th ed.) 722; *Louisiana Civ. Code*,

art. 1581, 1588; 4 Kent's Com. (13th ed) 519, 520; Williams v. Hardy, 15 La. Ann. 286. See Wilbourn v. Shell, 59 Miss. 205; 42 Am. Rep. 363; *In re Soher's Estate*, 78 Cal. 477; Toebbe v. Williams, 80 Ky. 664.

Instance of Document Held to Be a Holographic Will.—The following document, written, signed, and dated, in the hand of J. M., was held to be valid as his holographic will, or as a codicil thereto: "\$100,000. New Orleans, Jan. 25, 1848. Four years from and after my death, I hereby authorize and direct (and will) my executors to pay unto F. one hundred thousand dollars. John McDonogh." *Pena v. New Orleans*, 13 La. Ann. 86; 71 Am. Dec. 506.

Instances of Documents Held Not to Be Holographic Wills.—A decedent had two drawers, in one of which he kept his notes, deeds, and other valuable papers, carefully arranged, together with his money and other valuable effects; and in the other he kept some papers of little value, carelessly deposited with some effects of very small value. It was held that a holograph script, found in the latter place, could not be proved as a will, under the statute, for the articles found with the script could not justly be called "the valuable papers or effects" of the decedent. *Little v. Lockman*, 4 Jones (N. Car.) 494.

An instrument in the handwriting of a decedent, written on a sheet of letter paper, the body of the writing commencing with the decedent's name on the first page and ending about the middle of the next, the paper being folded so that the third page was outside, with the words "I's will" indorsed on the back, at about the middle of the third page when the paper was unfolded, in the handwriting of the deceased, with the name of the deceased not signed at the end of the writing, but with a date attached, and after the date a clause appointing an executor, the instrument not professing to dispose of the entire estate of the decedent, is not a good holographic will, and cannot be admitted to probate. *Roy v. Roy*, 16 Gratt. (Va.) 418; 84 Am. Dec. 696.

A written document providing that "this is to serifye that ie levet to mey wife Real and persnal and she to dispose for them as she wis" is properly construed as if it read: This is to certify that I leave to my wife real and personal property, and she to dispose of them as she wishes; and as thus read

shows a testamentary intent, and such document, if wholly written, dated, and signed by the testator, is entitled to probate as an olographic will. *Mitchell v. Donohue*, 100 Cal. 202.

Presumption Against Document's Being a Holographic Will.—In *Crutcher v. Crutcher*, 11 Humph. (Tenn.) 377, it is held that the Act of 1784, ch. 10, providing that when any will may be found amongst the valuable papers or effects of a person deceased, and it shall be in the handwriting of such person, and his name subscribed thereto, or inserted in some part of such will, it shall be sufficient to convey an estate in lands, prescribes a special case, which, being complied with, will make a will valid without a signature or attesting witnesses, so far as authentication is concerned; that the mode of authentication being complied with, the question arises whether the paper propounded was intended by the party to be his will; and the absence of the testator's signature, or if there is an attesting clause, and no attesting witnesses, if it does not contain a disposition of all the estate of the party, or if he made from time to time alterations without appointing executors or coming to a conclusion, or if the paper appears in the form of loose memoranda or notes, a presumption arises from any of these circumstances that the writer did not intend the paper to be and operate as his last will; but such presumption may be removed by satisfactory proof.

In *Virginia*, *West Virginia*, *North Carolina*, *Kentucky*, *Tennessee*, *Arkansas*, *Texas*, *California*, *Dakota*, *Montana*, *Utah*, and *Mississippi*, a holographic will, wholly written and subscribed by testator, need not be attested by witnesses. *Virginia Code* (1873), ch. 118, § 4; *West Virginia Laws* (1882), ch. 84, § 3; *North Carolina Code* (1883), § 2136; *Kentucky Gen. Stat.* (1883), ch. 113, § 5; *Baker v. Dobyns*, 4 Dana (Ky.) 220; *Tennessee Code* (1884), § 3004; *Arkansas Gen. Stat.* (1884), § 6492; *Texas Rev. Stat.* (1879), §§ 1847, 4859, 4860; *California Civ. Code*, § 6277; *Dakota Prob. Code*, § 21, Civ. Code, § 691; *Montana Prob. Code*, § 439; *Mississippi Code* (1880), § 1262; *Idaho Rev. Stat.* (1887), § 5728; *Arizona Rev. Stat.* (1887), §§ 3234, 3235.

Requisites of Holographic Will.—In *North Carolina* and *Tennessee*, the will is not good unless the name of the testator is subscribed or inserted, and the instrument found among valuable

tation of subscribing witnesses at the bottom, however, does not mar it, as their signatures form no part of the will.¹ For the same reason an unsigned attestation clause may be disregarded.² The name of the testator at the commencement of the paper has been held an equivocal act, and insufficient as a signature, unless it appears affirmatively from something on the face of the paper that it was so meant,³ nor is the fact that the paper is indorsed in the testator's handwriting as his will—as "Roy's Will," that being the testator's name—sufficient.⁴ A will consisting of a printed form, with the blanks filled in with the testator's handwriting, has been held not a holographic will and no part of it good.⁵ The

papers or effects of the deceased, or lodged in the house of another for safe keeping. *North Carolina Code* (1883), § 2136; *Tennessee Code* (1884), § 3004. See *Sawyer v. Sawyer*, 7 Jones (N. Car.) 134; *Hughes v. Smith*, 64 N. Car. 493; *Hill v. Bell, Phill.* (N. Car.) 122; 93 Am. Dec. 583; *Winstead v. Bowman*, 68 N. Car. 170; *Marr v. Marr*, 2 Head. (Tenn.) 303; *Hooper v. McQuary*, 5 Coldw. (Tenn.) 136.

Proof of Testator's Chirography.—In *North Carolina, Tennessee, and Arkansas*, the handwriting must be proved to be that of the testator by three credible witnesses who believe such will and every part of it, to be in his handwriting. *North Carolina Code* (1883), § 2136; *Tennessee Code* (1884), § 3004. See *Outlaw v. Hurdle*, 1 Jones (N. Car.) 150.

In *Texas*, two are enough. *Texas Rev. Stat.*, §§ 1847, 4859, 4860.

Revoking Power.—*Arkansas*.—In this state it is provided that no holographic will is good, in bar of a will in ordinary form; that is, a will executed and attested as prescribed. *Arkansas Dig.* (1884), § 6492. See *Rogers v. Diamond*, 13 Ark. 474; *Abraham v. Wilkins*, 17 Ark. 292; *Vines v. Clingfoot*, 21 Ark. 309; *Ex p. Horner*, 27 Ark. 443.

In other states such wills may be proved in the same manner as other private writings. *Montana Probate Code*, § 19; *Idaho Rev. Stat.* (1887), § 5728; *Arizona Rev. Stat.* (1887), § 979.

In *California and Idaho*, such will may be made either in or out of the state. *California Civ. Code*, § 6277; *Idaho Rev. Stat.* (1887), § 5728.

It has been held in *Louisiana* that a person who is blind may make a valid olographic testament. *State v. Martin*, 2 La. Ann. 667.

1. 4 Kent's Com. (13th ed.) 519, 520;

Andrews v. Andrews, 12 Martin (La.) 713; *Knight v. Smith*, 3 Martin (La.) 163; *Langley v. Langley*, 12 La. 114; *Brown v. Beaver*, 3 Jones (N. Car.) 516; 67 Am. Dec. 255; *Roth's Succession*, 31 La. Ann. 315. See *In re Soher's Estate*, 78 Cal. 477; *Perkins v. Jones*, 84 Va. 358.

2. *Hill v. Bell, Phill.* (N. Car.) 122; 93 Am. Dec. 583; *Guthrie v. Owen*, 36 Am. Dec. 318, n. See *Allen v. Jeter*, 6 Lea (Tenn.) 672.

3. **Position of Testator's Name.**—*Ramsey v. Ramsey*, 13 Gratt. (Va.) 664; 70 Am. Dec. 438; *Roy v. Roy*, 16 Gratt. (Va.) 418; 84 Am. Dec. 696. But see *Johnson's Estate*, Myr. Prob. (Cal.) 5.

Thus in *Ramsey v. Ramsey*, 13 Gratt. (Va.) 664; 70 Am. Dec. 438, where a holograph will commenced "I, Thomas Ramsey, of Charlotte, do hereby make my last will and testament in manner and form following," but the testator's signature did not appear elsewhere, the court in refusing probate used much the same language as appears in the text.

In *North Carolina and Tennessee*, the name may be either subscribed or inserted. *North Carolina Code* (1883), § 2136; *Tennessee Code* (1884), § 3004; *Tate v. Tate*, 11 Humph. (Tenn.) 465.

Position of Date.—The date may be placed below the signature. *Succession of Fuqua*, 27 La. Ann. 273.

The date may, in the absence of any designation by law of the particular place in which it is to be put on a holographic will, be placed at the head or foot, or in the body of the instrument. *Zerega v. Percival*, 46 La. Ann. 590.

4. *Roy v. Roy*, 16 Gratt. (Va.) 418; 84 Am. Dec. 696; *Plumstead's Appeal*, 4 S. & R. (Pa.) 545.

5. *In re Rand's Estate*, 61 Cal. 468; 44 Am. Rep. 555; *In re Billing's Estate*, 64 Cal. 427.

date is an important part of every holographic will and consists of the year, month, and day, the omission of any one of which is fatal.¹

5. Contingent Wills.—A contingent or conditional will is one so drawn as to become operative only upon the happening or not happening, or upon the existence or non-existence, of a certain set of circumstances during a certain period of time, so that if the contingency fails or occurs the will is or is not entitled to probate as the case may be.² But there are two points to be settled before any will can be refused probate upon the ground that it is

In *McMichael v. Bankston*, 24 La. Ann. 451; however, an holographic will in which two words appeared not to be in the testator's handwriting, was sustained on the ground that their presence or absence could have no material effect upon its meaning.

Olographic Will in Pencil.—It was held in *Philbrick v. Spangler*, 15 La. Ann. 46, that an olographic will in pencil is valid.

1. *Fuentes v. Gaines*, 25 La. Ann. 85; *In re Martin's Estate*, 58 Cal. 530. See *Clarke v. Ransom*, 50 Cal. 595; *In re Billing's Estate*, 64 Cal. 427. But see *Clark's Succession*, 11 La. Ann. 125; *Gaines v. Lizardi*, 3 Woods (U. S.) 77.

Where an olographic will was dated at the commencement, and, after making various dispositions, was signed by the testator, and he subsequently added another clause and again signed it, the instrument appearing to be congruous and continuous, it will be presumed, in the absence of proof to the contrary, that it was finished at one time, and is clothed with the forms required for its validity. *Lagrange v. Merle*, 5 La. Ann. 278; 52 Am. Dec. 589.

2. 1 Jarm. on Wills (5th Am. ed.) 17; *Theobald on Wills* (2d ed.) 11; *Redf. on Wills* (4th ed.) 177; *Schouler on Wills* (2d ed.) 285; *Lugg v. Lugg*, 2 Salk. 592; S. C., 1 Ld. Raym. 441; *Parsons v. Lanoe*, 1 Ves. 190; *Sinclair v. Hone*, 6 Ves. 607; *Roberts v. Roberts*, 2 S. & T. 337; *In re Porter*, L. R., 2 P. & M. 22; *In re Robinson*, L. R., 2 P. & M. 171; *Lindsay v. Lindsay*, L. R., 2 P. & M. 459; *In re Thorne*, 4 S. & T. 36; *Tarver v. Tarver*, 9 Pet. (U. S.) 174; *Damon v. Damon*, 8 Allen (Mass.), 192; *Ex p. Lindsay*, 2 Bradf. (N. Y.) 204; *Thompson v. Connor*, 3 Bradf. (N. Y.) 366; *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159; *Turner v. Scott*, 51 Pa. St. 126; *Todd's Will*, 2 W. & S. (Pa.) 145; *Wagner v. M'Don-*

ald, 2 Har. & J. (Md.) 346; *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101. See also *Dougherty v. Dougherty*, 4 Metc. (Ky.) 25; *Jacks v. Henderson*, 1 De-saus. (S. Car.) 543.

In *Todd's Will*, 2 W. & S. (Pa.) 145, it appeared that the testator, in contemplation of a journey, began an informal testamentary paper thus: "My wish, desire, and intention now is, that if I should not return (which I will, no preventing Providence) what I own shall be divided as follows," etc. It was held in this case that an instrument limited by a condition as to its operation could not be admitted to probate as a will, after the failure of the contingency on the happening of which it was to take effect, and hence that where the testator returned from his journey (no Providence preventing) and subsequently died, that the instrument should not be admitted to probate.

An absent husband wrote to his wife expressing uncertainty as to whether he should survive the dangers of his journey, concluding: "If I never get back home, I leave you everything I have in the world. The property I got by my first wife, I wish you to return everything to her father." It was held that this was a contingent will, which would become a will by the happening of the condition, but that, in the entire failure of such condition, the document would never become a will. *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101.

A paper was exhibited for record as the last will of C. W., proved to have been signed by him at a time when he was about to leave the state of his residence. It was written somewhat in the form of a letter and said: "If I should not come to you again, my son M. shall pay, etc." Evidence was given that C. W. went to *Kentucky* and re-

contingent or conditional and the condition has failed: First, whether the contingency is referred to as the occasion of making the will or as the condition upon which the instrument is to become operative,¹ or in other words, whether the intention of the testator is to make the validity of the will dependent upon the condition, or merely to state the circumstances and inducements which led him to make a testamentary provision;² and secondly, if the language clearly imports a condition, whether it applies to

turned, and that he lived for several weeks thereafter. The writing was refused probate. *Wagner v. McDonald*, 2 Har. & J. (Md.) 346.

Will Operating as Escrow.—In *Sewell v. Slingluff*, 57 Md. 538, evidence of the alleged parol declarations of the testatrix at the time of the execution of her will, that it should become inoperative on the happening of certain events, was held inadmissible. The court observed that the reasons which apply to other instruments as escrows, had no applicability to wills.

1 Redf. on Wills (4th ed.) 177; *Likefield v. Likefield*, 82 Ky. 591; 56 Am. Rep. 908; *Tarver v. Tarver*, 9 Pet. (U. S.) 174; *Damon v. Damon*, 8 Allen (Mass.) 192.

2 Hoar, J., in *Damon v. Damon*, 8 Allen (Mass.) 194; *French v. French*, 14 W. Va. 458; *Kelleher v. Kernan*, 60 Md. 440; *In re Barton's Estate*, 52 Cal. 538. Thus if the testator makes his will conditional upon his death during a particular period which he survives, the will does not take effect. *In re Porter*, L. R., 2 P. & M. 22; *In re Robinson*, 2 P. & M. 171; *Lindsay v. Lindsay*, L. R., 2 P. & M. 459. See *In re Thorne*, 4 S. & T. 36; 34 L. J. P. 131.

"On the other hand, if the possibility of death during a particular period is given as the reason or motive why the testator makes his will, it is not contingent upon the happening of the death during that period. *In re Dobson*, L. R., 1 P. & M. 88; *In re Martin*, L. R., 1 P. & M. 380; *In re Mayd*, 29 W. R. 214." *Theobald on Wills* (2d ed.) 11, 12.

Language Merely Expressive of Circumstances Under Which Will Was Made.

—The following expressions have been held merely expressive of the circumstances under which the will was made, and not conditional: "In the event of my death whilst serving in this horrid climate, or any accident happening to me." *In re Thorne*, 4 S. & T. 36. "In case of any fatal accident happening to

me, being about to travel by railway, I hereby leave." *In re Dobson*, L. R., 1 P. & M. 88. "In case of my death on the way." *In re Mayd*, 6 Prob. Div. 17. "Being about to take a long journey, and knowing the uncertainty of life." *Tarver v. Tarver*, 9 Pet. (U. S.) 174. "To provide for possible contingencies." *Kelleher v. Kernan*, 60 Md. 440. "Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath," etc. *French v. French*, 14 W. Va. 458. "According to my present intention, should anything happen to me before I reach my friends in St. Louis." *Ex p. Lindsay*, 2 Bradf. (N. Y.) 204. So, also, where the will began: "Being physically weak in health, have obtained permission to cease from all duty for a few days, etc.," and then proceeded, "and in the event of my death occurring during such time, I do hereby will and bequeath." *Goods of Martin*, L. R., 1 P. & M. 380.

Language Importing a Condition.—The following expressions have been held to create a condition upon the failure of which the will is not entitled to probate: Where a mariner heads his will with the caption, "Instructions to be followed if I die at sea or abroad," *Lindsay v. Lindsay*, L. R., 2 P. & M. 459; or where one writes, "If I die before my return from *Ireland*," see *Parsons v. Lanoe*, 1 Ves. 189; or, "If I never get back home, I leave you everything I have in the world." *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101.

So in *Kentucky*, where a will devising real estate read: "As I intend starting in a few days for the State of *Missouri*, and should anything happen that I should not return alive, my wish is," etc. *Dougherty v. Dougherty*, 4 Metc. (Ky.) 25.

And in *Missouri*, where the will read: "I this day start for *Kentucky*; I may never get back. If it should be my misfortune, I give my property, etc." *Robnett v. Ashlock*, 49 Mo. 171.

and affects the whole will or only some of its provisions.¹ The tendency of the later and better considered cases is to construe the language, if possible, as merely setting forth the circumstances which induced the testator to make a testamentary provision, rather than as creating a condition upon which alone it is to become operative,² and even where the language clearly imports a condition, the tendency is to restrain its operation to particular provisions, rather than to allow it to affect the entire instrument.³

In both instances the testator survived the journey between the two states and his will failed in consequence.

Again, where the will began: "I am going to town with my drill, and am not feeling good, and in case I should not get back, do as I say on this paper," and the testator went to town, became very ill there but was brought home, where he soon died of the same illness, it was held that the paper could not be admitted to probate. *Morrow's Appeal*, 116 Pa. St. 440. See further *Broadus v. Rosson*, 3 Leigh (Va.) 12; *Wagner v. M'Donald*, 2 Har. & J. (Md.) 346; *French v. French*, 14 W. Va. 458, and cases cited.

1. *Damon v. Damon*, 8 Allen (Mass.) 194; *Ex p. Lindsay*, 2 Bradf. (N. Y.) 204.

2. *Strauss v. Schmidt*, 3 Ph. 209; *Ex p. Lindsay*, 2 Bradf. (N. Y.) 206; *French v. French*, 14 W. Va. 458; *Kelleher v. Kernan*, 60 Md. 440; *In re Barton's Estate*, 52 Cal. 538. See cases collected in two preceding notes.

Probate of Will Doubtful in Terms—Subsequent Construction.—In *Ex p. Lindsay*, 2 Bradf. (N. Y.) 209, the court said: "If the will be admitted to probate, it will still remain a matter of construction whether the bequests are made dependent upon a condition or contingency. If it be denied probate, that question cannot be brought before a court of construction. If, therefore, in a case of this kind, there be room for reasonable doubt as to the contingent character of the instrument, if there are not clear and unquestionable terms of contingency, the probate judge is justified in a sentence of probate on the formal proof, so as to leave the determination of its conditional nature for subsequent construction and interpretation. In this instance, to say the least, there is room for reasonable doubt. The words 'According to my present intention, should anything happen to me before I reach

my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars in the hands of Mr. Harrison.' may express rather the occasion of making the instrument than a clear condition on which the disposition was to take effect. She does not say that she gives only in case anything should happen, but expresses a general desire to make 'a correct disposal' of her property, naturally introducing the reason or motive operating. The term 'should' in this connection, does not necessarily import condition or contingency as to the subject-matter of the instrument, but may have been designed to express the idea that lest or for fear 'anything should happen,' etc., she proposed to make a will. It is used by way of introduction, and not in the clause of gift. The will is inartificially drawn; and where language is employed without exactness or precision, close and literal interpretation may very easily carry us wide of the intention. I am, therefore, of opinion that the will should be admitted to proof, and its construction be left for future consideration."

3. *Schouler on Wills* (2d ed.), §§ 285, 286; *Damon v. Damon*, 8 Allen (Mass.) 192; *Ex p. Lindsay*, 2 Bradf. (N. Y.) 204.

Condition Restricted to a Portion Only.

—In *Damon v. Damon*, 8 Allen (Mass.) 192, a testator commenced his will as follows: "I, J. W. Damon, being about to go to Cuba, and knowing the danger of voyages, do make this as my last will and testament, in manner and form following: "First, if by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife," etc., and afterwards gave independent bequests, and spoke of the instrument as his last will and testament. He made the voyage and returned in safety, and afterward died. It was held that the will should be admitted to probate, the court, by Hoar, J., who said: "There seems to be no

reason upon principle why an instrument cannot be made which is to take effect as a will only on the happening of a contingency named in it. As every devise or legacy, and the appointment of an executor may be made conditional, if the same condition applies to all, it may be as well annexed to the entire instrument as to a single provision; and the happening of the condition can then be ascertained when the will is offered for probate. And so it has been held in various cases which have been cited at the bar. . . . We are unable to see that, on any sound principle of construction, the language used in this will can be taken to express merely the cause and inducement of making it. The introductory clause is complete in itself, in a form quite common, and states distinctly the motive of the testator in making the will. 'I, J. W. Damon, of . . . being in sound mind and body, and being about to go to *Cuba*, and knowing the dangers of voyages, do hereby make this as my last will and testament, in manner and form following.' So far, what is said applies to the whole instrument. Then come the particular dispositions: 'First, If by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife Ann,' etc. The condition is thus grammatically, and according to the common use of phraseology, attached to and qualifies the particular bequest. He gives a certain piece of property to his wife, if he loses his life during the voyage. There is no gift to her without that qualification. Suppose any other condition had been expressed—'If I die before I reach a certain age,' or 'before a certain house is finished,' or 'if the legatee survives A;,' could it be doubted that it would make the bequest conditional? The word 'first,' preceding the condition and the gift, has a tendency to show that the testator is expressing a particular qualification and not a general purpose. To change the word 'if' into 'lest' would be to make a change in the meaning on grounds purely conjectural. The other reasons urged for the opinion that the whole will was made 'lest the testator should die during the voyage,' namely, the appointment of his wife as accountant to settle his affairs in *Cuba*, 'and all other places where I may have business at the time of my decease,' he having no business elsewhere than in *Cuba* and Charlestown when the will

was made, and the repetition of the phrase 'this my last will and testament,' whatever weight might be given to them if the sole question were whether the whole will must fail if he accomplished the voyage in safety, are deprived of all force if the condition affects but a single clause.

"And upon the second question proposed, we are of opinion that the condition does not affect any other than the first clause of the will, and that the will is therefore entitled to probate, having been duly executed.

"The case most nearly analogous, to be found among the adjudged cases, is that of *Parsons v. Lanoe*, cited from 1 Ves. 189, but also to be found in *Ambl. 557*. Each of these reports is apparently imperfect and fragmentary; but, by taking both, a pretty correct idea of the case can be obtained. The report in *Ambler* is the best, so far as it gives the will itself more at length; and some of the expressions attributed to Lord Hardwicke in *Vesey*, to which it is hard to give a sensible meaning, are not found in it. As there recited, the will began thus: 'I, Charles De Lanoe, of . . . do make and appoint this to be my last will and testament, in manner following: *i.e. Impri-mis*. In case I should die before I return from the journey I intend, God willing, shortly to undertake for *Ireland*, my will and desire is, that my house and lands at Farley Hill . . . be all sold,' etc. Each subsequent clause containing a bequest referred expressly to this sale, and provided for a payment out of it; the final bequest being of the residue of the money arising from the sale, with all the remainder of his estate, real and personal, to his wife, whom he appointed executrix. The suit was a bill in equity for the payment of one of the legacies, and to procure a sale of the real estate for that purpose. The testator was childless when the will was made, and returned from *Ireland*, and had children born to him afterward. According to the report in *Ambler*, Lord Hardwicke decided that the condition was not so inserted as in express terms to make the whole will conditional; but that beyond all controversy it made the devise as to the sale conditional; and that all the subsequent dispositions were made to depend upon the sale, and so were connected with the condition. He did not advert to the appointment of an

If, however, the testator has married since the will was made, or has had children born thereafter, for whom the will makes no provision, the rule of construction is reversed in equity and any words are laid hold of which will make the instrument contingent and conditional.¹ The better opinion seems to be that parol evidence that the testator has recognized the will as valid and subsisting after the condition has failed, should be excluded unless the act of recognition amounts to a re-execution or republication within the meaning of the Statute of Wills.² But when a will written as

executrix; and all that was essential to the decision was, that the legacy to the plaintiff was upon a condition which had failed. He proceeded to discuss the effect of the birth of the children as a revocation of the will, but gave no opinion upon it, though intimating some views of his own respecting it. And it is manifest from the context that the remark which Vesey attributes to him, that his conclusion on the second question 'greatly strengthens the construction upon the first,' was misunderstood by the reporter; and that he could have only referred to the satisfaction which the court felt in coming to the decision which was made upon the construction of the will, in view of the result which a different decision would have caused, by disinheriting the children. Lord Hardwicke further held that no collateral proof of declarations of the testator respecting the will, not amounting to a republication, were admissible to control the effect of the condition.

"In the case at bar, the condition stands very much as in *Parsons v. Lanoe*, Ambl. 557. But the second and third clauses in the will are entirely independent of the first, and do not refer to it in any manner. They contain distinct legacies to collateral relatives. The will does not purport to make any disposition of personal property, unless the property referred to 'on the island of Cuba' may be construed as including some.

"The cases cited at the argument, with the exception of *Parsons v. Lanoe*, Ambl. 557, afford but little aid in coming to the decision at which we have arrived, and are chiefly valuable as showing that courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed. But no authority has been found

which would justify us in rejecting this will as wholly conditional."

R resided and owned some estate in A county, *Kentucky*. While on a visit to *Missouri* he made a will, a portion of which was as follows: "It is my wish that all the notes and accounts found among my papers (*vs.*) my brothers, should be destroyed or handed over to them. Should I never return, I also desire that each of them should have two hundred dollars in addition, and the remainder of my property divided equally between the heirs of F and J, at their respective ages of 18, should it be deemed judicious to do so." The remainder of the paper provides that M should have indulgence on the amount due for a farm, and that two persons, naming them, should attend to his affairs. It was held that the words "should I never return," are confined to the disposition of the notes and accounts. *Massie v. Griffin*, 2 Metc. (Ky.) 364.

1. Lord Hardwicke, in *Parsons v. Lanoe*, 2 Ambl. 562; 1 Ves. 192; *Jacks v. Henderson*, 1 Desaus. (S. Car.) 556. But see observations of Hoar, J., in *Damon v. Damon*, 3 Allen (Mass.) 196, upon *Parsons v. Lanoe*, 1 Ves. 192; Ambl. 561.

2. *Parsons v. Lanoe*, 2 Ambl. 560; *Goods of Winn*, 2 S. & T. 147; *Roberts v. Roberts*, 2 S. & T. 337; *Goods of Cawthron*, 3 S. & T. 417; *Dougherty v. Dougherty*, 4 Metc. (Ky.) 25.

In *England*, before the modern wills act of 1837, which provides that no will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same, the principle in the text was applied only to devises of realty, in regard to which Lord Hardwicke said, in *Parsons v. Lanoe*, 1 Ves. 191: "The penning of the will then being so, collateral or parol proof cannot be

if conditional upon a journey is re-executed, after the testator's return, the condition ceases, and the will may operate fully by remaining uncanceled.¹ It need hardly be observed that an absolute will duly executed *animo testandi* cannot be shown by extrinsic evidence to have been intended by the testator to take effect only upon a contingency which has failed.² When on the death of the testator the event is still in suspense, general probate will at once be granted.³

6. Alternative Wills.—Alternative wills are instruments so expressed that the contingency upon which each is to become operative is the alternative of that upon which the other is to become operative. As if a testator, after executing two wills of different dates, should declare by a codicil to the second will, that if he died before a certain date the earlier instrument should be taken as his last will and testament; otherwise, the later.⁴

7. Wills Operative at the Election of a Third Person.—Although a

taken into consideration, which would be dangerous; and, what the court, since the Statute of Frauds, is not warranted to do; for nothing will set it up but some act done by him (testator) after that event (the failure of the condition) to republish the will or defeat the condition." But as the statute did not prevent parol republication of bequests of personalty, evidence of subsequent recognition and adherence was admissible. *Strauss v. Schmidt*, 3 Ph. 218; *Burton v. Collingwood*, 4 Hagg. 176.

But under the statute 1 Vict., ch. 26, § 92, the doctrine laid down by Lord Hardwicke, in *Parsons v. Lanoe*, 1 Ves. 192, is equally applicable to all wills executed since its passage. *Goods of Winn*, 2 S. & T. 147; *Roberts v. Roberts*, 2 S. & T. 337.

Similar provisions exist in many of the *United States*. *Virginia Code*, ch. 118, § 9; *West Virginia Laws* (1882), ch. 84, § 8; *Kentucky Gen. Stat.*, ch. 113, § 11.

In *Georgia*, a parol republication in the presence of the original witnesses is good. *Georgia Code*, § 2478.

See further, on the subject, *French v. French*, 14 W. Va. 460; *Kelleher v. Kernan*, 60 Md. 440.

1. Schouler on Wills (2d ed.), § 287; *Goods of Cawthron*, 3 S. & T. 417.

On the other hand, the due execution of a new and inconsistent will would supersede the prior contingent will. *Goods of Ward*, 4 Hagg. 179.

2. *Sewell v. Slingluff*, 57 Md. 537. In this case, evidence offered to show that the will was intended by a testa-

trix to be probated only in case she died without issue, was excluded.

3. *In re Cooper*, 1 Deane 9. See *In re Bangham*, 1 Pro. Div. 429.

4. Thus, in *Hamilton's Estate*, 74 Pa. St. 69, a testator made a will dated November 20, 1871; he made another dated January 13, 1873; he made a "codicil to my last will and testament," dated "this —day of January, 1873." By the codicil, after referring to the law relating to bequests to charities, he provided, "Now I declare said will of 20th November, 1871, to be my last will should I die before the 1st of March, 1873, otherwise, the will of 13th January, 1873, shall be my last will." He died on the 23d of January, 1873. It was held that the paper of November, 1871, was his will; *Williams, J.*, in delivering the opinion of the court, said: "It is clear that the testamentary paper of January 13, 1873, admitted to probate by the register, cannot be regarded as the will of James Hamilton. It is not his will, for the contingency upon which it was to take effect never happened. *Todd's Will*, 2 W. & S. (Pa.) 145. It was a provisional will, and was only to become operative if he did not die before the 1st of March, 1873; if he did, it was to have no force or effect. He died on the 23d of January, 1873, and therefore, by the express provisions of the codicil to which it is subject, it did not take effect as his will. If, then, it never had any force or validity as a will, did it revoke the will of the 20th of November, 1871, which was also admitted to probate by the register? It did not revoke it in

testator cannot delegate to another power either to make or to revoke his will after his death, yet he may provide that a paper in form testamentary shall become operative or not, at the election of a third person. In such case the testamentary character of the paper is dependent upon the election of the third person, and it is not entitled to probate without his assent.¹

express terms, for it contains no revoking clause. It did not revoke it by implication, for the contingency upon which it was to take effect never happened. If it did not take effect as a will, it did not take effect at all, and was as powerless to revoke the prior will, as if it had never been made. But if it had contained a revoking clause, it does not follow that it would have repealed the former will. The fair construction in such case would be that the clause was intended only to operate if the paper took effect as a will; but if not, then it was to have no effect. *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 238. If at the time the testator executed the paper of the 13th of January, 1873, he did not intend that it should be his will if he died before the 1st of March, then it is clear that it did not revoke the will of the 20th of November, 1871. The codicil shows that he did not intend that it should be his will if he died before that time. It is true that the codicil has no other date than that of the month and year; but, in the absence of all evidence as to the precise time of its execution, the presumption is that it was executed at the same time with the paper of which it was intended to be part. But whether it was executed at that time or on a subsequent day, its effect on the paper is the same. It is an addition or supplement to it, and the whole must be construed together as one instrument. Thus construed, can there be a doubt that the will of the 13th of January, 1873, was intended to be provisional, and that it was not to take effect if the testator died before the 1st of March following? The fallacy of the appellants' argument lies in the assumption that the will of the 20th of November, 1871, was revoked *ipso facto* by the execution of the will of the 13th of January, 1873. But it was not revoked unless the testator intended to revoke it, and in the face of the declaration in the codicil, no inference that he intended to revoke it can possibly arise. There is no pretense that the

codicil was intended as an addition or supplement to the prior will. It was manifestly intended to be a part of the latter will, and the sole purpose of its sixth item was to convert what would otherwise have been an absolute into a conditional will. It changed the character of the instrument and prevented it from operating as a revocation of the former will. What rule or policy of law, then, prevents us from giving to it the effect which the testator intended that it should have? Why should it be so construed as to defeat the end for which it was designed? Whether the testator's gifts of charity stand or fall, it is clear that the will of the 20th of November, 1871, must be regarded as his will. If not, then he left no will; but so to hold would shock all sense of right and justice. From what time, then, does it speak? It was never republished, for it was never revoked; and, therefore, it speaks from its date. And, if so, its bequests of charity are not avoided by the statute of 26th April, 1855, which forbids such gifts within one month of the testator's decease."

1. In *Goods v. Smith*, L. R., 1 P. & M. 717, the testator wrote a codicil with his own hand, which concluded as follows: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary." It was held that the validity of this paper was conditional on the assent of the wife, and that as she elected not to avail herself of its provisions, it ought not to be included in the probate; Lord Penzance said: "The codicil in question contains this clause: 'I give to my wife the option of adding this codicil to my will or not, as she may think proper or necessary.' Now the proposition is clear that the mere fact that a paper is in the form of a will, will not necessarily show that it is testamentary. There must have been in the execution of it an *animus testandi*; the testator must have intended that the paper shall operate as a will. There have been cases in which persons have signed and executed, with the formalities required

8. Wills Intended to Take Effect in Execution of a Power—(See POWERS, vol. 18, p. 877). A testamentary disposition, intended to operate as the exercise of a power, is not necessarily dependent on the existence of the power, if the testator has a sufficient authority over the subject-matter, independent of the power,¹ or a power not expressly referred to.² If an intention to dispose of the property coexists with sufficient power to do so, which is actually exercised, the source or nature of the dispositive power is immaterial.³

9. Joint and Mutual Wills.—A joint will is, as the name implies, one single instrument made by two or more testators, and, if properly executed by each, and intended to take effect upon the death of each, is as much entitled to probate upon the death of each as if each had made a separate will.⁴ But a joint will made by two persons to take effect after the death of both will not be admitted to probate during the life of either.⁵

by law, papers in all outward respects wills, but which, it has afterward been proved to the satisfaction of the court, were executed in joke or for some collateral object. What the testator has tried to do in this case is, he has endeavored to leave it to his wife to say whether or not this testamentary paper shall be operative. He has declared it to be operative or not, according to a certain event, namely, his wife's determination. The court will be anxious to carry out his wishes, if it be able to do so within the provisions of the law; and the question is, whether the object of the testator is illegal. I think not. It is true that a testator cannot confide to another the right to make a will for him, and it is equally true that he cannot leave to another a power to revoke his will after his death, because the statute says that wills shall be revoked only in the manner prescribed by it, and if a will be destroyed by some person other than the testator, it must be destroyed in the presence of the testator, and by his direction, but there is nothing in the statute to prevent a man from saying that the question whether a paper shall be operative or otherwise shall depend upon an event to happen after his death. Neither common sense nor the words of the statute are opposed to such a proposition. . . . I think the intention of the testator in this case was lawful, and as his wife has exercised her option by refusing to recognize the second codicil as testamentary, I decree probate of the will and first codicil *ex vi.*"

1. *Southall v. Jones*, 1 S. & T. 298; *Sing v. Leslie*, 2 H. & M. 68; *Waldron v. Chasteney*, 2 Blatchf. (U. S.) 62. A will made by a married woman under a power need not refer to it. *Heyer v. Burger*, 1 Hoffm. Ch. (N. Y.) 1.

2. *In re Wilmot*, 29 Beav. 644; *Bruce v. Bruce*, L. R., 11 Eq. 371.

3. 1 Jarm. on Wills (5th ed.) *17. Compare *Beauclerk v. James*, 34 Ch. Div. 160.

4. *Flood on Wills* 431; *Goods of Stracy*, Deane 6; *Goods of Miskelly*, 4 Ir. R. Eq. 62; *Goods of Lovegrove*, 2 S. & T. 453; *Matter of Diez's Will*, 50 N. Y. 88; *Dufour v. Pereira*, 1 Dick. 419; *Ex p. Day*, 1 Bradf. (N. Y.) 476; *Evans v. Smith*, 28 Ga. 98; 73 Am. Rep. 751; *Betts v. Harper*, 39 Ohio St. 641; 48 Am. Rep. 477; *Hill v. Harding*, 92 Ky. 76; *Schumaker v. Schmidt*, 44 Ala. 454; 4 Am. Rep. 135; *Lewis v. Scofield*, 26 Conn. 452; 68 Am. Dec. 404; *Mosser v. Mosser*, 32 Ala. 551; *Black v. Richards*, 95 Ind. 184; *Wyche v. Clapp*, 43 Tex. 544. Compare *Clayton v. Liverman*, 2 Dev. & B. (N. Car.) 558; *Walker v. Walker*, 14 Ohio St. 157; 82 Am. Dec. 474.

Joint Wills by Husband and Wife.—As to the execution of joint wills by husband and wife, see *Allen v. Allen*, 28 Kan. 18; *March v. Huyter*, 50 Tex. 243; *Rogers*, Appellant, 11 Me. 303; *Matter of Diez's Will*, 50 N. Y. 88.

5. *In re Raine*, 1 S. & T. 144. See *Schumaker v. Schmidt*, 44 Ala. 454; 4 Am. Rep. 135; *Betts v. Harper*, 39 Ohio St. 639; 48 Am. Rep. 477.

In *Arkansas*, a joint will, to take

A joint and mutual or reciprocal will is an instrument by which each testator bequeaths his property to the other.¹ Where a joint will is expressed to take effect conditionally or upon a contingency, and the contingency does not happen, the joint will is inoperative even to revoke a previous will.² A joint will is revocable at any time by either testator or by the survivor.³

A joint and mutual or reciprocal will is revocable during the joint lives by either testator, so far as relates to his own disposition, upon giving notice to the other, but becomes irrevocable after the death of one of them if the survivor takes advantage of the provisions made by the other.⁴

V. WHAT CONSTITUTES A WILL—1. Distinguishing Characteristics.—The distinguishing features of all genuine testamentary instruments, whatever their form, are, first, that they are written *animo testandi*, and second, are of their own nature ambulatory or revocable during the testator's life. The requisite that the instrument be written *animo testandi* does not mean that the testator meant to write his will when he sat down to write it, but that he intended the instrument to be operative, as distinguished from a paper written in jest, or from a mere memorandum of instructions, and to effect by it such a disposition of his property as would be in its legal effect testamentary.⁵ A will differs from other instruments in that it is of itself ambulatory or revocable; for though a

effect upon the death of both testators, is invalid. *Hershy v. Clark*, 35 Ark. 17; 37 Am. Rep. 1.

1. *Dufour v. Pereira*, 1 Dick. 419; *Walpole v. Oxford*, 3 Ves. 401; *Denysen v. Mostert*, L. R., 4 P. C. 236; *Dias v. DeLIVERA*, L. R., 5 App. Cas. 123; *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751; *Lewis v. Scofield*, 26 Conn. 452; 68 Am. Dec. 404; *Matter of Diez's Will*, 50 N. Y. 88; *Cawley's Estate*, 136 Pa. St. 628.

Where two sisters, M. and G., executed a duly attested instrument, substantially as follows: "Know all men that we, M. and G., do covenant and agree, that for the love we bear to each other, whichever of us shall be the longest lived, shall be the heir of the other," it was held that this was a good will. *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751.

Under the *Louisiana Code*, "unity of confection" is prohibited, but as to how far this applies, see *Wood v. Roane*, 35 La. Ann. 865.

2. *Goods of Hugo*, 2 Pro. Div. 73.

3. *Theobald on Wills* (2d ed.) 12; citing *Hobson v. Blackburn*, 1 Add. 274; *Goods of Stracy*, Deane 6; *Goods of Lovegrove*, 2 S. & T. 453.

4. *Theobald on Wills* (2d ed.) 12;

Dufour v. Pereira, 1 Dick. 419; 3 Ves. 416; *Walpole v. Oxford*, 3 Ves. 402; *Denysen v. Mostert*, L. R., 4 P. C. 236; *Dias v. DeLIVERA*, L. R., 5 App. Cas. 123. And see, in this connection, the American cases of *Schouler on Wills* (2d ed.), § 456; *Wyche v. Clapp*, 43 Tex. 543; *Cawley's Estate*, 136 Pa. St. 628; *Izard v. Middleton*, 1 Desaus. Eq. (S. Car.) 116; *Breathitt v. Whittaker*, 8 B. Mon. (Ky.) 534; *Gould v. Mansfield*, 103 Mass. 408; 4 Am. Rep. 573; *Schumaker v. Schmidt*, 44 Ala. 454; 4 Am. Rep. 135.

Persons may, however, make joint wills which are revocable at any time by either of them, or by the survivor. *Hobson v. Blackburn*, 1 Add. 274; *Goods of Stracy*, Deane 6; *Goods of Lovegrove*, 2 S. & T. 453; *Hill v. Harding*, 92 Ky. 76.

As to enforcing agreements to make joint wills, see *Sherman v. Scott*, 27 Hun (N. Y.) 331; *Towle v. Wood*, 60 N. H. 434; 49 Am. Rep. 326.

5. *Schouler on Wills* (2d ed.), § 272; *Redf. on Wills* (4th ed.) 171; *Dunn v. Mobile Bank*, 2 Ala. 152; *Walker v. Jones*, 23 Ala. 448; *Mosser v. Mosser*, 32 Ala. 551; *Hester v. Young*, 2 Ga. 31; *Jackson v. Culpepper*, 3 Ga. 569; *Symmes v. Arnold*, 10 Ga. 506; *John-*

son v. Yancey, 20 Ga. 707; 65 Am. Dec. 646; Hall v. Bragg, 28 Ga. 330; Swett v. Boardman, 1 Mass. 258; 2 Am. Dec. 16; Plater v. Groome, 3 Md. 134; Claggett v. Hawkins, 11 Md. 381; Carey v. Dennis, 13 Md. 1; Boofter v. Rogers, 9 Gill (Md.) 44; 52 Am. Dec. 680; Combs v. Jolly, 3 N. J. Eq. 625; Allison v. Allison, 4 Hawks (N. Car.) 141; Frederick's Appeal, 52 Pa. St. 338; 91 Am. Dec. 159; Singleton v. Bremer, 4 McCord (S. Car.) 12; 17 Am. Rep. 699; Ingram v. Porter, 4 McCord (S. Car.) 198; Lyles v. Lyles, 2 Nott & M. (S. Car.) 531; Babb v. Harrison, 9 Rich. Eq. (S. Car.) 111; 70 Am. Dec. 203; Ragsdale v. Booker, 2 Strobb. Eq. (S. Car.) 348; Watkins v. Dean, 10 Yerg. (Tenn.) 321; 31 Am. Dec. 583; Millican v. Millican, 24 Tex. 426; Plumstead's Appeal, 4 S. & R. (Pa.) 545; Houser v. Moore, 31 Pa. St. 346; Morsell v. Ogden, 24 Md. 377; Crutcher v. Crutcher, 11 Humph. (Tenn.) 377. See also Murry v. Murry, 6 Watts (Pa.) 353; Hocker v. Hocker, 4 Gratt. (Va.) 277; Fort v. Fort, 3 Dev. (N. Car.) 19; Blocher v. Hostetter, 2 Grant Cas. (Pa.) 288.

In *Habergham v. Vincent*, 2 Ves. Jr. 231, Buller, J., said: "Whether the testator would have called this a deed or will, is one question; whether it shall operate in law as a deed or will, is a distinct question . . . that is to be governed by the provisions in the instrument."

What Constitutes a Will.—In *Patterson v. English*, 71 Pa. St. 458, the court, by Williams, J., said: "The main question in this case is, should the writing in controversy have been submitted to the jury to determine whether or not it is the will of Collins E. Patterson, deceased. "It consists of six different items written with a lead pencil, under the date of January 12, 1871, on the last four pages of the decedent's memorandum book, entitled 'Merchant's Account Book and Buyer's Guide,' found the next day after he died, in his private drawer, in a desk belonging to the plaintiff, David M. Rickabaugh, with whom he lived. These items are wholly disconnected and separated from each other by spaces of greater or less width, and a line drawn between them, with the name of C. E. Patterson, written with a lead pencil, immediately below the last item. They are all in the decedent's handwriting, but the date is not, nor does it appear by whom it was written. The genuineness

of the signature is denied, but the jury have found that it is in the decedent's own proper handwriting. Did the deceased, then, in writing down these detached items, and signing them in the manner he did, intend them to be his will, and to take effect as such after his death? They are not in the form of a will, and he nowhere declares them to be his will. They are not preceded or followed by the usual formalities of a will. There are no words of gift or bequest in either of the items, nor do any such words precede or follow them. What intrinsic evidence is there, then, arising from the face of the paper, or the words themselves, that the decedent wrote and intended them as his will? If a will is an instrument by which a person makes a disposition of his property, to take effect after his decease, what is there in these disconnected memoranda evincive of the decedent's intention to make such a disposition of his property? It is true that no formal words are necessary in order to make a valid will; the form of the instrument is immaterial, if its substance is testamentary. But if the instrument is not testamentary in form or substance, what intrinsic evidence is there that it was intended as a will? A gift or bequest after death is of the very essence of a will, and determines a writing, whatever its form, to be testamentary. Whether a writing is a will or not, does not depend upon the maker's declaring it to be a will at the time he executes it, but upon its contents. But how can an instrument or writing be regarded as a will if the maker does not declare it to be, and the contents do not show that it is, his will? To constitute a valid will of personalty the writing must be either complete on its face, or, if incomplete or defective, it must appear that it was intended by the writer to operate as his will in its unfinished and incomplete state. But how does it appear that the incomplete memoranda in this case were intended to operate as a will? There is nothing on the face of the paper or in the words themselves to indicate such intent, nor is there anything from which it can be inferred that any gift was intended except the words 'to be paid,' in the first, second and fourth items. But when were the amounts specified in these items to be paid? In the lifetime of the writer or after his decease? There is nothing in the language to show when they were to be paid. These items may have been

disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the grantor or settlor, yet the postponement in such case is produced by express terms, and does not result from the nature of the instrument.¹

intended as instructions for his will or as memoranda of gifts he intended to make in his lifetime. The mere words 'to be paid' do not amount to a testamentary bequest of the sums mentioned, nor show that they were to be paid after his death. But how is it with regard to the items which the plaintiffs allege were intended as bequests to them? They may have been memoranda of the amounts which the decedent had paid, or which he intended to pay, the plaintiffs for the services which they had rendered him while he was sick. There is not one word in either of them which clearly indicates that he intended them as testamentary bequests. There is then no intrinsic evidence that the decedent, in writing down the items in question in his memorandum book, intended them as his will."

Drafts of a will and three deeds, of which only two of the deeds were executed and none delivered, where the deceased had declared that together they should constitute a prospective settlement of his property, cannot be admitted to probate by his will, the proof showing that he stated to the draughtsman of these papers that when he delivered the deeds, he would execute the will, and that he had ample opportunity before his death, to have done so. *Clagett v. Hawkins*, 11 Md. 381.

Diagram Annexed to Will.—A testator caused his real estate to be surveyed and divided into as many portions as it would admit of, and valued each part proportionately; by his will he devised to several of his children, each a part, charged with the payment to the other children of such owelty as would establish equality among them all; as there was not real estate enough to give each child a part when divided, the sum of \$2,184.87, the ascertained value of each purpart, was to be paid by those who took land to each of those for whom there was no land; to his will he added a diagram of the partition he had made of his real estate, and declared in writing that he published that diagram as part of his will. To his daughter A he devised no land, but gave her a pecuniary legacy to the full amount of

the value assigned to each purpart. On the diagram was laid out a lot marked A's, which was not included in the lines of any of the purparts devised to the other children. It was held that this was not a devise of the lot in question to A, but that the testator died intestate in respect thereof. *Houser v. Moore*, 31 Pa. St. 346.

"Scienter."—In some cases it has been laid down that an instrument cannot be admitted to probate as a will unless the testator knew the instrument to be his will, and intended it as such. *Swett v. Boardman*, 1 Mass. 262; 2 Am. Dec. 16; *Combs v. Jolly*, 3 N. J. Eq. 625. See *Lyles v. Lyles*, 2 Nott & M. (S. Car.) 531; *Means v. Means*, 5 Strobb. (S. Car.) 167; *In re Wood's Estate*, 36 Cal. 75; *Toebe v. Williams*, 80 Ky. 661; *Waite v. Frisbie*, 48 Minn. 420; *Tabler v. Tabler*, 62 Md. 601. But in the absence of statutes requiring publication, it may be doubted whether this means more than that the testator must be shown to have intended to make such an effective disposition of his property as would be, in its legal effect, testamentary.

1. "Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of A in fee, the effect upon the usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A in fee; and yet the case fully illustrates the distinction in question; for, in the former instance, A, immediately on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation." 1 Jarm. on Wills (5th Am. ed.) *17. See further *Goods of Robinson, L. R.*, 1 P. & M. 171; *Comer v. Comer*, 120 Ill. 425; *Meck's Appeal*, 97 Pa. St. 313; *Miller v. Holt*, 68 Mo. 584; *Armstrong v. Armstrong*, 4 Baxt. (Tenn.) 357; *Nichols v. Chandler*, 55 Ga. 369; *Thompson v. Johnson*, 19 Ala. 59. See further, as to the distinction between wills and other disposi-

2. Informal Instruments—*a*. ENGLISH CASES.—Before the English Wills Act of 1837, 1 Vict., ch. 26, which prescribes a particular mode of attestation and execution, the rule adopted by the English ecclesiastical courts, in construing informal instruments disposing of the personal property of the deceased, was that any dispositive instrument designed not to take effect until the maker's decease, though assuming the form of a disposition *inter vivos*, more especially if incapable of operation in the intended form, was to be regarded as testamentary.¹ Hence, marriage articles,² letters,³ notes payable by executors to avoid the legacy duty,⁴ the assignment of a bond by indorsement,⁵ receipts for stock, indorsed bills,⁶ and checks on a banker, have been admitted to probate.⁷ In some cases, the court refused to apply the principle unless the instrument was in its nature revocable.⁸ But if the instrument was not testamentary either in form or in substance

tive instruments, *Mosser v. Mosser*, 32 Ala. 551; *Gillham v. Mustin*, 42 Ala. 365; *Massey v. Huntingdon*, 118 Ill. 80; *Edwards v. Smith*, 35 Miss. 200; *Castor v. Jones*, 86 Ind. 289; *Lines v. Lines*, 142 Pa. St. 150; *In re Skerrett's Estate*, 67 Cal. 585; *Seals v. Pierce*, 83 Ga. 787; *Babb v. Harrison*, 9 Rich. Eq. (S. Car.) 111; 70 Am. Dec. 203; *Cover v. Stem*, 67 Md. 449; *Leathers v. Greenacre*, 53 Me. 562; *Watkins v. Dean*, 10 Yerg. (Tenn.) 321; 31 Am. Dec. 583; *Towle v. Wood*, 60 N. H. 434; 49 Am. Rep. 326; *Reagan v. Stanley*, 11 Lea (Tenn.) 316. As to instruments which merely disinherit, see *infra*, this title, *Interests Undisposed of—Title of Heirs and Next of Kin*.

Will Rendered Irrevocable by Execution of a Trust Deed.—A will may be rendered irrevocable by the execution of a deed of trust for the uses of the will, as to the dispositions then made and fixed, but as to after acquired property, its effect as a will, with the attribute of revocability, is not altered or impaired. *Dawson v. Dawson*, 1 Cheves Eq. (S. Car.) 148.

1. 1 Jarm. on Wills (5th ed.) *24.

2. *Marnell v. Walton*, 2 Hagg. 247.

3. *Drybutter v. Hodges*, 2 Hagg. 247. See *Goods of Mundy*, 7 Jur. N. S. 52; *Passmore v. Passmore*, 1 Ph. 218; *Anderson v. Pryor*, 10 Smed. & M. (Miss.) 620; *Grattan v. Appleton*, 3 Story (U. S.) 755; *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153.

A, being about to sail for the *West Indies*, where he afterward died, addressed the following letter to B: "A thousand accidents may occur to me, which might deprive my sisters of that

protection which it would be my study to afford; and, in that event, I must beg that you will attend to putting them in possession of two-thirds of what I am worth, appropriating the remaining third to Miss C . . . and her child, in any manner that may appear most proper." It was held that the paper should be received and treated as a will. *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153.

A letter written in his handwriting by which a person expressed his desires as to the disposition of his property in case of his death was held to have been properly admitted to probate as his will. See *Porter v. Turner*, 3 S. & R. (Pa.) 108. But a letter by which he stated his willingness to assist a certain brother to whom he gave nothing by the former letter, to the extent of his whole property to get him out of his difficulties, was held not to be a testamentary paper. *Anderson v. Pryor*, 10 Smed. & M. Miss. 620.

4. *Maxee v. Shute*, 2 Hagg. 247. See *Jones v. Nicolay*, 2 Robt. 288; 14 Jur. 675; *In re Marsden*, 1 S. & T. 542.

5. *Musgrave v. Down*, 2 Hagg. 247.

The payee of a note indorsed it as follows: "If I am not living at the time this note is paid, I order the contents to be paid to A;" which indorsement he signed. He died before the note was paid. It was held that the indorsement was testamentary, and entitled to probate as a will. *Hunt v. Hunt*, 4 N. H. 434; 17 Am. Dec. 434.

6. *Sabine v. Goate*, 2 Hagg. 247.

7. *Bartholomew v. Henley*, 2 Ph. 317.

8. *Goods of Robinson*, L. R., 1 P. & M. 384; *Patch v. Shore*, 2 D. & S. 589.

(none of the gifts in it being expressed in testamentary language, or being in terms postponed to the death of the maker), and if no collateral evidence was adduced to show that it was intended as a will, it was excluded from probate.¹ Thus probate was refused of a letter addressed by the deceased to a friend, directing the sale of stock in the public funds, and distribution of the proceeds, on the ground that it referred to an immediate and not a posthumous sale.² Inasmuch, however, as devises of realty under the Statute of Frauds had to be signed by the testator and attested by three credible witnesses, such construction was inadmissible, unless the instrument was signed and attested as required by the act;³ and as by the English Wills Act of 1837, 1 Vict., ch. 26, signature and attestation were made essential to a valid bequest of personalty, a similar restriction was placed upon the application of the above principles in regard to that species of property.⁴

b. AMERICAN CASES.—In those states in which no particular form of execution, attestation, or acknowledgment is required by the local statute, the principle adopted by the English ecclesiastical courts is substantially recognized, so that it may be laid down as a general rule that in such states, any instrument which effects a disposition of property, to take effect after the death of the maker, and which is in its nature revocable, conferring no rights *in presenti*, but to take effect *in futuro*, will be entitled to probate;⁵ but that if the local statute prescribes certain formalities of execution, the instrument will not be entitled to probate, unless the requirements of the statute have been complied with, although its dispositions be testamentary in character; or, in other words, the test as to whether or not the dispositions of the instrument are testamentary, is the same in both jurisdictions; but even if testamentary, it cannot be admitted to probate unless the formalities of execution, attestation, and acknowledgment prescribed by the local statute have been complied with.⁶ Thus, the existing requirements of the local statute not being violated thereby, bonds, bills of

1. Jarm. on Wills (5th ed.) *24; King's Proctor v. Daines, 3 Hagg. 231; Langley v. Thomas, 26 L. J. Ch. 609.

2. Glynn v. Oglander, 2 Hagg. 428. See also Griffin v. Ferard, 1 Pa. St. 97; Nicholls v. Nicholls, 2 Ph. 180.

3. Powell on Devises (3d ed.) 27.

4. Jarm. on Wills (5th ed.) *31.

5. Reagan v. Stanley, 11 Lea (Tenn.) 316; Watts v. Public Administrator, 4 Wend. (N. Y.) 168; 1 Paige (N. Y.) 347; *In re Wood's Estate*, 36 Cal. 75; Witherspoon v. Witherspoon, 2 McCord (S. Car.) 520; Robeson v. Kea, 4 Dev. (N. Car.) 301; Turner v. Scott, 51 Pa. St. 126; Book v. Book, 104 Pa. St. 240; Frederick's Appeal, 52 Pa. St. 338; 91 Am. Dec. 159; Frew v. Clarke, 80 Pa. St. 170. In none of which states

were the requirements of the existing statutes violated by admitting the paper to probate.

6. Schouler on Wills (2d ed.), § 267. See Gibson v. VanSyckle, 47 Mich. 439; Cover v. Stem, 67 Md. 449.

"A paper which is evidently of a testamentary character, which was intended to operate as a will, and which is wholly invalid cannot be turned into a declaration of trust, so as to operate as a will and defeat the statute prescribing how the will of a married woman shall be executed." Paxton, J. in Long's Appeal, 86 Pa. St. 204; McCarty v. Waterman, 84 Ind. 550.

Void as to Realty. Valid as to Personalty.—Where a will disposing of both real and personal estate is invalid for

exchange, contracts, diaries, letters and other informal instruments have been held testamentary.¹ The following indorsement, addressed to A's wife on the back of a business letter addressed to A and his wife: "After my death you are to have forty thousand dollars; this you are to have, will or no will—take care of this until my death," was held testamentary.² On the other hand, a mere

not complying with the statutory requisites for the testamentary disposition of realty, it may, nevertheless, be good as a will of personalty. *Hilliard v. Binford*, 10 Ala. 977. In such a case, the provisions as to the real estate will be disregarded, the testator, so far as legal effect is concerned, dying intestate as to the realty. *Hilliard v. Binford*, 10 Ala. 977. *Lake v. Warner*, 34 Conn. 483; *Guthrie v. Owen*, 2 Humph. (Tenn.) 202; 36 Am. Dec. 311.

1. *Hunt v. Hunt*, 4 N. H. 434; 17 Am. Dec. 434; *Jackson v. Jackson*, 6 Dana (Ky.) 257; *Johnson v. Yancey*, 20 Ga. 707; 65 Am. Dec. 646; *Carey v. Dennis*, 13 Md. 1; *Reagan v. Stanley*, 11 Lea (Tenn.) 316; *Matter of Beebe*, 6 Dem. (N. Y.) 43; *Knox's Estate*, 131 Pa. St. 220; *Brown v. Eaton*, 91 N. Car. 26; *Fosselman v. Elder*, 98 Pa. St. 159; *Schad's Appeal*, 88 Pa. St. 111; *Scott's Estate*, 147 Pa. St. 89; *Fouché's Estate*, 147 Pa. St. 395; *Leathers v. Greenacre*, 53 Mo. 561; *Cowley v. Knapp*, 42 N. J. L. 207; *Kelleher v. Kernan*, 60 Md. 440; *Byers v. Hoppe*, 61 Md. 206; 48 Am. Rep. 89; *Belcher's Will*, 66 N. Car. 51; *In re Wood's Estate*, 36 Cal. 75; *In re Skerrett's Estate*, 67 Cal. 585; *Barney v. Hays*, 11 Mont. 571. *Compare* *Shields v. Mifflin*, 3 Yates (Pa.) 389.

Informal Instruments Held Testamentary.—*In re Skerrett's Estate*, 67 Cal. 585, two instruments in the handwriting of the deceased, attached together, and found among his papers, one being in the form of a letter signed by him and addressed to his sister, and the other purporting to be a copy of a deed of gift from the former to the latter, were held, it appearing on the face of the letter that the property described in the deed was intended by the deceased as a provision for the sister after his death, to be testamentary, and admissible to probate. In this case the court, by Myrick, J., said: "The instrument, taken as an entirety, should have been admitted. It was written entirely by the hand of the deceased; it

was signed by him, and a date appears at the commencement. Neither the copy of the deed nor the letter, taken by itself, constitute a will; the one is not testamentary in its character; the other has no date; but taking them together as the deceased left them, forming one document, it is complete. The first part furnishes the date, and the latter the testamentary character. We think the following words clearly show an *animus testandi*, viz.: 'We all know life is uncertain, and we don't know the moment we may be called away. . . . I therefore want you to know you are provided for under any circumstances. . . . My intention is to provide for you while I live, the same as I have always done; and hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live.' Doubtless the deceased had it in his mind, when he executed the deed to send it to his sister at some time, thus vesting the title in her in his life time; but for some reason he retained it, perhaps so that he could sell the property if he should desire, but that he intended she should have the property upon his death, if not sold by him, is to us very clear. Such being the case, and the instrument being executed with the formalities required by law, it is entitled to be admitted to probate."

A document framed in its commencement like a power of attorney, but attested by the witnesses, and authorizing two persons mentioned therein to administer on his estate, and dispose of or retain his estate for the benefit of his heirs, is a good will, and the persons designated are authorized to act as executors and dispose of the testator's real estate. *Rose v. Quick*, 30 Pa. St. 225. See further, upon the subject a note appended to *Burlington University v. Barrett*, 92 Am. Dec. 383.

2. *Byers v. Hoppe*, 61 Md. 207; 48 Am. Rep. 89. In this case the court, by Miller, J., said: "In our opinion these concluding sentences: 'And Ann,

memorandum of advancements, not executed with the formalities prescribed by the statute, is not entitled to probate;¹ nor is an antenuptial agreement giving the wife power to dispose of certain real and personal property by will, although under seal and duly attested, entitled to probate as a testamentary paper.² Mere brevity and informality of expression will not exclude the instrument from probate, provided it be executed with the formalities prescribed by the local statute. Thus an instrument which merely appoints an executor,³ or leaves the testator's property "for distribution under the laws of the state," has been upheld as testamentary.⁴ In *Pennsylvania*, subscribing witnesses are not required and various informal papers have been sustained as in effect testamentary.⁵

after my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death,' accompanied with the direction, 'To Eliza Ann Byers,' evince just as effectually, in legal contemplation, that the writer wrote them *animus testandi*, as if he had said in terms, 'I hereby will and bequeath to Eliza Ann Byers forty thousand dollars, to be paid to her at my death out of my personal estate.' There is nothing to indicate that he intended to make this bequest by a will to be thereafter executed, and that it was not to take effect unless such a will was made. The plain terms are: 'You are to have forty thousand dollars after my death,' not by a will which I intend to make giving you that sum, but, 'you are to have it, will or no will;' and he then directs her to 'take care of this until my death,' that is, to keep this writing as the instrument which makes and evidences the gift. It is also an instrument complete on its face, and being written and signed by the testator it possesses all the requisites of a valid will of personal property. There is nothing incomplete or unfinished about it. It exhibits no incomplete formality which the testator may have supposed was essential to its validity. No blanks are left as to the amount intended to be given, or the party intended to be benefited, nor does it contain a clause appointing an executor with a blank left for the name, or an attestation clause without witnesses, or any similar imperfection. It is not necessary to the validity of a will that it should contain the appointment of an executor, or that it should dispose of all the testator's estate, real or per-

sonal, nor does the omission to make such appointment or the failure to dispose of the entire estate, afford any evidence whatever of an absence of the *animus testandi*, where the instrument is complete on its face, and professes in direct and explicit terms to dispose of only a part of the testator's property."

1. *Sims v. Sims*, 39 Ga. 117; 99 Am. Dec. 450.

2. *Michael v. Baker*, 12 Md. 158; 71 Am. Dec. 593.

3. *Barber v. Barber*, 17 Hun (N. Y.) 72.

4. *Lucas v. Parsons*, 24 Ga. 640; 71 Am. Dec. 147.

The following instrument, "I wish five thousand dollars to go to John C. Coe in the event of my dying intestate, and the balance of my property to go to Robert Beatie, to be disposed of by him as his judgment may dictate," if properly executed and witnessed, is testamentary in its character, and is a will. *In re Wood's Estate*, 36 Cal. 75. See *In re Barton's Estate*, 52 Cal. 538.

5. *Clingan v. Mitcheltree*, 31 Pa. St. 25; *Carson's Appeal*, 59 Pa. St. 496; *Harvard v. Davis*, 2 Binn. (Pa.) 418. See also *Hight v. Wilson*, 1 Dall. (Pa.) 94; *Rohrer v. Stehman*, 1 Watts (Pa.) 463.

Thus, a paper, in form a power of attorney, authorizing two persons therein named to administer on the party's estate, and to sell and dispose of, or retain, his property, as they should think proper, for the greatest benefit of his heirs, after his decease, is a good will; and the persons therein named are fully empowered as executors to sell the real estate of the testator. *Rose v. Quick*, 30 Pa. St. 225. In this case the court, by Porter, J., said: "This paper is a

3. Deeds Distinguished from Wills.—Upon the principle of the preceding section, an instrument in the form of a deed is testamentary if it confers no interest *in presenti*, is revocable at pleasure, and is not to take effect till the death of the maker;¹ and, if

will. It is in writing. It is signed by the testator at the end thereof. It has been proved by the oath of two witnesses. It is to take effect after his death. It starts like a power of attorney, but soon loses that character. It describes the bodily and mental condition of the writer, in the usual phraseology of wills. Its directions are given expressly for the benefit of his heirs after his decease. He confers on the persons whom he nominates, full powers as executors, by imposing the duties which the law would impose if he had simply named them as executors; for to act fully, promptly, and prudently with the property of a dead man for the benefit of his heirs, is the substance of an executor's duty. He directs the administration of his estate, real and personal, and authorizes its sale or retention according to the discretion of the appointed agents. He might have employed more words, and, in this, professional counsel might have assisted him; but no part of his intention is left unexpressed. Of its character as a will, the paper contains intrinsic evidence; and, therefore, the case finds no precedent in the decisions cited in the argument respecting memoranda, indorsements, and letters which required other evidence to help them out."

So on the authority of *Frew v. Clarke*, 80 Pa. St. 170, an assignment of a life insurance policy "to my wife M. after my death, when she can do with it according to her best will, without partiality towards her children," has been held testamentary. *Schad's Appeal*, 88 Pa. St. 111.

A testatrix executed a will in 1878, in due form, by which she bequeathed various legacies to a niece, Isabella Fosselman who lived with her. She afterward died suddenly in January, 1880. Among her papers was found a sealed envelope indorsed in her handwriting thus: "Dear Bella, this is for you to open." The contents of the envelope were a promissory note for \$2,000 and the following paper, also in the testatrix's handwriting: "Lewistown, Oct. 2, 1879. My wish is for you to draw this 2,000 dollars for your use, should I die sudden, Elizabeth Fossel-

man." An amicable issue having been framed between Isabella Fosselman and the testatrix's executor to determine the ownership of the promissory note, it was held that the indorsement on the envelope and the contents thereof constituted together a valid testamentary disposition of the note to the plaintiff in the issue, operating as a codicil to the testatrix's will, and that therefore the plaintiff was entitled to judgment. *Fosselman v. Elder*, 98 Pa. St. 159.

1. 1 Jarm. on Wills (5th Am. ed.) 18; Lawson's Rights, Remedies and Practice, § 3141; *Hixon v. Wytham*, 1 Ch. Cas. 248; *Finch* 195; *Green v. Proude*, 3 Keb. 310; 1 Mod. 117; *Henderson v. Farbridge*, 1 Russ. 479; *Peacock v. Monk*, 1 Ves. 127; *Cock v. Cooke*, L. R., 1 P. & M. 241; *In re Coles*, L. R., 2 P. & M. 362; *Robertson v. Smith*, L. R., 2 P. & M. 43; *Goods of Marsden*, 1 S. & T. 542; *Milnes v. Foden*, 15 Prob. Div. 105; *Doe v. Cross*, 8 Q. B. 714; *Frew v. Clarke*, 80 Pa. St. 170; *Rose v. Quick*, 30 Pa. St. 225; *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159; *Carey v. Dennis*, 13 Md. 1; *Jordan v. Jordan*, 65 Ala. 301; *Gillham v. Mustin*, 42 Ala. 365; *Daniel v. Hill*, 52 Ala. 430; *Millican v. Millican*, 24 Tex. 426; *Johnson v. Yancey*, 20 Ga. 707; 65 Am. Dec. 646; *Hall v. Bragg*, 28 Ga. 330; *Sperber v. Balsler*, 66 Ga. 317; *Miller v. Holt*, 68 Mo. 584; *Reed v. Hazleton*, 37 Kan. 321; *Armstrong v. Armstrong*, 4 Baxt. (Tenn.) 357; *In re Lautenschlager*, 80 Mich. 285; *Crocker v. Smith*, 94 Ala. 295; *Compare Hinkle v. Landis*, 131 Pa. St. 573; *Meck's Appeal*, 97 Pa. St. 313; *Turner v. Scott*, 51 Pa. St. 126; *Ritters' Appeal*, 59 Pa. St. 9; *Stewart v. Stewart*, 5 Conn. 317; *Gage v. Gage*, 12 N. H. 371; *Wagner v. McDonald*, 2 Har. & J. (Md.) 346; *Henington v. Bradford*, Walk. (Miss.) 520; *Jones v. Morgan*, 13 Ga. 515; *Allison v. Allison*, 4 Hawks (N. Car.) 141; *Evans v. Lauderdale*, 10 Lea (Tenn.) 73; *Wheeler v. Durant*, 3 Rich. Eq. (S. Car.) 452; *Jacks v. Henderson*, 1 Desaus. (S. Car.) 543; *Jugram v. Porter*, 4 McCord (S. Car.) 198; *Millidge v. Lamar*, 4 Desaus. (S. Car.)

617; *Sartor v. Sartor*, 39 Miss. 760; *Golding v. Golding*, 24 Ala. 122; *Crain v. Crain*, 21 Tex. 790; *Hart v. Rust*, 46 Tex. 556; *Sharp v. Hall*, 86 Ala. 110; *Hall v. Burkham*, 59 Ala. 349; *Williams v. Tolbert*, 66 Ga. 127; *Castor v. Jones*, 86 Ind. 289; *Massey v. Huntington*, 118 Ill. 80; *Seals v. Pierce*, 83 Ga. 787; *Redfield v. Bellette*, 14 Ark. 148.

Directing Personal Representatives to Pay, Etc.—In *Frew v. Clarke*, 80 Pa. St. 170, an instrument in the following form was held testamentary: "Know all men by these presents, that I, James McCully, . . . do order and direct my administrators or executors, in case of my death, to pay to Robert D. Clarke, the sum of \$75,000, as a token of my regard for him and to commemorate the long friendship existing between us. Witness my hand and seal this 17th day of April, A. D., 1872. James McCully." [SEAL.]

In this case the court, by Mercer, J., said: "A will is defined to be the legal declaration of a man's intentions, which he wills to be performed after his death. 2 Bl. Com. 500; *Bouv. Law Dict.*; 1 *Jarm. on Wills* 11. An instrument in any form, whether a deed, poll, or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. *Habergham v. Vincent*, 2 Ves. Jr. 204. It may be by an indorsement on a note: *Hunt v. Hunt*, 4 N. H. 434; 17 *Am. Dec.* 434; or by letter: *Morrell v. Dickey*, 1 *Johns. Ch. (N. Y.)* 153. Whatever be the form of the instrument, if it vests no present interest, but only directs what is to be done after the death of the maker, it is testamentary. *Turner v. Scott*, 51 Pa. St. 126. The essence of the definition is, that it is a disposition to take effect after death. Nor does it matter that the person intended to make a note instead of a will. If he used language which the law holds to be testamentary, his intention is to be gathered from the legal import of the words he employed. *Redf. on Wills* 5; *Turner v. Scott*, 51 Pa. St. 126. No form of words is necessary to make a valid will. The form of the instrument is immaterial, if its substance is testamentary. *Patterson v. English*, 71 Pa. St. 458. See also *Rose v. Quick*, 30 Pa. St. 225; *Frederick's Appeal*, 52 Pa. St. 338; 91 *Am. Dec.* 159. This instrument is in writing. It is signed at the end thereof. It contains no admission of indebtedness. It fur-

nishes no evidence of a debt. It contains no promise to pay. It vested no present interest. It was not to take effect until after the death of McCully. In the meantime he could revoke it at his pleasure. It therefore possessed all the essential characteristics of a will, and was undoubtedly testamentary in its character."

An instrument in the following form was made and delivered to the person therein named: "Md., September 4, 1884. At my death, my estate or my executor pay to July Ann Cover three thousand dollars. David Engel, of P. Witness: Columbus Cover." [SEAL.]

In an action of debt on this instrument, as a writing obligatory, after the death of the maker, against his executor, it was held to be a testamentary paper and not an obligation for the payment of money, and that no recovery could be had thereon. *Cover v. Stem*, 67 Md. 449. The court, by Alvey, C. J., said: "It is contended, on the part of the appellant, that this instrument is a bill obligatory, and imports a legal obligation of the maker, the time of payment only being deferred until after his death, when his administrator or executor was directed to pay the amount. While, on the other hand, it is contended by the appellee that the instrument has all the characteristics of a testamentary paper, and did not, in any proper sense, create a legal obligation upon the maker, such as that of a bond or single bill. What the consideration may have been to induce the maker to pass such an instrument, does not appear. But it is insisted that the seal to the instrument imports a sufficient consideration for the obligation of the maker; and this, as a general proposition, is certainly true as applied to bonds and deeds generally. But still the question here is, whether the instrument declared on be in its nature a bill obligatory, binding and conclusive upon the maker, or whether it be a mere posthumous disposition of three thousand dollars, part of his estate, to be paid by his executor, as any other pecuniary legacy given by the testator. An obligation is defined to be a deed in writing, whereby one man doth bind himself to another to pay a sum of money, or do some other thing. *Shep. Touch.*, tit. 'Obligation' p. 367. The same definition is given in *Com. Dig.*, tit. 'Obligation' (B), and in *Bacon's Abr.*, tit. 'Obligation' (B). It is true, no precise form of words is

necessary to create a bond or obligation. Therefore, any memorandum in writing under seal, whereby a debt is acknowledged to be owing, will obligate the party to pay; for it is said that any words which prove a man to be a debtor, if they be under seal, will charge him with the payment of the money. *Core's Case*, Dyer 226; *Shep. Touch.* 368, 369, 370, and *Bac. Abr.*, 'Obligation' (B), and the examples there given of what form of words will be sufficient to create a valid obligation. It is, however, laid down in *Bac. Abr.*, 'Obligation' (B), as essentially necessary to create a valid obligation, that words be employed to declare the intention of the party, and which must clearly denote his being bound; 'because such obligation is only in the nature of a contract, or a security for the performance of a contract, which ought to be construed according to the intention of the parties.' In other words, there must be terms employed to create a *debitum in presenti* though the *solvendum* may be in *futuro*, and even after the death of the obligor. It would seem to be clear that the relation of debtor and creditor must be created and subsist in the lifetime of the parties to the instrument, though the time of payment may be deferred until after the death of one of the parties. *Shep. Touch.* 368, 369; *Hannon v. State*, 9 Gill (Md.) 446; *Carey v. Dennis*, 13 Md. 1; *Sto. Pro. Notes*, § 27. Here, in the instrument before us, there are no words that create a *debitum in presenti*; there are no words that create the relation of debtor and creditor in the lifetime of the parties to the instrument; but the words employed simply import a posthumous disposition of a part of the estate of the maker of the instrument, and nothing more. . . . By the terms of the instrument in question, the three thousand dollars are simply directed to be paid out of his estate by his executor. No language could be more expressive of a testamentary purpose." *Compare* *Shields v. Irwin*, 3 Yeates (Pa.) 389.

Mutual Agreement.—Two sisters, Jincey and Patsey, executed an instrument, which was in substance as follows: "Know all men, that we, Jincey and Patsey, do 'covenant and agree' that, for the love we bear to each other, whichever of us may be the longest lived shall be the heir of the other." It was held that the instrument was a will. *Evans v. Smith*, 28 Ga. 98; 73

Am. Dec. 751. The court, in this case, by Benning, J., said: "The consideration of each sister is her love for the other—not this agreement of the other. The making of the instrument by the one sister, is not the consideration for the making of it by the other. No; the making of it by the one, is an act entirely independent of the making of it by the other. The case is, in substance, precisely the same as it would have been if each sister had executed a separate paper, and had said in that paper just what makes her part in the joint paper. The mere words, I say, authorize this conclusion. Suppose, then, that each sister had executed a separate instrument, and in it had expressed the same ideas which she expressed in the joint instrument, would these instruments not be wills? What would there be to prevent them from being wills—assuming, of course, that they were properly attested, and were otherwise regular as to form? Nothing, as far as we can see. They would be instruments merely in consideration of love; therefore, they would be revocable at pleasure; they would be instruments not to take effect until the death of their respective makers; therefore they would not be deeds, for deeds take effect at their execution. Then, they would be wills, or they would be nothing."

Illustration of Conveyance Held Testamentary.—In the trial of an action of ejectment, the defendants in support of their title offered in evidence as a deed, an instrument of writing in the following language:

"State of Mississippi,)
Franklin county.)

"This deed of conveyance, made and entered into by and between John W. Reynolds, of the first part, and Sarah A. Reynolds, of the second part, both of the above county and state, witnesseth: That for and in consideration of the love and affection I have for my wife, Sarah A. Reynolds, and also in consideration of the sum of four hundred dollars to me in hand paid, the receipt whereof is hereby acknowledged, I have this day granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey unto the said Sarah A. Reynolds, her heirs and assigns, all of my right, title, and interest in and to the following described tract of land, to wit [the land described being the same as that sued for], situated in the

above county and state, and all my personal property that I now own or may own at the time of my death, to my said wife, Sarah A. Reynolds, her heirs and assigns, to have and to hold forever; upon the following conditions, however, and none other, that I reserve the right to alter, change, or entirely abolish this deed if I so desire during my life, and that I retain all of the said property during my life, and have the control of the same, and that this deed do not take effect until after my death, and that after my death my wife, Sarah A. Reynolds, pay all of my debts, and the remainder over paying my debts to be hers and her assigns' forever.

"Given under my hand and seal this, the 3d day of February, 1879.

[SEAL.] "JOHN W. REYNOLDS."

This instrument was, on the day of its date, acknowledged as a deed. The plaintiff objected to its admission in evidence "on the ground that it was a paper testamentary in character and not a deed, and that it was bad as a will because not attested or probated." The court sustained the objection and excluded the alleged deed. Held not to be error. *Cunningham v. Davis*, 62 Miss. 366, the court, by Campbell, C. J., saying: "In form the instrument is a deed. It was so called by the maker. It was acknowledged as such by him before a justice of the peace. Its character must be determined from its several provisions. If by it any present interest was vested it should be held to be a deed. If it was not to have any operation or effect until the death of the maker it could not be treated as a deed, although it was so named, and is in form a deed. The provision in these words, 'And that this deed do not take effect until after my death,' coupled with the direction that the object of the bounty of the maker of the instrument should pay all his debts and have only the remainder of his property, convinces us that the paper was testamentary in its character."

Illustration of Instrument Held Not Testamentary.—In *Williams v. Tolbert*, 66 Ga. 127, a paper in the following form was held not to be testamentary: "This indenture, made this, the 14th day of February, 1879, between Elijah Williams, of the one part, and Elizabeth Cheatham, of the other, witnesseth, that the said Elijah, for and in consideration of the natural love and affection which he bears to his

daughter, Elizabeth, has given, granted and conveyed (on the terms and limitations hereinafter expressed), and does by these presents give, grant and convey unto the said Elizabeth for life with remainder to her children, all that tract of land situate, etc. . . . A plat of the same is hereto annexed for a fuller description of the same, and it is hereby expressly stipulated and agreed between the parties to this deed of gift, that the said Elijah reserves to himself a life estate in the tract of land herein and hereby conveyed, to have, use, occupy, and enjoy the same during his natural life, and to take and enjoy the rents, issues and profits of the same during his life only." The said paper then closed with the words of a fee-simple deed, the usual warranty of title and the attestation of an ordinary deed, except that there were two witnesses besides the justice of the peace. In this case the court, by Crawford, J., said: "The line of separation between what constitutes a deed and a will is sometimes so shadowy as to make it extremely doubtful whether it is the one or the other. The law of this state prescribes a rule by which the courts are to be governed, but even that is neither infallible nor satisfactory. It declares that in all cases, to determine the character of an instrument, whether it is testamentary or not, the test is the intention of the maker, from the whole instrument, read in the light of surrounding circumstances. If the intention be to convey a present estate, though the possession be postponed until after his death, the instrument is a deed; if an interest accruing and having an effect after his death, it is a will. . . . Does this paper convey a present interest to Elizabeth Cheatham? It declares itself an indenture, made and entered into between the parties; it gives, grants and conveys; the grantee is to have and to hold forever in fee simple; the title is warranted; it purports to be signed, sealed, and delivered. What is there, then, to take it out of the ordinary signification and legal effect of these words? That clause by which he reserves the use and occupation, and the right to take the rents during his life? If this were eliminated, of course there would be no question about it. But is this reservation at all inconsistent with the conveyance of a present estate so far as title is concerned, though the posses-

executed, acknowledged, and attested with the formalities prescribed by the local wills act, is operative.¹ An instrument in the form of a deed, purporting to convey an undivided interest in what the grantor dies seised of, may be a will.² So instruments in the form of deeds *inter partes*, purporting to convey property to trustees, but providing that the trusts should not take effect till after the death of the donor, have been held testamentary.³ But the mere fact that an instrument cannot take effect as a deed does not show that it is testamentary,⁴ although if the requirements of the local wills act have been complied with, that fact is to be taken into consideration in determining the intent of the maker.⁵

sion be postponed until after the death of the grantor? We think not. Besides, in the reservation itself is to be found the words: 'It is hereby expressly stipulated and agreed between the parties to this deed of gift that the said Elijah is to have in the tract of land herein and hereby conveyed,' etc. The above is not the language of a will, nor that where the conveyance is intended to operate as one. Indeed, the whole terms of the instrument indicate the intention to pass the title to the property at once to the donee, and not to retain it in the donor. He retains the right to use it and take the rents only, but nowhere indicates any reservation of title. And this is the principle ruled in *Daniel v. Veal*, 32 Ga. 589, and reaffirmed upon a paper containing almost the identical words, in *Bass v. Bass*, 52 Ga. 531. Nor is it at all affected by the ruling in *Nichols v. Chandler*, 55 Ga. 369, but is in perfect harmony therewith."

Where an instrument purporting to convey property to trustees absolutely, contains all the characteristics of a deed, it will not be construed a writing testamentary, simply because one of the trusts embraced in it is for the use of the property by the grantor during her life. *Cumming v. Cumming*, 3 Ga. 460. See also *Boling v. Boling*, 22 Ala. 826; *Jackson v. Culpepper*, 3 Ga. 569; *Lightfoot v. Colgen*, 5 Munf. (Va.) 42.

1. *Cunningham v. Davis*, 62 Miss. 366; *Boling v. Boling*, 22 Ala. 826; *Cover v. Stem*, 67 Md. 449; *Moye v. Kittrell*, 29 Ga. 677.

An instrument reciting services rendered the maker by another in terms granting the latter certain premises reserving to the maker their use, occupation, and control during his life, the possession of the conveyance to be retained

by him for the same time and then delivered to the grantee, is invalid as a deed, but if executed with the formalities requisite to a will may operate as a testamentary disposition of the estate. *Kelly v. Richardson* (Ala. 1893), 13 So. Rep. 785.

2. *Watkins v. Dean*, 10 Yerg. (Tenn.) 321; 31 Am. Dec. 583; *Stevenson v. Huddleson*, 13 B. Mon. (Ky.) 299; *Brewer v. Baxter*, 41 Ga. 212; 5 Am. Rep. 530; *Gage v. Gage*, 12 N. H. 371.

3. *Goods of Morgan*, L. R., 1 P. & M. 214. See also *In re Knight*, 2 Hagg. 554; *Shingler v. Pemberton*, 4 Hagg. 356.

4. *In re Skerrett's Estate*, 67 Cal. 585; *Lightfoot v. Colgin*, 5 Munf. (Va.) 42; *Edwards v. Smith*, 35 Miss. 197; *Dawson v. Dawson*, 2 Strobb. Eq. (S. Car.) 34.

Thus, an instrument purporting to be a deed or gift, but inoperative for want of delivery, cannot, in the absence of proper evidence that a testamentary disposition was intended, be admitted to probate as a will. *In re Skerrett's Estate*, 67 Cal. 585.

5. This doctrine is maintained in *Crain v. Crain*, 21 Tex. 790, and *Thompson v. Johnson*, 19 Ala. 59.

Where a father made deeds to his son of the principal part of his estate, to the exclusion of other children, who, in their petition to avoid the same, charged that they were not *bona fide* conveyances, but inofficious wills, intended to take effect after the death of the father, these deeds being declared void as in fraud of the law securing to children a portion of the parent's estate, and not for actual fraud in procuring them, are good for the one-fourth, of which the father had the right to dispose in addition to the distributive share to which such son was entitled. *Crain v. Crain*, 21 Tex. 790.

4. **Whether an Instrument May Operate Partly as a Deed and Partly as a Will.**—One part of an instrument may operate *in presenti* as a deed, and another *in futuro* as a will, as where one going on a journey, by an instrument in the form of a power of attorney, appointed his mother to receive the rent of his lands for her own use until his return, and, in the event of his death, “thereby assigned and delivered to her the sole claim to his lands.”¹

5. **Wills Distinguished from Gifts Mortis Causa.**—A will differs from a gift *mortis causa* in that the latter, instead of purporting to be an intended disposition of property to take effect after death, purports to be an immediate transfer and must be accompanied by delivery;² hence a document intended to take effect as a will, which is void for want of attestation, cannot be sustained as a

Alteration of Deed by Subsequent Will.

—A deed, valid and operative, may not be subsequently explained or altered by a will. Where a testator had previously by deed conveyed property in trust for his daughter and her issue, in such manner as to divest himself of all power and control over the property carried by it, his subsequent will, though duly executed, could not operate upon the property then no longer his. *Purcell v. Purcell*, *Riley Eq. (S. Car.)* 282.

The will of B, executed May 16, 1838, was admitted to probate on the 18th September of the same year. The executors of this will, afterward, on the 20th November following, offered for probate a deed duly executed and recorded, dated 18th September, 1832, by which their testator conveyed to them, his two sons, “one-half of all the personal estate of which he might die possessed.” In June, 1839, after process of citation to all parties interested, the orphans’ court admitted this deed to record, as a testamentary paper. On the 20th May, 1845, B, and his then wife, one of the heirs and devisees of the testator, filed in the said orphans’ court a petition, praying, that the probate of the said deed might be revoked and recalled. Upon appeal from the order of the said court dismissing this petition, it was held that this deed was not a testamentary paper, and that the order of the orphans’ court, ordering it to be received as such was null and void. *Robey v. Hannon*, *6 Gill (Md.)* 463.

A father, resident in *Texas*, made conveyance of most of his estate to a child; but the gift was not completed by delivery. It was held that the deed could operate as a will, and that it

would transfer the title to so much of the estate as the father could dispose of by will (*i. e.* one-fourth), and that the grantee would be entitled to an equal portion of the residue of his father’s estate with the other children. *Crain v. Crain*, *21 Tex.* 790.

1. *Doe v. Cross*, *8 Q. B.* 714. See *Taylor v. Kelly*, *31 Ala.* 59; *68 Am. Dec.* 150; *Reed v. Hazleton*, *37 Kan.* 321; *Robinson v. Schly*, *6 Ga.* 515; *Dudley v. Mallery*, *4 Ga.* 52; *Dawson v. Dawson*, *2 Strobb. Eq. (S. Car.)* 34; *Burlington University v. Barrett*, *22 Iowa* 61; *92 Am. Dec.* 376. But compare *Thompson v. Johnson*, *19 Ala.* 59.

Where a party executed a will, which he afterward incorporated into a deed conveying his property to the parties named in the will, to be enjoyed by the grantees according to the tenor of the will, and subsequently executed codicils, it was held, that the will was incorporated with the deed only as to property then existing, of which it was a valid disposition, *in presenti*, but still remained a will as to all other property which it could affect, and was subject to modification by codicils which might dispose of the income of the property so conveyed since. The disposition by deed was to take effect in possession only at the testator’s decease. *Dawson v. Dawson*, *2 Strobb. Eq. (S. Car.)* 34.

Instrument Partially Testamentary.—

A paper may be testamentary in design as to part of the property and so admissible to probate; but incomplete in design as to another part, and so far inoperative. *Devecmon v. Devecmon*, *43 Md.* 335.

2. See *GIFTS*, vol. 8, p. 1347.

gift *mortis causa*,¹ nor can a void gift *mortis causa* be sustained as a valid will of personalty.²

6. Memorandum of Instructions.—A duly executed instrument described as instructions for a will, may have effect as a will, if it appears that it was intended to take effect in the absence of a more formal instrument;³ otherwise, however, if it be merely a preliminary draft or minute not designed to take effect as a will,⁴

1. *In re Hughes*, W. N. (1888) 163.

2. *Girts*, vol. 8, p. 1350. See *Basket v. Hassell*, 108 U. S. 267.

3. *Theobald on Wills* (2d ed.) 11; citing *Bone v. Spear*, 1, Philkin 345; *Towe v. Castle*, 1 Curt. 303, 2 Moo. P. C. 133; *Barwick v. Mullings*, 2 Hagg. 225; *Hattatt v. Hattatt*, 4 Hagg. 211; *Arndt v. Arndt*, 1 S. & R. (Pa.) 263. As to unsigned testamentary instruments in the absence of statutory regulation, see *McLean v. McLean*, 6 Humph. (Tenn.) 452; *Public Administrator v. Watts*, 1 Paige (N. Y.) 347, 4 Wend. (N. Y.) 168.

4. *Coventry v. Williams*, 3 Cush. 787; *Aurand v. Witt*, 9 Pa. St. 54; *Wall v. Wall*, 123 Pa. St. 545; *Lungren v. Swartzwelder*, 44 Md. 482; see *Sharp v. Sharp*, 2 Leigh (Va.) 249; *Hocker v. Hocker*, 4 Gratt. (Va.) 277.

But in *Booster v. Rogers*, 9 Gill (Md.) 44; 52 Am. Dec. 680, it was held that a paper, though not a last will and testament at the time it is written, may be made such afterwards by adoption; that a paper, though intended merely as an instrument of instructions or a memorandum, to enable the scrivener to prepare the will, will be admitted to probate, if the more formal will be left unfinished by reason of any act which the law pronounces to be the act of God. There must, however, be a continuance of the intention of the deceased, down to the time when the act of God intervened and prevented the execution of the formal instrument. An immediate or sudden death is not required, if according to the proof, the jury are satisfied that there was no change of intention in regard to the provisions of the will.

In *Lungren v. Swartzwelder*, 44 Md. 482, it appeared that a paper was found in a safe at the decedent's store, in a pocketbook, with some notes and certificates of bank and other stocks. The heading of the paper was, "Hagerstown, August 11th, 1875, what I own is as follows." Beneath followed a list of his houses and stock, and memoranda

of sums to be paid to various persons, out of the sales of certain of his houses, the whole concluding as follows: "I appoint for my administrators H. W., of Cumberland, Maryland, and F. A. H., of Hagerstown, Maryland" (Signed) "P. S." The paper was proved to have been written and signed by the deceased, and there was nothing to show that it was not signed on the day of its date. He died on the 14th of December, 1875, aged about seventy-two years. As regards his mental and bodily condition, there was no proof tending to show that he was prevented by sudden sickness, or anything which the law would pronounce an act of God, from perfecting it, or executing a formal will, for more than three months after the date of the paper. It was held that the paper in itself contained no indication that the writer intended it should be, and wrote it for his last will and testament, and in the absence of evidence of some acts or declarations clearly showing that he intended the paper, as it stood, to be his will, or subsequently recognized or adopted it as such, it could not be admitted to probate. The court, by Miller, J., said: "It appears from the proof that the paper before us was written and signed by the deceased, and there is nothing to show it was signed on a different day from its date. He died about the 14th of December, 1875, aged about seventy-two years, and had never been married. He had been engaged in the hardware business, was an intelligent, prosperous, and good business man, and left real estate consisting of a dwelling house and warehouses in Hagerstown, valued at about thirty thousand dollars, besides personal property. After the date of this paper and during the autumn, his health was feeble, but he was still able to go to his store and attend to his business. His mental faculties remained unimpaired, and he was capable of executing a valid deed until at least a few days before his death. As respects his mental

even though duly executed;¹ or be wanting in the formalities of execution and attestation prescribed by the local statute.²

and bodily condition, there is no proof tending to show he was prevented by sudden sickness, or anything which the law would pronounce an act of God, from perfecting it, or executing a formal will capable of passing his real as well as personal estate, for more than three months after the date of this paper. It cannot, therefore, be upheld as a will upon that ground. It was found in his safe at his store, in a pocket-book with some notes and certificates of bank and other stocks. But this fact of itself does not make it a will. The place of deposit and the care with which it was kept, are merely circumstances to be considered and weighed with all the other facts of the case, in solving the question whether the party intended it as his will or not. In the absence of proof to the contrary we must assume the paper was written and signed on the day it bears date. The questions then for us to determine are, did he write it *animo testandi*, that is, did he then intend the paper as it stood, to be his will without alteration and without looking to anything further to be done in order to perfect it? or did he afterwards recognize and adopt it as his will? To give a satisfactory answer to these questions we must first look to the paper itself and the intrinsic evidence it furnishes. What is it and what does it profess to be? It nowhere on its face professes to be the will of the writer. The major part of it is simply a statement of what he owned, in form and in fact an inventory, or a schedule of his property. That is followed by three clauses indicating who should receive portions of it (and as to one of these he had not made up his mind as to the amount, and as to another, was undecided whether he would give him anything) by a will to be thereafter executed. He would give to one two thousand dollars, out of the proceeds of the sale of his house. To his brother's widow he would give one or perhaps two thousand dollars, after, that is, out of the sale of property on the square. It then says his houses are to be sold and the proceeds 'paid over to the respective parties named in my will,' that is, the parties named in the will which I may or intend to execute, and then is added

'perhaps J. W., if he quits drinking liquor,' that is, I may give J. W. a portion if he reforms his habits. There is no residuary clause, and nothing is said respecting any disposition of the stocks and bonds scheduled in the former part of the paper, and no disposition indicated, except by a will to be thereafter made, of the great bulk of the proceeds of his real estate. It seems to us impossible for anyone to read this paper and say the writer of it intended it should be, and wrote it for his last will and testament. So far as it refers to any intended testamentary disposition of his property it indicates a mind in as hesitating and undecided a state as could well be imagined. It does not rise to the dignity of memoranda or instructions to a scrivener for the preparation of a will. He knew, or if he did not, he was informed by his attorney after the date of this paper, that three witnesses were essential to a valid will of real estate, and was furnished with the form of such an instrument, and yet so far as this paper contains any possible intimation of testamentary wishes, it refers to that species of property alone, and is not attested by a single witness. Unless, therefore, we can find evidence of some acts or declarations clearly showing that he intended this paper as it stood to be his will, or subsequently recognized or adopted it as such, it cannot be admitted to probate."

1. *Ferguson-Davie v. Ferguson-Davie*, 15 Prob. Div. 109. In this case a testatrix having duly executed a will, subsequently executed a paper drawn up by her husband with her full concurrence, which was headed "This is not meant as a legal will, but as guide." It was held that the paper was not a valid testamentary document, and that probate must be refused. See *Hocker v. Hocker*, 4 Gratt. (Va.) 277. Compare *Toebbe v. Williams*, 80 Ky. 661.

Variance of Subsequent Will from Memorandum.—It has been held that in so far as the will varies from the instructions, it is inoperative if executed upon the assurance that it complied with them. *Waite v. Frisbie*, 45 Minn. 361.

2. 1 Redf. on Wills (4th ed.), p. 225; *Vernam v. Spencer*, 3 Bradf. (N. Y.)

16; Ruoff's Appeal, 26 Pa. St. 219; Wall v. Wall, 123 Pa. St. 545.

In *Vernam v. Spencer*, 3 Bradf. (N. Y.) 16, the testator, in the presence of two witnesses attending at his request, signed the instrument at the foot, and died in the attempt to sign again in the margin. It was held, that the provision of the statute requiring the attestation of the subscribing witnesses had not been complied with, and that the instrument was not valid as a last will and testament, not being complete at the testator's decease. The testator being still occupied in authenticating the instrument at the moment of the attack, there was no testamentary declaration or rogation of the witnesses. Bradford, Sur., said: "Had the witnesses subscribed in the testator's lifetime and in his presence, and without objection, there would have been enough in all the circumstances to justify sentence of probate, notwithstanding the absence of a formal testamentary declaration and request to the witnesses to attest. Not that I consider the statute to require the witnesses to sign in the testator's actual presence or view, but the fact that the testator has seen them sign and acquiesces therein, often aids the proof of testamentary declaration and request, and gives weight and substance to informal and casual declarations. But in the present case, although the testator had subscribed the will at the seal, he was still engaged in signing his name in the margin, when his power of consciousness ceased. Though he had written all the law required him to write, he had not written all he proposed to write, and he expired before he accomplished his purpose. There was no finality even in his action; and much less had he arrived at that stage when the document was to be turned over to the witnesses for attestation. He had requested two persons to attend, in order to be witnesses, but he had not yet requested them to witness and attest the will, for he had not yet reached that point—he was still occupied in authenticating the instrument, and before it had left his hands he was seized with death. That event arrested the transaction in an imperfect and unfinished condition. I do not think, therefore, that under the circumstances the testator declared the instrument he was signing to be his last will and testament, or that he had requested the persons present to subscribe that in-

strument as witnesses. The help given to informal statements by the signature of the witnesses in the testator's presence and with his approbation, is wanting.

"But if the facts showed a complete act on the part of the testator, so far as related to his own subscription, the testamentary declaration and the request to the proposed witnesses to attest, and then an interruption of the affair by death, could the witnesses subscribe after his decease, so as to give the will validity? The statute requires the will to be subscribed by at least two attesting witnesses—can that act be performed after the death of the principal? At the moment of death the law disposes of his estate, either by descent or in conformity to his last will, if there be one. To interrupt the descent there must be a valid will. The will speaks at the instant of death. If without vitality then, what can ever give it vitality? If the will now under consideration took effect on the testator's decease, then his property passed by an unattested instrument, and the Statute of Wills is set at naught. It did not take effect then, but on the subscription of the witnesses, six weeks afterwards, took effect, as of the time of the death by way of relation, it follows that the act of the witnesses operated to divest the heirs of property descended, and to vest it in devisees, under an instrument not perfected in the lifetime of the ancestor. If the witnesses can perform that act an hour, or six weeks after the decedent has expired, they can do so a year after. Can the devolution of his estate depend upon them or their volition? If not, then they may be compelled to sign, although if the decedent were living they could refuse.

"To the due execution of a will, several ceremonial parts are necessary, and one just as necessary as another. There is no will until they are all completed. The absence of any one ceremony destroys the unity. These ceremonies are acts. The mere intention to have them all performed is not sufficient, but the intention must be effectuated in fact. If accident intervene to prevent their performance, the intention cannot be taken in lieu of performance, or instead of the act. Nor is it enough to say the decedent has done all he could do, or all that he was called upon to do in his own person, and therefore the will is valid. Such a doctrine would make a will good,

7. Extraneous Papers—Incorporation by Reference.—If a will executed and witnessed as required by the local statute, incorporates into itself by reference, any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof, as the paper referred to therein, takes effect as part of the will and should be admitted to probate as such.¹ But

when the parties requested to subscribe as witnesses refused—which they might do from justifiable and conscientious motives. In the execution of the last will and testament nothing rests entirely in intention—and the act of the witnesses is just as essential as the act of the testator.

“Nor do the parties requested to attend as witnesses contract to become witnesses. Till they sign, whether they shall become attesting witnesses or not, rests in their and the testator's absolute discretion. They may at the last instant perceive some reason for not authenticating the document. Till they sign, whether he shall complete the will, or whether they shall become attesting witnesses or not, is in the testator's absolute discretion. At the last moment his intention to perfect the will is still ambulatory; and even after a formal request to them to sign he may change his mind as to making a will at all, or may perceive some reason for preferring other witnesses. The request to the witnesses to attest is itself revocable till acted on. Death revokes it. At the time the witnesses sign, they must sign under a present existing request. The request is their authority, and they must act under a present subsisting authority. They derive all their right and power to subscribe from the testator's present volition and consent. When he ceases to exist, their power is withdrawn. Every derivative power depending on the will of the author dies with him, unless extended in express terms beyond his death.

“But I do not think the testator had in the present case done all the law required him to do. To make a valid will, it was just as necessary for him to procure before his death the attestation and subscription of two witnesses, as it was for him to have the will drawn and subscribed. The testator is the prime mover, to devise his property he needs to see completed certain forms during

his lifetime; and if by the intervention of Providence he does not live to see them all accomplished, the act is not completed. If Mr. Spencer had lived, the will now before me, in the state in which it was offered for probate, could not have been taken as a good will. The instant before his death it was not a valid will. The moment he died it was not a valid will—and then how could that which was not valid and perfect during life, and at death, become valid six weeks after he expired? Again, though the attestation in the testator's exact view is not necessary, still the attestation is in a certain sense part of the testator's act, and a ceremonial part of the will. The whole will is his act. The witnesses are mere aids or instruments in performing it. The attestation is part of the execution; it is dependent on the testator's request, though not on his presence, and when the witnesses sign they do so for the testator, and as his agents.”

Failure to Comply with Statutory Requirements.—If the record shows that the requirements of the statute were not observed, the decree of probate is an absolute nullity. Wall v. Wall, 123 Pa. St. 545.

1. Gray, C. J., in *Newton v. Seamans' Friend Soc.*, 130 Mass. 91; 39 Am. Rep. 433; *Wms. Exrs.* 97; *Haberg-ham v. Vincent*, 2 Ves. Jr. 204; *Singleton v. Tomlinson*, L. R., 3 App. Cas. 404; *Bizzey v. Flight*, 3 Ch. Div. 269; *Goods of Sibthorp*, L. R., 1 P. & M. 106; *Van Straubenzee v. Monck*, 3 S. & T. 6, 32 L. J. Prob. 21; *Goods of Sunderland*, L. R., 1 P. & M. 198; *Goods of Pascall*, L. R., 1 P. & M. 606; *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *In re Shillaber's Estate*, 74 Cal. 144; *In re Soher's Estate*, 78 Cal. 477; *Hall v. Hill*, 6 La. Ann. 745; *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 488; *Bullock v. Bullock*, 2 Dev. Eq. (N. Car.) 307; *Milledge v. Lamar*, 4 Desaus. (S. Car.) 617; *Fesler v. Simpson*, 58 Ind. 83; *Fickle*

v. Snepp, 97 Ind. 289; 49 Am. Rep. 449; *Beall v. Cunningham*, 3 B. Mon. (Ky.) 390; 39 Am. Dec. 469; *Harvy v. Chonteau*, 14 Mo. 587; 55 Am. Dec. 120; *Tonnele v. Hall*, 4 N. Y. 140; *Brown v. Clark*, 77 N. Y. 369; *Chambers v. McDaniel*, 6 Ired. (N. Car.) 226; *Zimmerman v. Zimmerman*, 23 Pa. St. 375; *Baker's Appeal*, 107 Pa. St. 381; 52 Am. Rep. 478; *Johnson v. Clarkson*, 3 Rich. Eq. (S. Car.) 305; *Pollock v. Glassell*, 2 Gratt. (Va.) 439. But compare *Myer's Estate*, Myr. Prob. (Cal.) 205; *Crosby v. Mason*, 32 Conn. 482; *Phelps v. Robbins*, 40 Conn. 250.

In conformity with this doctrine, a will void for want of proper attestation has been validated by a subsequent codicil properly attested, which refers to the will and states that it is to be taken as a part thereof. *In re Murfield's Will*, 74 Iowa, 479.

But in *Sharp v. Wallace*, 83 Ky. 584, it was held that an unattested codicil, although wholly in the handwriting of the testatrix, could not bring into operation as a will a paper which was neither in the handwriting of the testatrix nor attested as required by the statute. The court, by Lewis, J., said: "The question presented to us for consideration is, whether the instrument purporting to be a codicil, which was wholly written and subscribed by her, and, therefore, itself executed in one of the modes prescribed by the general statutes, has the effect to set up and give validity to the paper dated January, 1867. Clearly the reference made in the codicil to the preceding instrument is definite and certain enough to identify it. It must be also admitted that she intended the two as her will, and believed they would be valid as such; and if the codicil had been subscribed or acknowledged by her in the presence of two credible witnesses, who subscribed their names thereto in her presence, it would, according to the construction heretofore given to the Statute of Wills by this court, have had the effect to give validity to the preceding unfinished instrument as her will; for that question was thoroughly considered in the case of *Beall v. Cunningham*, 3 B. Mon. (Ky.) 390; 39 Am. Dec. 469, may be now regarded settled. In that case the following language was used:

"A codicil is a part of the will to which it is attached or refers, and both must be taken and construed together as one instrument. The codicil recog-

nizes the existence of the original, changing it in part and affirming it in those parts in which it is not altered; and hence it has been well established that a codicil executed with the solemnities required by the statute for passing lands is a republication of a will, and both taken together make but one will, and that such republication will have the effect to pass lands acquired after the date of the will, but before the date of the codicil, or to revive and give force and operation to a revoked will."

"It was contended by counsel in that case, that though a codicil duly executed might operate as a republication of a revoked will which had been duly executed, it could not have the effect to bring into operation as a will a paper which had never been signed or executed as such. But said the court: 'We can see no difference in principle in the cases. . . . If the codicil can so ingraft itself upon and draw within its operative influence a revoked will as to amount to a republication, we cannot perceive why it may not ingraft itself upon and draw within its operative influence any instrument which the testator may treat as his will, so as to amount to a republication of the whole as his will.' In *Davis v. Taul*, 6 Dana (Ky.) 51, it was held that 'when a codicil operates as a republication of the will, the whole is to be construed together as if the will had been then written and executed.' And in *Armstrong v. Armstrong*, 14 B. Mon. (Ky.) 269, the court said: 'A codicil is in legal effect a republication of a will, and the whole is to be construed together as if the will had been executed at the date of the codicil.' It will be perceived that in case of the republication of a revoked will in virtue of a codicil, the two are to be construed together, as if the will had been executed at the date of the codicil, and where the preceding instrument has never been completed, it and the codicil, which has the effect to give it validity that it never before had, must be taken together and make but one will, not merely for the purpose of construction but as to their execution; and it seems to us such must be the logical and necessary result of imparting to the codicil the legal effect of making valid as a will an instrument having no efficacy without. But section 5, chapter 113, general statutes, provides that 'no will shall be valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some

other person in his presence, or by his direction, and, moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the witnesses.'

"The object of the statute providing the manner in which a will shall be executed to render it valid, is to insure identity and prevent imposition and fraud. And though a substantial compliance with it is all that is required, no court is authorized to admit to probate an instrument as the last will of a deceased person in violation of its express language, however well founded may be the belief it was intended by him as his will. Taking the codicil and preceding unfinished instrument together as but one will, as it seems to us we are bound to do, it was not executed in either of the modes required by the statute, not having been wholly written by the testatrix, nor subscribed or acknowledged by her in the presence of attesting witnesses. It is true a document may, for the purpose of identification of an object or person mentioned in a will, or to elucidate and explain the intention of a testator, be referred to and made part thereof; but we are unable to perceive how any instrument, testamentary in its character, but not fully and properly executed as a will, can be made efficacious as such under our statute by mere reference in a codicil not itself subscribed or acknowledged before attesting witnesses."

In *Jarm. on Wills* (5th Am. ed.), p. 90, it is written in reference to the incorporation of a document in the probate of a will by reference that "three things are necessary: first, that the will should refer to some document as then in existence; secondly, proof that the document propounded for probate, was, in fact, written before the will was made; and thirdly, proof of the identity of such document with that referred to in the will."

Description of Instrument Referred to.—It has been held that a clause which "ratifies and confirms a deed, dated, etc., and made between, etc.," is sufficient to incorporate the instrument referred to. *Sheldon v. Sheldon*, 1 Rob. 81, 3 No. Cas. 254, 8 Jur. 877; *Bizzey v. Flight*, L. R., 3 Ch. Div. 269. But see *Goods of Hubbard*, L. R., 1 P. & M. 53.

The expression in the donor's will

viz.: "I give and bequeath to my son P, in addition to what I had given him by deed of gift," certain notes, etc., is not a sufficiently definite reference to the deed, which was invalid, for want of delivery, to incorporate it into the will and thereby pass the land. *Bailey v. Bailey*, 7 Jones (N. Car.) 44.

Instrument Referred to Should Be Then in Existence.—A reference to a document as "made or to be made" affords ground for the presumption that the document had not already been made. *In re Skair*, 5 No. Cas. 57; *In re Astell*, 5 No. Cas. 489 n. See also *In re Hake-will*, 1 Deane 14; 2 Jur. N. S. 168; and *In re Countess of Pembroke*, 1 S. & T. 250; 1 Deane 182; 2 Jur. N. S. 526, is perhaps referable to this ground.

A reference to persons or things "hereinafter named" is not so clear a reference to any document as then existing as to incorporate writings that follow the signature of the testator and of the witnesses, although it be proved that in fact such writings were in existence before the will was executed. *Goods of Watkins*, L. R., 1 P. & M. 19; *Goods of Brewis*, 33 L. J. Prob. 124; *In re Dallow*, L. R., 1 P. & M. 189.

Likewise, a reference to "the annexed schedule" is not sufficiently specific to incorporate, without more matter subsequent to the signing and attestation. *Lord Cairns in Singleton v. Tomlinson*, L. R., 3 App. Cas. 414. Here the schedule was not written, but endorsed, being on the fourth side of a sheet of paper on which the will was written. See also *In re Ash*, 1 Deane 14; 2 Jur. N. S. 526.

By the execution of a valid codicil, a document may be incorporated which was made between the time of the execution of the will, and that of the codicil, as a codicil may republish the will, and make it speak as at the date of the codicil. *In re Hunt*, 2 Rob. 622; *Goods of Truro*, L. R., 1 P. & M. 201. But if a will refers to a paper as afterward to be executed, a later codicil making no reference back cannot suffice to incorporate such paper. *Goods of Matthias*, 3 S. & T. 100.

Evidence to Establish Identity of Document Referred to.—Where the description of the document referred to is not perfectly distinct, yet if it is in terms sufficiently definite to render it capable of identification, extrinsic evidence is admissible, together with such internal evidence as may be found in the document itself, to supply the

if the paper was not in existence when the will was executed, but is to be hereafter prepared and executed, no reference in the existing will can give it any valid testamentary effect, independently of its own proper execution in conformity with the local statute. Hence the testator cannot reserve a power to dispose of property at a future time, by what is tantamount to a will informally executed.¹ Where a will refers to a memorandum which cannot be found upon the testator's decease, the will may take effect without it, either on the presumption that the paper was intentionally destroyed with a view to revoking it, or because an apparent testamentary disposition is not to be disappointed because other dispositions have failed.²

necessary proof. Thus in *Allen v. Maddock*, 11 Moore, P. C. C. 427, an unexecuted will was held to have been incorporated in a duly executed codicil by the heading: "This is a codicil to my last will and testament" no other document having been found to answer to the reference. See also *In re Countess of Durham*, 3 Curt. 57, 1 No. Cas. 365, 6 Jur. 176; *In re Pewtner*, 4 No. Cas. 479; *In re Darby*, 4 No. Cas. 427, 10 Jur. 164; *Jorden v. Jorden*, 2 No. Cas. 388; *In re Dickens*, 3 Curt. 60, 1 No. Cas. 398; *Goods of Almonino*, 1 S. & T. 508, 29 L. J. P. 46; *In re Willesford*, 3 Curt. 77, 1 No. Cas. 404; *In re Bacon*, 3 No. Cas. 644; *Goods of Mercer*, L. R., 2 P. & M. 91; *Goods of Greves*, 1 S. & T. 250, 28 L. J. P. 18 (where the evidence of identity failed). But see *In re Edwards*, 6 No. Cas. 306; *Collier v. Langebear*, 1 No. Cas. 369; *In re Sotheron*, 2 Curt. 831, 1 No. Cas. 73, would not now be followed.

Where a document headed "instructions for the will of J. Wood," disposed of the residue "in such manner as I shall direct by my will to be indorsed hereon," and the testator afterward made a will, which, though not indorsed on the "instructions" was expressed to be made in "pursuance of the instructions for his will," no other instructions being found, it was held that the "instructions" in question were incorporated in the will. *Wood v. Goodlake*, 4 Monthly Law Mag. 155, 1 No. Cas. 144. Compare *Goods of Pascall*, L. R., 1 P. & M. 606; *Goods of Gill*, L. R., 2 P. & M. 6.

Presumption of Identity.—Where the reference in the will to the document sought to be incorporated into the probate is specific as to date, heading, and other particulars, and if the document propounded agrees in these particulars with the description contained in the

will, its previous existence and identity will, in the absence of circumstances or evidence tending to a contrary conclusion, be assumed. *Swete v. Pidsley*, 6 No. Cas. 190.

In *Ford v. Ford*, 70 Wis. 19, schedules referred to in the will and attached thereto, were construed with it as one instrument.

So notes made by a testator, payable at his death, when folded up with the will, referred to, and clearly identified therein, and remaining in his possession at his death, have been held to form a part of the will. *Fickle v. Snapp*, 97 Ind. 289; 49 Am. Rep. 449.

Reference to a Void Instrument.—There is no doubt that a valid bequest or devise may be made by reference to an invalid instrument. Thus, where a testator in his will stated that he had given his son one thousand dollars by note, for his full share of his estate, and ordered his executor to pay the legacy above mentioned within one year after his death, it was held that this was a valid legacy for one thousand dollars, though the note was not valid. *Loring v. Sumner*, 23 Pick. (Mass.) 98.

1. *Schouler on Wills* (2d ed.), § 281, citing *Johnson v. Ball*, 5 De G. & L. 85; *Crocker v. Hertford*, 4 Moo. P. C. 339; *Thayer v. Wellington*, 9 Allen (Mass.) 213; 85 Am. Dec. 753; *Langdon v. Astor*, 3 Duer (N. Y.) 477; 16 N. Y. 9. See *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418; *Magoohan's Appeal*, 117 Pa. St. 238.

In some states the courts are very reluctant to admit as wills any extraneous unattested paper, whose purport is to dispose, and not merely to explain, describe, or arrange the details under the formal instrument. *Phelps v. Robbins*, 40 Conn. 250; *Thompson v. Quimby*, 2 Bradf. (N. Y.) 449.

2. *Wood v. Sawyer*, Phill. (N. Car.)

8. Wills Written on Several Sheets of Paper.—A will may be written on several sheets of paper; it is sufficient, if the different parts are connected by their internal sense, coherence, or adaptation.¹

9. Evidence of Testamentary Intention.—Evidence is admissible to show that a deed or other instrument of gift which on the face of it is not testamentary, was not intended to operate until the death of the person executing it;² to show that an instrument,

251; *Dickinson v. Stidolph*, 11 C. B., N. S. 341; *Thompson v. Quimby*, 2 Bradf. (N. Y.) 449.

A testator by a testamentary paper, purporting to be a codicil to his last will and testament, bequeathed his balance at his banker's to his wife. No will could be found, although a will was proved to have been in existence, and in the testator's possession previous to the date of the codicil. The court was of opinion, looking at the provisions of the codicil, that the testator intended it to be independent of the will, and therefore admitted it to probate until such time as the will should be found. *Goods of Greig*, L. R., 1 P. & M. 72.

1. *Wikoff's Appeal*, 15 Pa. St. 281; 53 Am. Dec. 597; *Matter of Dayger*, 47 Hun (N. Y.) 127. See *Marsh v. Marsh*, 1 S. & T. 528; *Jones v. Habersham*, 63 Ga. 146; *Ginder v. Farnum*, 10 Pa. St. 98. See also *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 114; *Porter v. Turner*, 3 S. & R. (Pa.) 108.

Where there was no suspicion of unfairness, a writing on a separate sheet of paper, not signed by the testator, but connected by the sense and the dependence of one part upon the other with a second sheet, the last page of which was properly signed and attested, and which, when offered for probate, was recognized by the witnesses, was held by the court to be a part of the will. *Martin v. Hamlin*, 4 Strobb. (S. Car.) 188; 53 Am. Dec. 673.

The presumption is that papers bound or fastened together, coherent in sense, and constituting the will as formed after the testator's death, were so bound or fastened, and constituted the will when it was attested. *Marsh v. Marsh*, 1 S. & T. 528.

The will of the deceased had been engrossed by a law stationer on fifteen brief sheets of paper, consecutively numbered. On the sixteenth sheet the testator had written a codicil, and on the eighteenth and last, a schedule of

property referred to in the will. On the death of the testator, it was found that the original fourth sheet had been removed and placed loose in his desk, and that the original seventeenth sheet had been used by the testator in substitution of the fourth. The several sheets were tied together with tape. It was held, that the legal presumption that papers bound together and constituting the will, as found at testator's death, were so bound together at the time of execution and attestation was not rebutted by the circumstances of the case. *Rees v. Rees*, L. R., 3 P. & M. 84.

2. *Theobald on Wills* 11; *citing Cooke v. Cock*, L. R., 1 P. & M. 241; *Robertson v. Smith*, L. R., 20 P. & M. 43; *In re Coles*, L. R., 2 P. & M. 362; *Goods of Webb*, 3 S. & T. 482; *Goods of English*, 3 S. & T. 586; *Robertson v. Dunn*, 2 Murph. (N. Car.) 133; 5 Am. Dec. 525.

An instrument which was in form a deed contained the following clause: "For the love and affection which I have for my wife, I give unto her all my property, real and personal, during her widowhood; and if she marries, it is all to go back to my niece Sally;" and there was nothing else in the instrument which showed unequivocally whether the maker intended it to take effect before or after his death. It was held that it was doubtful, from the expression "I give . . . during widowhood," whether the maker intended to give an interest *in presenti*, or only after his decease, but that upon consideration that he gave all of his estate, it was highly improbable that he intended the gift to take effect before his death, and it was therefore a will. *Sartor v. Sartor*, 39 Miss. 760.

Where it was doubtful whether the instrument offered in evidence was a deed or a will, it was held that the facts of its execution and delivery and the declarations of the maker at the time, together with the instrument, should be permitted to go to the jury. *Herrington v. Bradford*, Walk. Miss. 520.

on the face of it testamentary, was not written *animo testandi*; ¹ but not to show that the operation of a will, absolute in its terms, depends upon a condition.²

VI. FORMAL REQUISITES—1. Signature—*a.* **ENGLISH RULE.**—In *England*, wills of personalty made before January 1, 1838, when the Statute of 1 Vict., ch. 26, came into operation, were valid without the signature of the testator, and, whether the will was in the handwriting of the testator or of some other person duly authorized by him, the rule was the same.³ Although the presumption in such cases was against testamentary papers not actually executed by the testator,⁴ yet such presumption was feeble, and easily repelled by satisfactory evidence that the non-execution might be ascribed to some other cause than an abandonment of

1. *Nicholls v. Nicholls*, 20 Ph. 180; *Goods of Norworthy*, 11 Jur. N. S. 570; *Lister v. Smith*, 3 S. & T. 282; *Whyte v. Pollok*, L. R., 7 App. Cas. 400.

Testamentary Intent.—"The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act, was in reality the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the court should turn it into an effective instrument. And such no doubt is the law. There must be the *animus testandi*. In *Nicholls v. Nicholls*, 2 Ph. 180, the court refused probate to a will regularly executed, which was proved to have been intended only as a specimen of the brevity of expression of which a will was capable. And in *Trevelyan v. Trevelyan*, 1 Ph. 149, the court admitted evidence and entertained the question whether the document was seriously intended or not. In both cases the court held that evidence was admissible of the *animus testandi*. And to the same effect is the authority of *Swinb.*, pt. 1, § 3. and of *Shep. Touch.* 404. The analogies of the common law point the same way. A deed delivered as an escrow, though regularly executed, is not binding. And in *Pym v. Campbell*, 6 El. & Bl. 370, the Queen's Bench held that a regular agreement signed by the party might be avoided by parol evi-

dence that at the time of its signature it was understood that it should not operate unless a certain event happened. There can therefore be no doubt of the result in point of law if the fact is once established. But here I must remark that the court ought not, I think, to permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury, that their verdict recognizes and expresses no degree of clearness in proof. They are sworn to find one way or the other, and they do so sometimes on proof amounting almost to demonstration, at others on a mere balance of testimony; sometimes upon written admissions and independent facts proved by disinterested parties, sometimes on conflicting oaths or a nice preponderance of credibility. And it is difficult to impress them with the enormous weight which attaches to the document itself as evidence of the *animus* with which it was made. This weight it becomes the court to appreciate, and to guard with jealousy the sanction of a solemn act." *Lister v. Smith*, 3 S. & T. 288.

2. *Sewell v. Slingsluff*, 57 Md. 537.

3. 1 Wms. on Exrs. (9th ed.) 94; *Salmon v. Hays*, 4 Hagg. 382. See *Forbes v. Gorbon*, 3 Ph. 628; *Coles v. Trecothick*, 9 Ves. 240; *Gaskins v. Gaskins*, 3 Ired. (N. Car.) 158; *Public Administrator v. Watts*, 1 Paige (N. Y.) 347; 4 Wend. (N. Y.) 168; *McLean v. McLean*, 6 Humph. (Tenn.) 452.

4. *Scott v. Rhodes*, 1 Ph. 12; *Abbott v. Peters*, 4 Hagg. 380; *Montefiore v. Montefiore*, 2 Add. 358; *Bragge v. Dyer*, 3 Hagg. 380; *McLean v. McLean*, 6 Humph. (Tenn.) 452.

the intention therein expressed;¹ as by showing that the execution was prevented by act of God,² or that the deceased intended it to operate in its present state and without doing any further act in order to give it testamentary effect.³ The principle only applied, however, to unexecuted, as distinguished from imperfect papers, and hence was inapplicable if the body of the instrument was unfinished and incomplete, unless it was clearly proved by the party setting up the instrument that the deceased had come to a final resolution respecting it as far as it went.⁴

On the other hand, devises of realty were required by the Statute of Frauds to be in writing signed by the testator or some other person in his presence and by his express direction.⁵ As the statute did not require the signature to be subscribed, it was held that a will in the testator's own handwriting commencing, "I, John Stiles, do declare this to be my last will," etc., was sufficiently "signed" within the statute, although not subscribed with his name.⁶ The Statute 1 Vict., ch. 26, § 9, which applies to all wills made, re-executed or republished after January 1, 1838, provides that no will of either real or personal estate shall be valid unless in writing and "signed at the foot thereof by the testator or by some other person in his presence and by his direction."⁷

b. AMERICAN RULE.—In nearly all of the states of the Union, statutes exist providing that all wills, whether of real or personal estate, must be in writing and signed by the testator,⁸ or by

1. *Montefiore v. Montefiore*, 2 Add. 357; *Gaskins v. Gaskins*, 3 Ired. (N. Car.) 158; *Public Administrator v. Watts*, 1 Paige (N. Y.) 347; *McLean v. McLean*, 6 Humph. (Tenn.) 452.

2. *Masterman v. Maberly*, 2 Hagg. 235; *Scott v. Rhodes*, 1 Ph. 12; *Gaskins v. Gaskins*, 3 Ired. (N. Car.) 158; *Plater v. Groome*, 3 Md. 134.

Supervening insanity has been held sufficient to account for non-execution. *Hoby v. Hoby*, 1 Hagg. 146; *Fulleck v. Allinson*, 3 Hagg. 527.

3. *Roose v. Mouldsdale*, 1 Add. 131.

For instances in which testamentary effect has been given to finished papers remaining unexecuted, see *Barburton v. Burrows*, 1 Add. 383; *Masterman v. Maberly*, 2 Hagg. 235; *Goods of Lamb*, 4 Notes of Cas. 561; *Scott v. Rhodes*, 1 Ph. 12; *Read v. Phillips*, 21 Ph. 122; *Thomas v. Wall*, 3 Ph. 23; *Friswell v. Moore*, 3 Ph. 135.

4. *Wms. on Exrs.* (8th Eng. ed.), pt. I, bk. II, ch. II, § I; *Montefiore v. Montefiore*, 2 Add. 358. See also *Robeson v. Kea*, 4 Dev. (N. Car.) 301; *Plater v. Groome*, 3 Md. 134. Compare *Frierson v. Beall*, 7 Ga. 438; 29 Car. II., ch. 3, § 19.

5. *Schouler on Wills* (2d ed.), § 300; 29 Car. II., ch. 3, § 19.

6. 1 *Wms. on Exrs.* (9th ed.) 107; *Cook v. Parsons*, Pre. Ch. 184; *Coles v. Trecothick*, 9 Ves. 249.

7. 1 *Wms. on Exrs.* (9th ed.) 107.

8. See the statutes of the various states.

In *Ex p. Leonard*, 39 S. Car. 518, it was held that where the person directed to sign the will for the testatrix subscribed her name to it before coming into her presence and the presence of the witnesses, but, when in her presence and that of the witnesses, wrote beneath her name his name, preceded by the word "by" and followed by the words "by request," he sufficiently signed for the testatrix in her presence and that of the witnesses.

In *New York*, a will is signed by the testatrix if her name is written by one of the attesting witnesses at the testatrix's request, who accompanies the request with a mention of her name in full. *In re Stevens' Will* (Surrogate Ct.), 3 N. Y. Supp. 131; 6 Dem. (N. Y.) 262.

A paper drawn at the instance of the deceased as his will, but never signed or

some other person by the testator's express direction and in his presence; in *Pennsylvania* this last may not be done, unless the testator is prevented from signing himself by the extremity of his last sickness. In *Indiana*, it is sufficient if the will be signed by another with the testator's consent, in his presence; and in *Arkansas* sufficient, if done at the testator's request, whether in his presence or not; so also in *New Mexico*, if he is unable to sign himself or does not know how.

c. CONSTRUCTION OF ENGLISH AND AMERICAN STATUTES.—

In states in which the place of signature is not designated by statute, the rule established is substantially that adopted under the English Statute of Frauds, upon which such acts are based, and the place of signature is of secondary consequence, provided that wherever the testator may have chosen to place his name, he meant it to stand for his final signature, and thereby authenticate the entire instrument as propounded.¹ In states in which the

seen by him, admitted to probate on the affidavit of two witnesses, stating that he ordered the preparation of the paper but died before he could execute it, does not comply with the Act of *Pennsylvania* 1833, making provision that a will must be signed by the testator, or by some person in his presence at his express direction, unless prevented by the extremity of his last illness; and such a paper is void though the probate decree remains unappealed from for more than five years. *Wall v. Wall*, 123 Pa. St. 545.

Where a will is written on three pages, and signed at the bottom of the second page, and a disposition of the estate is made on the third page, the will is not properly executed, and should not be admitted to probate. *Frazier's Estate*, 8 Pa. Co. Ct. Rep. 306.

1. Schouler on Wills (2d ed.), § 312. See *Hall v. Hall*, 17 Pick. (Mass.) 373; *Armstrong v. Armstrong*, 29 Ala. 538; *Ramsey v. Ramsey*, 13 Gratt. (Va.) 664; 70 Am. Dec. 438; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102; *Kirkpatrick's Will*, 22 N. J. Eq. 463; *Matter of Booth's Will*, 127 N. Y. 109; *Allen v. Everett*, 12 B. Mon. (Ky.) 371; *Mile's Will*, 4 Dana (Ky.) 1.

In *Adams v. Field*, 21 Vt. 256, the will commenced in these words: "I, Samuel Adams," etc., and was wholly in the handwriting of the testator, but written at different times, and contained the usual testimonium clause, but was not subscribed by the testator at the foot. It appeared that the testator produced the instrument in

the presence of three witnesses, and declared it to be his will, and requested them to witness it, and that they did attest it in the presence of the testator and of each other. It was held, that the testator thereby adopted the instrument, as it was then signed, as his will, and that the will thereby became complete, the same as if the testator had originally written his name at the commencement, with the intent that it should serve as a signature to the will, and that it was a sufficient signing of the will, within the meaning of the statute of that state.

In some cases it has been held that this intent must appear on the face of the will. See *Rosser v. Franklin*, 6 Gratt. (Va.) 1; 52 Am. Dec. 97; *Waller v. Waller*, 1 Gratt. (Va.) 454; 42 Am. Dec. 564; *Denton v. Franklin*, 9 B. Mon. (Ky.) 28; *Jolly's Will*, 5 N. J. Eq. 456; *Graham v. Graham*, 10 Ired. (N. Car.) 219; *Ray v. Hill*, 3 Strobb. (S. Car.) 297; 49 Am. Dec. 647.

Under the *Virginia Code* (1887), § 2514, which provides that "no will shall be valid unless it be in writing and signed by the testator or by some other person in his presence, and by his direction, in such manner as to make it manifest that the name is intended to be as a signature," it was held that a will wholly in the testator's handwriting, beginning: "I, A. W., of the county of H., declare this to be my last will and testament," but nowhere else containing the testator's name, and inclosed in a sealed envelope on which was written, in the testator's handwriting, "My Will

local statute requires the testator's signature to be at the end of the will or subscribed thereto, it has been held that the signature must be sufficiently near the end of the written matter to prevent interpolations in the intervening space,¹ and that if any testamentary provision is placed after the signature, the whole instrument is to be excluded from probate.²

—A. W.,” was not signed by the testator. *Warwick v. Warwick*, 86 Va. 596. The court said: “The signing required by the statute must manifestly appear to be intended as a signature from the face of the instrument, which must appear, by internal evidence, equally convincing as the signing at the foot or end. . . . The finality of the testamentary intent must be ascertained from the face of the paper, and extrinsic evidence is not admissible either to prove or disprove it. The signing of a will, to be a sufficient signing under the statute, must be such as, upon the face of the instrument, appears to have been intended to give it authenticity. It must appear that the name was regarded as a signature, and that the instrument was complete without further signature; and the paper itself must show this, for the statute requires that the will shall be so signed—that is, signed in a manner to make it manifest that the name was intended as a signature. It is an equivocal act, as is well settled, to insert the name at the top or beginning, and extrinsic evidence is not employed to effect, either *pro* or *con*, the question of finality of intention, when this internal evidence, to be afforded by the face of the paper, is wanting.”

In *Alabama*, it has been held under a statute similar to the Statute of Frauds, that the testator's name at the beginning of a will dictated by himself, is to be regarded as a sufficient signing by another at his request. *Armstrong v. Armstrong*, 29 Ala. 538.

1. *Soward v. Soward*, 1 Duv. (Ky.) 126. Such also appears to have been the English rule prior to the passage of 15 & 16 Vict., ch. 24; *Willis v. Lowe*, 5 No. Cas. 432; *Smee v. Bryer*, 6 Moo. P. C. 404.

Under the statute law of *Missouri*, a will written by an attorney at the request of a friend, out of the presence of the testator, and not subscribed, is not “signed” within the meaning of the statute although the name of the testator appears in the exordium or body of the will, and is invalid, al-

though expressly assented to by him and duly attested in his presence. The statute is imperative, and the “signing” therein referred to must be construed to mean the affixing of the testator's name at the bottom of the will, either in his own handwriting or that of some one else by his direction. *Catlett v. Catlett*, 55 Mo. 330.

In *Baker v. Baker* (Ohio, 1894), 37 N. E. Rep. 125, it was held that where a testator, in what purports to be his last will and testament, appoints his sister-in-law executrix thereof, and before he signs the instrument writes thereon, after the attestation clause, the words “my sister-in-law is not required to give bond when probated,” and thereafter, in the presence of the subscribing witnesses, signs the instrument above those words, it will be a signing by the testator at the end thereof as required by the *Ohio* Revised Statutes.

2. *Matter of Hewitt's Will*, 91 N. Y. 261; *Matter of O'Neill's Will*, 91 N. Y. 516; *Matter of Conway's Will*, 124 N. Y. 455; *Hays v. Harden*, 6 Pa. St. 409; *Wikoff's Appeal*, 15 Pa. St. 291; 53 Am. Dec. 597; *Baker's Appeal*, 107 Pa. St. 381; 52 Am. Rep. 478. See *Fouché's Estate*, 147 Pa. St. 395.

In *Hays v. Harden*, 6 Pa. St. 413, *Gibson, C. J.*, said: “Signing at the end of a will was required by the statute to prevent the evasion of its provisions that followed the English Statute of Frauds, which the judges held to be satisfied wherever the testator's name, in his own handwriting, was found in the introductory or any other part of the instrument. Besides, as all the devises in a will constitute one instrument, signing at the end of it serves to show that the whole disposition of the testator's estate was finished and not in embryo, which the want of a formal act of authentication had before left room to doubt. The argument, that all which precedes the signature, having once been formally executed, should remain stable, and that the additional matter alone should be rejected, is plausible

In *England* and *Pennsylvania*, it has been held that a will signed at the end of the obviously inherent sense, though not at the end in point of space, is "signed at the end thereof" within the meaning of the act, and hence portions below the signature, connected by asterisks or reference with portions preceding it, do not invalidate the instrument;¹ in *New York*, it has been held

but unsound. It is evident that the testator considered the whole to be one will; and we have no reason to believe he would have wished any part of it to stand if the whole did not. We must bear in mind that every executed will is revocable in the testator's lifetime; and when devises are subjoined to it, it is evident that the original paper does not contain the testator's whole counsel. A codicil, being distinct and supplemental, stands on different ground; for where it is itself executed according to the statute, it casts no doubt or uncertainty on the state of the testator's mind as to what preceded it. It is better, therefore, that an informal addition should operate as a statutory revocation of the whole than that a plain injunction should be frittered away by exceptions. The statute is a most wholesome one; and while we refrain from carrying its provisions beyond the views of the framers of it, we must not err on the other side."

Under the statute of *Pennsylvania* of 1833, providing that "every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof," a will signed and containing, after the signature, and before the attestation, the words, "I will that C. and H. be my executors," is void. *Wineland's Appeal*, 118 Pa. St. 37.

Testator after his signature wrote the following clause: "For the satisfaction of all concerned, and others: For many years I made my home and residence with my brother, residing on my farm, township as above; while laboring under the infirmities of life, his treatment towards me was of such a nature as to compel me to leave the house and find an asylum in the house of my nephew, Abraham Hays, as above; in consideration of his hospitality towards me, I will and bequeath to him the above described farm." This was subscribed by witnesses, but was not signed by the testator. It was held testamentary and sufficient to exclude the whole instru-

ment from probate. *Hays v. Harden*, 6 Pa. St. 409.

On the other hand, the words, "This will was commenced in the year of our Lord, 1843, and added to as occasion required," written below the signature and attestation, have been held immaterial. *Wikoff's Appeal*, 15 Pa. St. 291; 53 Am. Dec. 597. The court, by Gibson, C. J., said: "The matter in it bore neither on the contents of the will nor on its interpretation. It was not testamentary; and it was no more a part of the will than was the label on the back of it. 'This will,' subjoined the testatrix, 'was commenced in the year of our Lord, 1843, and added to as occasion required.' Very different the additional matter in *Hays v. Harden*, 6 Pa. St. 409, which consisted, not only of reasons for a precedent devise which might have influenced the construction of it, but an additional substantive devise, which showed that the preceding part had not disclosed the testator's whole counsel."

Position of Date.—The will is not invalidated by the fact that the signature precedes the date. *Flood v. Pragoff*, 79 Ky. 607.

1. *Goods of Birt*, 24 L. T. R. 142; *Baker's Appeal*, 107 Pa. St. 381; 52 Am. Rep. 478.

In *Baker's Appeal*, 107 Pa. St. 381; 52 Am. Rep. 478, a will was written on the first and third pages of a sheet of paper, and signed at the end of the third page. In a devise to A., written on the third page, numbered "4th," certain words describing the property devised were erased, and the words "See next page" were there interlined. On the fourth page of the same sheet of paper was written an unsigned clause, numbered "4th" making a bequest to A., and also additional bequests to other beneficiaries. The scrivener who drew the will testified that the erasure and interlineation were made by him at testator's direction, and he identified the writing on the fourth page as the subject of the said reference in the will, and as having

been written by him at the testator's direction prior to the signing by the testator. It was held that the writing on the fourth page was to be read into the will as constituting the fourth clause thereof, and that the entire instrument, with said clause incorporated therein, should be admitted to probate as the testator's will. In this case the court, by Clark, J., said: "The sixth section of the Act of 8th April, 1833, P. L. 249, provides that 'every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him, at the end thereof,' etc. The construction, which had been previously given to the act of 1705, made this provision necessary; the plain purpose of the legislature, in requiring the signature of the testator to be written at the end of the will, was to assimilate wills, in the mode of their execution, to other instruments for the transmission of title, to furnish a more certain and satisfactory means of authentication, and thus to distinguish what might be mere incomplete memoranda, from that which certainly declared the full and final purposes of the testator respecting his property. That this was, at least, the primary and principal object of the statute of 1833 is abundantly shown, not only in the report of the commissioners but in numerous decisions of this court since its passage. *Strickler v. Groves*, 5 Whart. (Pa.) 386; *Hays v. Harden*, 6 Pa. St. 409. It is the *animus testandi*, therefore, which is manifested by the testator's signature to a will, and unless signing be prevented by an absolute inability, the fact of a completed testamentary disposition cannot otherwise appear.

"The will of George Baker is commenced upon the first, and is formally concluded upon the third page of a folio of foolscap paper. The fourth page of the paper, however, contains another, and further testamentary provision, and, as the signature to the will is at the end of what is written on the third page, it is urged on the one side that it is not signed, according to the statutory requirement, at the end thereof; on the other side, it is contended that what is written on the fourth page is, by clear reference, incorporated into the body of the will, and that although the signature is not at the end of the writing, in point of space, yet if

the item on the fourth page be drawn into its appropriate and clearly intended connection, on the third, the signature will then appear at the end of the will in point of fact.

"It will not, we think, be seriously questioned, notwithstanding the provisions of the Act of 1833, that any relevant paper or writing, attached or detached, if there be no reasonable question as to its identity, or of its existence at the execution of a will, may be so referred to therein, as thereby to become incorporate with the provisions. No case in *Pennsylvania* has been cited by counsel, with the exception perhaps of *Hauberger v. Root*, 6 W. & S. (Pa.) 437, in which this rule is expressly asserted; nor, in the somewhat hasty search we have made, do we find any in which the precise point is presented, but in *England*, and in the courts of some of the states, under similar statutes, the doctrine is distinctly declared.

"In *Habergham v. Vincent*, 2 Ves. Jr. 223, which was a case decided under the Statute of Frauds, Wilson, J., sitting with Lord Chancellor Laughborough, says: 'I believe it is true, and I have found no case to the contrary, that if a testator in his will refer expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will; and such reference is the same as if he had incorporated it, because words of relation have a stronger operation than any other.' This case was followed in *Re Countess of Durham*, 3 Curt. 366, and in many other cases, both in the civil and ecclesiastical courts of *England*, and it cannot be doubted that such was the rule in the authentication and probate of wills, under the Statute of Frauds. By the Statutes of 7 Will. IV., and 1 Vict., ch. 26, however, all previous provisions, as to execution and attestation of wills, were repealed, and it was thereby enacted that no will should be valid, unless in writing and executed as therein provided, and one of the requisites was that it should be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction. In *Willis v. Lowe*, 5 No. Cases 428, and in *Smee v. Bryer*, 6 Moo. P. C. C. 404, however, it was held that the signature must be so affixed at the end of the will, as to leave no blank

that the principles deduced from the English decisions are inapplicable, and that the signature must be at the physical end.¹ In

space for any interpolation between the end of the will and the signature. This was found to produce such extensive injustice, that by the Statute 15 and 16 Vict., ch. 24, the legislature interfered to alter the law so established; but in this amendatory statute it is expressly provided that no signature shall be operative, to give effect to any disposition or direction which is underneath or which follows it, nor to any disposition or direction inserted after the signature shall be made. Upon these provisions of the statute law of England, the case of *Allen v. Maddock*, 11 Moo. P. C. C. 426, was decided; in that case, after an extended reference to all the English authorities, and a full discussion of the subject, it was held that an unattested paper, which would have been incorporated in an attested will or codicil, executed according to the Statute of Frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of the Wills Act, 1 Vict., ch. 26. That where there is a reference in a duly executed testamentary instrument to another testamentary instrument, imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence as to its identity, and such parol evidence is not excluded by the 1 Vict., ch. 26. The judgment in *Allen v. Maddock*, 11 Moo. P. C. C. 427, was delivered by Lord Kingsdown, who says: 'It was not contended in this case, nor, so far as we are aware, has it been contended in any case, since the Wills Act of 1837 (1 Vict.), that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a will or codicil; but the question has always been, what reference in the valid paper is sufficient to let in evidence to identify the invalid?' The doctrine declared in *Allen v. Maddock*, 11 Moo. P. C. C. 427, has not, we believe, in any respect, been modified, changed or doubted. It is followed in many subsequent cases, and is frequently referred to as containing a clear and elaborate exposition of the law on the subject. *Goods of Almonino*, 29 L. J. P. 46; *Goods of White*,

30 L. J. P. 55; *In re Birt*, 24 L. T. R. 142."

In *Fouché's Estate*, 147 Pa. St. 395, it was held that a will was not invalidated by the fact that the testator's signature was not written under some calculations in figures beneath the will, which formed no part of it.

In *Goods of Thomas Greenwood* (1892), P. 7, the will contained no nomination of executors in the body of it, but at the bottom, below the attestation clause, were the words, "executors, W. G. and C. S." There was an asterisk before these words and an asterisk before the word "executor" wherever it occurred in the will. It was proved that these words were written before the execution of the will. After the execution, the testator directed the name of C. S., who was an attesting witness as well as executor, to be erased and the name of W. S. to be written over the erasure. The will was not re-executed after these alterations had been made. It was held that the nomination of executors might be included in the probate, but that the name of C. S. must be restored both as executor and attesting witness.

In *Goods of Anstee*, (1893), P. 283, the signature of the testator and the attesting witnesses appeared at the bottom of the first page of a will, immediately after an unfinished sentence, which was completed overleaf on the second page. It was held that probate might be granted of the first page of the will.

1. *Matter of Conway's Will*, 124 N. Y. 455; *Demett v. Taylor*, 5 Redf. (N. Y.) 561; *M'Guire v. Kerr*, 2 Bradf. (N. Y.) 244; *Butler v. Benson*, 1 Barb. (N. Y.) 526; *Lewis v. Lewis*, 13 Barb. (N. Y.) 17; *Robins v. Coryell*, 27 Barb. (N. Y.) 556. See also *Sisters of Charity v. Kelly*, 67 N. Y. 409, reversing *Sisters of Charity v. Kelly*, 7 Hun (N. Y.) 290.

In drawing an instrument presented for probate as a will, a blank form was used, the whole of which was upon one side of the paper. A blank was left for the dispositions to be made, preceded by the words "I give, devise and bequeath my property as follows." This blank was filled up by three complete devises; at the end of the last was

underlined, in parenthesis, the words "carried to back of will." Upon the back of the sheet was written the word "continued;" following it were various bequests, and then the words "signature on face of the will." The signature of the testator appeared at the end of the testimonium clause on the face of the paper, and those of the witnesses under the attestation clause. It was held (Bradley, Haight, and Brown, JJ., *dissenting*), that there was not such a subscription and signing by the testator and witnesses "at the end of the will" as is required by the statute; and, therefore, that the instrument was improperly admitted to probate. *Matter of Conway's Will*, 124 N. Y. 455. In this case, the court, by Parker, J., said: "Reference is made to the rule stated in 1 *Williams on Executors* (9th ed.), at page 139, 'If a testator in a will or codicil, or other testamentary paper duly executed, refers to an existing unattested will or other paper, the instrument so referred to becomes a part of the will,' and other authorities tending to the same direction being cited, it is asserted that within the principle thus established 'a testator may write substantial portions of his will upon the margin of the document, or upon the back of the paper, or upon the paper annexed to the will, if such provisions are referred to in the body of the instrument and connected therewith by means of asterisks, words, or symbols indicating their relation to the provisions on the face of the paper.'

"A brief reference to the state of the law relating to the execution of wills in *England* will make it apparent that neither the decisions of its courts nor the rules deduced therefrom by English text writers can be made applicable to cases arising under our statute.

"Prior to January 1, 1838, no solemnities were necessary for the making of a will of personal estate. Wills were admitted to probate which did not contain either the signature or seal of the testator, and were in the handwriting of some other person. While the Statute of Frauds provided the formalities of signature and attestation necessary for a devise of lands, by statute (1 Vict., ch. 26, § 9), it was provided 'That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction,

and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.' This act took effect January 1, 1838. A new ground of contest in the courts was now presented as to what should be considered a signing of the will at the end or foot thereof. In 1 *Williamson Exrs.* (9th ed.) 108, it is said that the tendency was at first in the direction of a liberal construction of this part of the statute, but afterwards it was deemed necessary to take a more rigid view of the enactment on the ground that it was intended to prevent any addition being made to the will after the deceased had executed it. Accordingly probate was refused in a great number of cases. This result, not at all surprising, in view of the fact that, prior to 1838, testamentary dispositions of personality were frequently given effect where the testator had not even signed or authorized the signing of the writing, led to the passage of the statute (15 Vict., ch. 24) entitled 'An act for the amendment of the laws with respect to wills,' passed June 17, 1852. Section 1 provides as follows: 'Where, by an act passed in the first year of the reign of Her Majesty Queen Victoria, entitled an act for the amendment of the laws with respect to wills, it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, every will shall, so far only as regards the position of the signature of the testator or of the person signing for him, as aforesaid, be deemed to be valid within the said enactment as explained by this act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such, his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow, or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature placed among the words of the testimonium clause or clause of

Pennsylvania, it has been held that a clause appointing executors, following the signature, invalidates the instrument.¹ In *California*, the will is good, except the appointing clause.² In *New York*, it has been held that such a clause does not invalidate the instrument, unless it was inserted before signing.³ When a statute requires the will to be signed "at the end" and witnessed, and the testator alone signed, and afterwards called for his will "to

attestation shall follow, or be after or under the clause of attestation, either with or without the blank space intervening, or shall follow or be after, or under, or beside the names, or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment, but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.' Clearly it needs no other argument than is furnished by a statement of the practice in *England* respecting the probate of wills prior to 1838, and a reading of the amendment of 1852, to demonstrate the inapplicability of English decisions to a question like that before us. By statute the English courts are commanded to consider the intent of the testator in determining whether there was a due execution. With us, it is the intention of the legislature and not that of the testator, which controls such a question."

Where a map, to which several references were made in the body of a will, was attached thereto below the signatures of the testator and witnesses, the map was deemed to be constructively inserted in the will where such references were made, and the will was, therefore, held to be properly executed at the end of the will, in conformity to the statute. *Tonnele v. Hall*, 4 N. Y. 140.

1. *Wineland's Appeal*, 118 Pa. St. 37.

The court, by Paxson, C. J., here said: "It cannot be said that the clause appointing the executors is no part of a will. It is an important part, though not always essential. It cannot be brushed aside as mere idle words to which no meaning is to be attached. Nor can they be rejected, and so much of the will be probated as stands above the signature. As was said by Chief Justice Gibson, in *Hays v. Harden*, 6 Pa. St. 413: 'It is better, therefore, that an informal addition should operate as a statutory revocation of the whole than that a plain injunction should be frittered away by exceptions.' I am aware that our act of 1833 closely resembles the Statute of 1 Vict., ch. 26, and that some English authorities seem to sanction the doctrine contended for by the appellees. It is said in 1 Williams Executors (9th ed.) 112, note d, in commenting upon the above Statute of Vict. and its supplement of 15 Vict., ch. 24, that 'in order to get rid of the objection that the will was not signed at the foot or end thereof, the court in some cases has thought itself justified in regarding a portion running below the signature as forming no part of the will, and granting probate exclusive of that portion. Our act of 1833, as well as the Stat. of Vict. are in part borrowed from the British Statute of Frauds, two sections of which have been so evaded by judicial construction as to be practically repealed. We do not propose that the Act of 1833 shall meet with the same fate. The legislature has laid down a rule so plain that it cannot be evaded without a clear violation of its terms. No room is left for judicial construction or interpretation. It says a will must be signed at the end thereof, and that's the end of it.' See also *In re Baird's Estate*, 3 Pa. Dist. Rep. 514.

2. *McCullough's Estate*, Myr. Prob. (Cal.) 76.

3. *Matter of Jacobson*, 6 Dem. (N. Y.) 298. See *Brady v. McCrosson*, 5 Redf. (N. Y.) 431.

finish it," added a bequest, and then had the witnesses sign, without signing again himself, the whole will was held invalid.¹ A subscription after the attestation clause, is a signing at the "end of the will" within the meaning of the statute, as the testator by so signing is considered as making the attestation clause a part of the will.² Where the will is written on several sheets of paper, one signature is sufficient. In such case, the order in which the sheets are found at the testator's death is presumed to be the same as when the will was executed.³ Where the different clauses of a will have been written at different times, one signature and attestation is sufficient for all.⁴ So where the testator signs the will on several sheets, or in different places, the last signature, if at the end of the will, is the efficient one.⁵ Under the *Pennsylvania* statute, in order to sustain, as a will, a paper to which the decedent did not sign his name, it must be proved by two witnesses, not only that he was prevented by the extremity of his last sickness from signing himself, but also that he was prevented by the same cause from requesting someone to sign his name for him and in his presence,⁶ and the testator's continued inability to sign the will, with his repeated application to others to sign for him, and their refusal, is not a compliance with the act.⁷

d. SIGNATURE DISTINGUISHED FROM EXECUTION.—The word execution is sometimes used to indicate the act of signing, as distinguished from attestation;⁸ strictly speaking, however, execution includes all formal requisites essential to the validity of the instrument.⁹

e. REQUISITES OF VALID SIGNATURE.—The first essential of a valid signature is that the name or mark be put upon the paper, or subsequently adopted, with the intent of finally authenticating the instrument so that no further signature on the maker's part

1. *Glancy v. Glancy*, 17 Ohio St. 134.

2. *Younger v. Duffie*, 94 N. Y. 535; 46 Am. Rep. 156; *Matter of Acker*, 5 Dem. (N. Y.) 19; *Matter of Landy's Will*, 78 Hun (N. Y.) 479. See *Matter of Cohen's Will*, 1 Tuck. (N. Y.) 286. But compare *Sisters of Charity v. Kelly*, 67 N. Y. 409. So, also, where the statute merely requires that the will be signed by the testator. *Hallowell v. Hallowell*, 88 Ind. 251.

3. *Rees v. Rees*, L. R., 3 P. & M. 84; *Marsh v. Marsh*, 1 S. & T. 528; *Wikoff's Appeal*, 15 Pa. St. 281; 53 Am. Dec. 597; *Ginder v. Farnum*, 10 Pa. St. 98; *Ela v. Edwards*, 16 Gray (Mass.) 91; *Martin v. Hamlin*, 4 Strobb. (S. Car.) 188; 53 Am. Dec. 673.

4. *Goods of Catrall*, 3 S. & T. 419.

5. *Evan's Appeal*, 58 Pa. St. 238.

6. *Ruoff's Appeal*, 26 Pa. St. 219;

Dunlop v. Dunlop, 10 Watts (Pa.) 153; *Asay v. Hoover*, 5 Pa. St. 21; 14 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418; *Prickett's Estate*, 1 Phila. (Pa.) 306.

7. *Stricker v. Groves*, 5 Whart. (Pa.) 386.

8. See Jarm. on Wills, ch. 6; *Beach on Wills*, ch. 3; *Everhart v. Everhart*, 34 Fed. Rep. 82; *Matter of Booth's Will*, 127 N. Y. 109.

9. In *Schouler on Wills* (2d ed.), § 302, n. 1, the following language is used: "The Statute 1 Vict., ch. 26, § 9, sanctions this use of the word. It declares that no will shall be valid unless in writing, 'and executed in manner hereinafter mentioned;' and then proceeds to describe the details of signing, acknowledging, and attesting the will."

is contemplated.¹ The making of a mark with intent to authenticate the instrument has been held a sufficient signing within the meaning of the statute, even though the testator's inability to write had not been established,² and although his name did

1. 1 Jarm. on Wills (5th ed.) 79; Right v. Price, Dougl. 241; Ramsey v. Ramsey, 13 Gratt. (Va.) 664; 70 Am. Dec. 438; Dunlop v. Dunlop, 10 Watts (Pa.) 153. See Matter of Booth's Will, 127 N. Y. 109; Warwick v. Warwick, 86 Va. 596; Armstrong v. Armstrong, 29 Ala. 538.

The name of a testator at the commencement of a holograph will is an equivocal act, and unless it appears affirmatively from something on the face of the paper that it was intended as his signature, it is not a sufficient signing under the statute. Ramsey v. Ramsey, 13 Gratt. (Va.) 664; 70 Am. Dec. 438. See Matter of Booth's Will, 127 N. Y. 109.

2. Baker v. Denning, 8 Ad. & El. 94; Guthrie v. Price, 23 Ark. 396; Smith v. Dolby, 4 Harr. (Del.) 350; Nickerson v. Buck, 12 Cush. (Mass.) 332; Chase v. Kittredge, 11 Allen (Mass.) 53; 87 Am. Rep. 687; Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666; St. Louis Hospital Assoc. v. Williams, 19 Mo. 609; Watts v. Public Administrator, 4 Wend. (N. Y.) 168; Butler v. Benson, 1 Barb. (N. Y.) 526; Burford v. Burford, 29 Pa. St. 221; Flannery's Will, 24 Pa. St. 502; Pool v. Buffum, 3 Oregon 438; *In re Guilfoyle's Will*, 96 Cal. 598. See also McCarty v. Hoffman, 23 Pa. St. 507; Greenough v. Greenough, 11 Pa. St. 489; 51 Am. Dec. 567; Ray v. Hill, 3 Strobb. (S. Car.) 297; 49 Am. Dec. 647.

In *Pennsylvania*, signature by mark was expressly authorized by Act of Jan. 27, 1848, P. L. 16. Knox's Estate, 131 Pa. St. 229.

In *Everhart v. Everhart*, 34 Fed. Rep. 85, the testimony showed that M. Everhart requested one of the witnesses to write his will, which he did, as dictated by said Everhart; that when it was written said Everhart attempted to sign it, but from physical debility was unable to do so, though in the attempt made a small mark or scratch on the paper, and failed to do more; that he said he made and published the paper as his last will and testament. It was held insufficient. The court said: "The paper writing shows a small mark or scratch on the left-hand corner, but

no name attached to it. There are also two small marks or dots on another part of the paper, very dim, and look as though made with the point of a pencil, and not at the usual place for signing such a paper, by the party executing it. The name of M. Everhart only appears in the commencement of the paper, which it is evident was not intended as a signature of the testator. The draughtsman was not requested to sign the testator's name, and the testator's effort to sign the paper himself shows he did not recognize the signature made in the commencement of the writing by the draughtsman as his signature. The place where made, and the character of the small marks and dots, furnish no evidence that they were made as a substitute for the signature of the testator. It is true that a testator may sign his will by making a mark, but he must intend the mark as a substitute for his name; and when there is no name written, or anything indicating who made the mark, and especially when the mark is made at an unusual place for the signature, it ought to require very satisfactory evidence that the mark was intended by the testator as his signature, or as a substitute for it."

In *St. Louis Hospital Assoc. v. Williams*, 19 Mo. 609, it was held that if in addition to the mark made by the testator his name is signed to the will by another, at his request, the will is void unless the person subscribing the testator's name signs his own name as a witness and states that he wrote the testator's name at his request, as required by an act concerning wills in the state of *Missouri*. See *Northcutt v. Northcutt*, 20 Mo. 266. See also *McGee v. Porter*, 14 Mo. 611; 55 Am. Dec. 129. See also the following *Pennsylvania* cases: *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567; *Assay v. Hoover*, 5 Pa. St. 21; 14 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. St. 444; 47 Am. Dec. 418.

In *Main v. Ryder*, 84 Pa. St. 217, it was held that the fact that the testator knew how to write did not invalidate the execution of a will by making his mark.

not appear on the face of the will.¹ So where the testator affixed his initials,² or christian name,³ or even assumed name, since such

1. *In re Bryce*, 2 Curt. 325.

2. *In re Savory*, 15 Jur. 1042.

3. *Knox's Estate*, 131 Pa. St. 220.

What Constitutes a Signature.—In *Knox's Estate*, 131 Pa. St. 230, the court, by Mitchell, J., said: "The precise case of a signature by the first name only, does not appear to have arisen either in *England* or in the *United States*; but the principles on which the decisions already referred to were based, especially those in regard to signing by initials only, are equally applicable to the present case, and additional force is given to them by the decisions as to what constitutes a binding signature to a contract under the same or analogous statutes. Browne, on the Statute of Frauds, § 362, states the rule thus: 'In cases where the initials only of the party are signed, it is quite clear that, with the aid of parol evidence which is admitted to apply to them, the signature is to be held valid.' And see *Palmer v. Stephens*, 1 Den. (N. Y.) 478; *Sandborn v. Flagler*, 9 Allen (Mass.) 474; *Weston v. Myers*, 33 Ill. 432; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (N. Y.) 446; *Chichester v. Cobb*, 14 L. T. N. S. 433. Though we find no precise precedent, yet the analogies are all favorable, rather than otherwise, to the sufficiency of a signing by first name only, if it meets the other requirements of the act. These are matters depending on circumstances which will be considered further on. Looking beyond the decisions to the general use of language, what is understood by signing, and signature? Webster defines to sign as to 'affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting;' and signature as 'a sign, stamp, or mark impressed; . . . especially the name of any person written with his own hand, employed to signify that the writing which precedes accords with his wishes or intentions; a sign manual.' All the definitions include a mark, and no dictionary limits a signature to a written name. There can be no doubt that historically, and down to very modern times, the ordinary signature was the mark of the cross; and there is perhaps as little question that

in the general diffusion at the present day, the ordinary use of the word implies the written name. But this implication is not even yet necessary and universal. The man who cannot write is now happily an exception in our commonwealth, but he has not yet entirely disappeared and in popular language he is still said to 'sign,' though he makes only his mark. Thus, in *Assay v. Hoover*, 5 Pa. St. 26; 14 Am. Dec. 713, the witness says: 'The name was written after the will was read to her, and after she had signed it. . . . She was reclining in bed when she signed it,' although the signature the witness was testifying to was only a mark. But, even in the now usual acceptation of a written name, signature still does not imply the whole name. Custom controls the rule of names, and so it does the rule of signatures. The title by which a man calls himself and is known in the community, is his name, as in *Main v. Ryder*, 84 Pa. St. 217, whether it be the one he inherited or had originally given him or not. So the form which a man customarily uses to identify and bind himself in writing is his signature, whatever shape he may choose to give it. There is no requirement that it shall be legible, though legibility is one of the prime objects of writing. It is sufficient if it be such as he usually signs, and the signatures of neither Rufus Choate nor General Spinner could be rejected, though no man, unaided, could discover what the ragged marks made by either of these two eminent personages were intended to represent. Nor is there any fixed requirement how much of the full name shall be written. Custom varies with time and place, and habit with the whim of the individual. Sovereigns write only their first names, and the sovereign of *Spain*, more royally still, signs his decrees only, 'I, the King' (*Yo el Rey*). English peers now sign their titles only, though they be geographical names, like *Devon* or *Stafford*, as broad as a county. The great Bacon wrote his name, *Fr. Verulam*, and the ordinary signature of the poet-philosopher of fishermen was *Iz: Wa:.* In the fifty-six signatures of the most solemn instrument of modern times, the Declaration of Independence, we find every variety from Th. Jeffer-

name would be taken as a mark;¹ or stamped his name;² or affixed a seal stamped with his initials and pronounced it his "hand and seal."³ An imperfect or indistinct subscription of the testator's name may be regarded as his mark.⁴ It is immaterial that a wrong name was written against the mark,⁵ or that the testator was also wrongly named in the body of the will,⁶ or that the testator's hand was guided by another in signing⁷ or making his mark.⁸ Sealing is not

son to the unmistakably identified Charles Carroll, of Carrollton. In the present day it is not uncommon for business men to have a signature for checks and banking purposes somewhat different from that used in their ordinary business, and in familiar correspondence, signature by initials, or nick-name, or diminutive, is probably the general practice.

"What, therefore, shall constitute a sufficient signature must depend largely on the custom of the time and place, the habit of the individual, and the the circumstances of each particular case. As already seen, the English and some American cases hold that a signature by initials only, or otherwise informal and short of the full name, may be a valid execution of a will or a contract, if the intent to execute is apparent. To this requirement our statute adds that the signature must be at the end, as evidence that the intent is present, actual, and completed. On this point of the completed act, the use of the ordinary form of signature is persuasive evidence, and the absence of it may be of weight in the other scale. As was suggested by the learned judge below, if a will drawn with formality, or in terms that indicate the aid of counsel, or the intent to comply with all the forms of law, be signed with initials or first name only, doubt would certainly be raised as to the completed purpose of the testator to execute it, and if then it appeared that his habit was to sign his name in full, the doubt might become certainty; while, on the other hand, if it were shown that he usually, or even frequently, signed business or other important papers in the same way, the doubt might be dissipated. As in all cases where the intent is the test, there can be no hard and fast legal rule as to form. The statute requires that the signature shall be at the end, and that requirement must be met without regard to intention, but what shall constitute a signature must

be determined in each case by the circumstances."

1. *In re Redding*, 2 Rob. 339; 14 Jur. 1052; *In re Glover*, 11 Jur. 1022.

2. *Jenkyne v. Galsford*, 3 S. & T. 93. In this case a testator, toward the end of his life, had his usual signature engraved, so that it might be stamped on letters and other documents requiring his signature. He made two codicils, each of which was so stamped with his name by another person, in his presence and by his direction. It was held a due execution of the codicils under the Statute of Wills.

3. *Goods of Emerson*, L. R., 9 Ir. L. R. 443.

4. *Hartwell v. McMaster*, 4 Redf. (N. Y.) 389. See also *Phate's Estate*, 9 Pa. Co. Ct. Rep. 644.

5. *Bailey v. Bailey*, 35 Ala. 687; *In re Clark*, 1 S. & T. 22; *Long v. Zook*, 13 Pa. St. 400; *Knox's Estate*, 131 Pa. St. 229.

6. *Misnomer of Testator*. — *In re Dowse*, 31 L. J. Prob. 172. In this case Thomas Dowse executed by mark a will in which the testator was described as John Dowse, and against his mark was written: "The mark of John Dowse." The court being satisfied that Thomas Dowse was the person who made the mark, and that he did so *animus testandi*, granted probate.

7. *Stevens v. Vancleve*, 4 Wash. (U. S.) 262; *Vandruff v. Rinehart*, 29 Pa. St. 232; *In re Shotwell's Estate*, 11 Pa. Co. Ct. Rep. 444; *VanHanswyck v. Wiese*, 44 Barb. (N. Y.) 494; *Fritz v. Turner*, 46 N. J. Eq. 515; *McMechen v. McMechen*, 17 W. Va. 684; 41 Am. Rep. 682. In such case the signature is the act of the testator and not of the person guiding his hand. *Vines v. Clingfost*, 21 Ark. 309; *Vandruff v. Rinehart*, 29 Pa. St. 232; *Trezevant v. Rains* (Tex. 1892), 19 S. W. Rep. 567.

8. *Wilson v. Beddard*, 12 Sim. 28; *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *VanHanswyck v. Wiese*, 44 Barb. (N. Y.) 494; *Jackson v. VanDusen*, 5

signing,¹ and, except in *Nevada*, is unnecessary,² although proper, to allay doubt where powers touching real estate are expressly given.³ In *England*, and in many of the states of the Union, the will may be signed by some other person by the testator's express direction and in his presence.⁴ In *Pennsylvania*, a testator must sign himself, unless prevented by the extremity of his last sickness.⁵ In *New Jersey*, where the statute requires that "the signature shall be made by the testator or the making thereof acknowledged by him in the presence of two witnesses," signature by another is held insufficient.⁶

Johns. (N. Y.) 144; 4 Am. Dec. 330; *Vandruft v. Rinehart*, 29 Pa. St. 232; *Cozen's Will*, 61 Pa. St. 196; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102.

Request of Assistance.—It is not necessary to prove an express request for such assistance. The act is his own with the assistance of another, and not that of another under authority from him. *Cozen's Will*, 61 Pa. St. 201.

1. 1 Jarm. on Wills (5th ed.) 78; *Schouler on Wills* (2d ed.) 309; *Smith v. Evans*, 1 Wils. 313; *Wright v. Wakeford*, 17 Ves. 434; *Pollock v. Glassell*, 2 Gratt. (Va.) 452.

2. *Stimson's Am. Stat. Law*, § 2641. In *New Hampshire*, wills need no longer be sealed. Act Sept. 30, 1887. *Stimson's Am. Stat. Law*, 1st Sup., § 2641.

3. *Schouler on Wills* (2d ed.), § 309.

4. See *supra*, this title, *Formal Requisites—Signature—English Rule; American Rule*. See further *Butler v. Benson*, 1 Barb. (N. Y.) 527; *Matter of Carroll's Succession*, 28 La. Ann. 388; *Riley v. Riley*, 36 Ala. 496; *Armstrong v. Armstrong*, 29 Ala. 538; *In re Cornelius' Will*, 14 Ark. 675; *Abraham v. Wilkins*, 17 Ark. 292; *Sutton v. Sutton*, 5 How. (Del.) 459; *Rigg v. Wilton*, 13 Ill. 15; *McGee v. Porter*, 14 Mo. 611; 55 Am. Dec. 129; *Northcutt v. Northcutt*, 20 Mo. 266; *Simpson v. Simpson*, 27 Mo. 288; *St. Louis Hospital Assoc. v. Williams*, 19 Mo. 609; *Pool v. Bufum*, 3 Oregon 438; *Jenkins' Will*, 43 Wis. 610. Compare *Higgins v. Carlton*, 28 Md. 117; 92 Am. Dec. 666.

In *Waite v. Frisbie*, 45 Minn. 361. *Gillfillan, C. J.*, said: "The direction to sign must precede the act of signing. Mere knowledge by the testator that another has signed, or is signing, without previous direction, and assent to or acquiescence in it, to be inferred from looks, or a nod of the head, or

motion of the hand, or other ambiguous token, is not enough. We do not mean that the express direction must be in words. A person unable to speak may sometimes convey his wish that another sign his name as unequivocally by gestures as though he spoke the words, but the meaning of such gestures must be as clear and unambiguous as the words; and the act of signing must be in obedience to the direction thus conveyed. It follows from what we have said that mere assent or acquiescence, implied by, or to be inferred from, looks or gestures, when another suggests that A or B sign the name, is not such an express direction as the statute requires." See also *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567.

5. *Vernon v. Kirk*, 30 Pa. St. 223.

In *Vosburg's Will*, 9 Pa. Co. Ct. Rep. 243, it was held that the fact that a testator procured his signature to be made to his will by another person, when he was able to write his own signature, will not invalidate the will, under Act *Pennsylvania* April 8, 1833 (Purd. Dig. (11th ed.) 1710), which permits such signature for the testator "by some person in his presence, and by his express direction;" but it is a suspicious circumstance, which, when fraud is averred, will justify the order of an issue to determine whether the will was properly executed. See also *Barr v. Graybill*, 13 Pa. St. 395.

6. *In re McElwaine*, 18 N. J. Eq. 499.

In this case the court said: "In general, the maxim *qui facit per alium, facit per se* governs, and makes a signing by an agent a signing by the principal. But this act says the signature shall be made by the testator, or the making thereof acknowledged by him; it does not speak of acknowledging or adopting the signature, but of the making thereof. The fifth section of

In states in which signature by another is allowed, the other person may be one of the subscribing witnesses,¹ and it is immaterial that he signed his own name instead of the name of the testator.²

the Statute of Frauds (29 Car. II., ch. 3), which was in force in this state until the act of 1713-14, required that wills should be signed by the testator, 'or by some other person in his presence, and by his express direction.' The statute of this state, of 1713-14, and also that of 1851, in declaring the manner in which wills should be executed, have omitted these words, and must be held to have had an object in the omission. Again, the Statute of 1 Vict. 26, ch. 9, from which our statute of 1851 is mainly taken, contains the same provisions as the Statute of Frauds, 'or by some other person, in his presence, and by his direction.' The English Statute of Frauds, in which this language was first used, in other parts of it, carefully provides for the signing by an agent 'lawfully authorized;' and in one section, by an agent 'lawfully authorized by writing.' That language has been adopted in this state, in all the re-enactments of those provisions of the Statute of Frauds; while in every statute relating to wills, the provision that will may be signed by some one for the testator, was omitted. In the construction of the *New York* statutes, which in like manner omitted this provision, their courts held that the omission in the principal section would have made the inference legitimate and unavoidable, that they intended to alter the law, and disallow such subscription or signature in the presence and by the direction of the testator, had not another section of the same act provided for the manner in which another person might sign the testator's name to the will, by his direction. *Robins v. Coryell*, 27 Barb. (N. Y.) 559; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 91; 40 Am. Dec. 225. The words of the Act of 1851, and also of the Act of 1850, are stronger than those of the statutes 29 Car. II., or 1 Vict., in *England*; they are 'the signature shall be made by the testator, or the making thereof acknowledged by the testator.' While thus providing more carefully for the execution of a will, it must be supposed that they intended, by omitting the words in the English acts, to require, in all cases, some actual signature by the testator

himself, and not to allow his name to be signed by anyone, without the safeguards required of its being done by some person, in his presence, and by his express direction. Otherwise, a will written and signed for a testator, without his knowledge, or a substituted copy of one, already signed with a good imitation of his hand, might be shown him, and if he acknowledged the signature before two witnesses, and declared it to be his will, it would be executed according to the statute. The signing required by this statute must be held to be some signature, making some mark or *signum* upon the paper so as to identify and give efficacy to it by some act, and not by words merely."

This seems to be the meaning given to the word sign in the English Statute of Frauds, and other like statutes, in the cases where the question arose whether making a mark with the hand guided by another, was held a sufficient signing. *Wilson v. Beddard*, 12 Sim. 28; *Stevens v. Vancleve*, 4 Wash. (U. S.) 269; *Meehan v. Rourke*, 2 Bradf. (N. Y.) 393.

"In *Stevens v. Vancleve*, 4 Wash. (U. S.) 269, Justice Washington holds that the will which was executed by writing his name, his hand being guided by another at his express request, was executed in strict conformity with the English Statute of Frauds, which he assumed, perhaps wrongly, was in force in this state. There would have been no occasion to resort to this reasoning or assumption, if the signing required by the statute of this state, or the English Statute of Frauds, could as well be done by another for him, as by the testator himself. If signing by the testator included signing by another, the addition in the English statute is superfluous; and if intended only to regulate the signing by another, it would have been added in another form." *Compare Smith v. Harris*, 1 Rob. 262.

1. *In re Bayley*, 1 Curt. 914; *Smith v. Harris*, 1 Rob. 262; *Herbert v. Berrier*, 81 Ind. 1; *Riley v. Riley*, 36 Ala. 496; *Robins v. Coryell*, 27 Barb. (N. Y.) 556. See *Pool v. Buffum*, 3 Oregon 438.

2. So held at least under 1 Vict., ch. 26, in a case where the other person

A subscription "A B for C D at his request" has been held sufficient.¹ The signature of another, to be valid, must be intended as final, and hence it has been held that if the name of the testator be subscribed by another at his request and in his presence, but with the intention of afterwards executing it himself by mark, the execution will not be valid if he fails to affix his mark.²

signed his own name after the words "Signed on behalf of the testator, in his presence and by his direction, by me." *In re Clark*, 2 Curt. 329. And a like ruling would probably be sustained under corresponding statutes in the *United States*. *Vernon v. Kirk*, 30 Pa. St. 218; *Abraham v. Wilkins*, 17 Ark. 292.

1. *Vernon v. Kirk*, 30 Pa. St. 218; *Abraham v. Wilkins*, 17 Ark. 292.

In *Vernon v. Kirk*, 30 Pa. St. 222, the court, by Strong, J., said: "It was only by judicial construction that our Statute of Wills, passed April 8, 1833, was made to require at the end of the will, the testator's signature by his name. Our act was taken from the British statute, 29 Charles II., § 2, under which it had repeatedly been decided that a signature by a mark was sufficient. When, therefore, the legislature adopted words having a recognized judicial signification, it might fairly have been presumed that they intended by the words that sense in which they were understood at the time of adoption. It is probable that they looked less to the mode of the signature, than to its place, which they required to be at the end of the will. This appears still more probable, when it is observed that if the design was to require a signature by the name of the testator, then the power of making a will was denied to all who could not write; for if a mark was not a signature, within the meaning of the statute, then those unable to write could not sign, and signing by another was permitted only when inability to sign was caused by the extremity of the last sickness. This seems to have been overlooked when *Barr v. Graybill*, 13 Pa. St. 395; *Asay v. Hoover*, 5 Pa. St. 21; 14 Am. Dec. 713, and other kindred cases were decided. As already said, the purpose of the legislature seems rather to have been to designate the place where the signature should be, to wit, at the end of the will, than to prescribe the manner in which it should be made. It was to remedy the mischief, then prev-

alent, of setting up as a testamentary disposition an imperfect, unfinished paper. This was accomplished by requiring the signature, whatever it might be, whether by the testator, or by another at his request, to be at the end of the writing, thus evidencing that the testamentary purpose was complete. It was not, as was supposed in the earlier cases, to furnish, in the handwriting evidence of identity, and protection against fraud; for the name might be signed by the testator or by another at his request, in which last case no such proof is deducible from the handwriting. The authentication of the instrument was left to witnesses. The Act of January 27th, 1848, P. L. 16, was designed only to correct the mistaken construction of the Act of 1833; and now, while the place of the signature is rigidly defined, its mode is left unfettered. If, therefore, the testatrix requested Ezekiel Norman to sign the paper as her will, and he complied with her request, in the manner already described, the requirements of the Act of Assembly were fulfilled, and, in form, the will was sufficiently executed."

2. *Main v. Ryder*, 84 Pa. St. 217. In this case the court, by Mercur, J., said: "It appears to have been executed by the testator making his mark or cross at the end thereof. It has two subscribing witnesses, and is wholly regular on its face. It is contended that the Act of 1848 applies only to cases where the testator is unable to write his name by reason of want of education, and does not excuse the absence of the signature of one who is able to write. We discover nothing in the act sustaining that view. It makes no mention of insufficient education or of physical inability. It declares that form of execution as sufficient in all cases. The manifest object of the act is to permit a will to be signed as any other written instrument may be signed. Hence, in *Vandruft v. Rinehart*, 29 Pa. St. 232, it was held that if one is unable, from palsy or other cause, to make his signature or

Where the person requested to sign for the testator did so by writing at the foot "This will was read and approved by C. F. B., by E. C., in presence of, etc.," followed by the signatures of the witnesses, the will was held good.¹ Where the statute requires the will to be signed by the other person in the testator's presence, a signature or mark affixed while he was unconscious, is incapable of subsequent ratification without re-execution.² Where mutual wills are executed by several testators, it is essential that each sign his own; and where two sisters made mutual wills and each by mistake signed the will of the other, both were held invalid.³

mark to his will, another person may steady his hand and aid him in so doing. If so done by the assistance of another it is the testator's own act. So in *Cozen's Will*, 61 Pa. St. 196, the testator was paralyzed, and said he was unable to write, but would put his mark to the will. He was raised in bed; a pen was put into his hand, which was held by another while he made his mark. This was held to be a valid execution of the will. In the case we are now considering, it appears by the evidence of Thorpe, who drew the will, that he handed it to the testator, who was lying in bed, to sign. The latter said, 'You sign it.' Case or Stanton said, 'Yes, he can make his mark just as well.' Case and Stanton each testified substantially corroborating Thorpe, and added that Miner made the further remark that he had written his name, but did not know as he could do it then, or did not know but he could do it again. Thereupon Thorpe wrote Miner's name, not in a manner indicating that it was to stand as Miner's fully executed signature, but preparatory to his making his mark.

Thorpe wrote it 'Daniel ^{his} Miner.'
mark.

"In that portion of the charge covered by the eighth assignment the court said: 'We therefore charge you that if Thorpe wrote Daniel Miner's name to the will in Miner's presence and by his express directions, and Miner made the attempt to make his mark, but failed to complete the mark, or to make it in the manner required by the statute, still the will is sufficiently executed if these facts are proved by two witnesses, who were present at the time, although Miner, when he directed his name to be signed, intended to make his mark also, and Thorpe, when he wrote the name, intended that Miner should make his mark.'

"This, we think, was clearly error.

It assumes that although the testator directed his name to be written with the view of adding his mark, and thus making his signature, yet the will is completely executed before the mark is made. This cannot be so. It gives to an unexecuted intention the same effect as if fully executed. It gives to the statute a construction not sanctioned by its letter or its spirit. It is undoubtedly true the statute does provide, if the testator's name is subscribed by his direction and authority, it is a valid execution of the will. That, however, is when the testator has directed his name to be written as his complete signature. If so directed and intended, it becomes sufficient in itself. In such case the testator would not have intended to make any signature with his own hand, and none would be required. The learned judge holds the will may be sufficiently executed, although the testator failed to make his mark 'in the manner required by the statute,' and when neither the testator nor the scrivener had done any act which either intended as a full execution of the will, and when the will would show on its face that it was not fully executed." Compare *Rosser v. Franklin*, 6 Gratt. (Va.) 1; 52 Am. Dec. 97.

Missouri.—As to the formalities prescribed by the code, where one signs the testator's name at his request, see *St. Louis Hospital Assoc. v. Williams*, 19 Mo. 609; *St. Louis Hospital Assoc. v. Wegman*, 21 Mo. 17; *Northcutt v. Northcutt*, 20 Mo. 266; *McGee v. Porter*, 14 Mo. 611; 55 Am. Dec. 129; *Simpson v. Simpson*, 27 Mo. 288.

1. *Jenkyns v. Galsford*, 32 L. J. P. 122.

2. *Dunlop v. Dunlop*, 10 Watts (Pa.) 153.

3. *Anonymous*, 14 Jur. 402; *Goods of Hunt*, L. R., 3 P. & M. 250. See also *In re Alter's Will*, 7 Phila. (Pa.) 529.

The signature may be on a piece of paper stuck or tied on at the end of the will and containing nothing but the signature and attestation;¹ but in such case the fact that the piece of paper was so attached before execution must be proved.² A signature, whether by name or mark, satisfies the statute, notwithstanding the fact that the testator's name does not appear in the body of the instrument.³ Where the testator is blind or illiterate, it must be shown that he was acquainted with the contents of the will before he signed it, for in such case, the presumption that one who executes an instrument knows and approves its contents, does not arise.⁴

2. Publication.—Publication is the formal declaration or acknowledgment by the testator, in the presence of the subscribing witnesses, at the time of subscription, that the instrument they are called upon to attest is his last will and testament, and is only necessary when expressly required by statute,⁵ as is the case in

1. *Goods of Horsford*, L.R., 3 P. & M. 211; *Cooke v. Lambert*, 32 L. J. P. 93.

2. *Goods of West*, 32 L. J. P. 182.

3. *In re Bryce*, 2 Curt. 325.

4. *Wms. on Exrs.* 19; *In re Axford*, 1 S. & T. 540; *Barton v. Robins*, 3 Ph. 455, note (b.); *Martin v. Mitchell*, 28 Ga. 382; *Wampler v. Wampler*, 9 Md. 540; *Worthington v. Klemm*, 144 Mass. 167; *Day v. Day*, 3 N. J. Eq. 549. See also *Matter of Bull*, 111 N. Y. 624.

In *Wampler v. Wampler*, 9 Md. 540, it was held that the will of a blind man, duly executed and attested, and proved to have been dictated by, and read to, the testator, is entitled to probate, though not read to him by, or in the presence of, the attesting witnesses.

In *New York*, it has been held that reading the will to the testator before execution, in the presence of subscribing witnesses, fulfills the requirements of the local statute. *Moore v. Moore*, 2 Bradf. (N. Y.) 261.

In *Georgia* and *Alabama*, the will need not be read in the presence of the witnesses. *Martin v. Mitchell*, 28 Ga. 382; *Wampler v. Wampler*, 9 Md. 540.

If the contents are correctly made known to the testator, it is not necessary to show that there was any formal reading. *Edwards v. Fincham*, 3 Curt. 63; 4 Moo. P. C. 198; *Hess' Appeal*, 43 Pa. St. 73; *Boyd v. Cook*, 3 Leigh (Va.) 32. See also *King v. Kinsey*, 74 N. Car. 261; *Matter of Crumb's Will*, 6 Dem. (N. Y.) 478.

5. 1 *Jarm. on Wills* (5th ed.) 80, note by Bigelow, citing *Osborn v. Cook*, 11 Cush. (Mass.) 532; 59 Am. Dec. 155; *Adams v. Field*, 21 Vt. 256; *Dean v.*

Dean, 27 Vt. 746; *Watson v. Pipes*, 32 Miss. 451; *Verdier v. Verdier*, 8 Rich. (S. Car.) 135; *Huff v. Huff*, 41 Ga. 696. See *Beane v. Yerby*, 12 Gratt. (Va.) 239; *Cilley v. Cilley*, 34 Me. 162; *Canada's Appeal*, 47 Conn. 450; *Meurer's Will*, 44 Wis. 392; 28 Am. Rep. 591. See also *In re Porter*, 9 Mackey (D. C.) 493.

Indiana.—Under the statute of *Indiana*, which provides "that no will, except a nuncupative will, shall effect any estate, unless it be in writing, signed by the testator, or by some one in his presence, with his consent, and attested and subscribed in his presence by two or more competent witnesses," it is not necessary to a due execution of a will that the testator should in any manner indicate to the witnesses who are called upon to attest the same, that the instrument or document thus to be executed and attested is the will of the party executing the same. *Brown v. McAlister*, 34 Ind. 375. See also *Turner v. Cook*, 36 Ind. 129.

Publication Unnecessary, Apart from Statutory Enactments.—The writing, signing, and attesting of a will are, of themselves, a sufficient publication of the same, when a formal declaration is not required by statute. *Bond v. Seawell*, 3 Burr. 1775; *Moodie v. Reid*, 7 Taunt. 355; *In re Hulse's Will*, 52 Iowa 662; *Ray v. Walton*, 2 A.K. Marsh. (Ky.) 71; *Small v. Small*, 4 Me. 220; 16 Am. Dec. 253; *Cilley v. Cilley*, 34 Me. 162; *Osborn v. Cook*, 11 Cush. (Mass.) 532; 59 Am. Dec. 153; *Black v. Ellis*, 3 Hill (S. Car.) 68; *Dean v.*

some states.¹ Publication differs from acknowledgment in that it is not merely a substitute for signing in the presence of attesting witnesses, but accompanies the final execution of the will under all circumstances.² To satisfy the statutory requirement, the testator must in some way communicate, by words, signs, or conduct, to the attesting witnesses, at the time they are called upon to subscribe as witnesses, that the instrument they are called upon to attest is his last will and testament and so recognized by him.³ A well-drawn attestation clause should begin

Dean, 27 Vt. 746; Allen v. Griffin, 69 Wis. 529.

1. See local statutes.

In matter of Dale's Will (Supreme Court), 9 N. Y. Supp. 396; 56 Hun (N. Y.) 169, it was held that under 3 *New York Rev. Stat.* (6th ed.), p. 63, § 38, providing that the testator, at the time of subscribing his will, or of acknowledging the same, "shall declare the instrument so subscribed to be his last will and testament," a will is not entitled to probate, though in the testator's handwriting, where the testimony of the subscribing witnesses shows that the testator purposely withheld from them the fact that the document which they were attesting was his will.

Where the witnesses were called by the decedent to sign the paper lying before him, as witnesses, and not informed of the nature of it, the want of a declaration by the testator to a subscribing witness, required by statute, is not supplied by the fact that the witnesses surmised that it was a codicil to his will. Matter of Harris' Will, 1 Tuck. (N. Y.) 293.

2. Schouler on Wills (2d ed.), § 326. See Matter of Simmon's Will (Supreme Ct.), 9 N. Y. Supp. 352; Fusiller's Estate, Myr. Prob. (Cal.) 40; Den v. Mitton, 12 N. J. L. 70; Ludlow v. Ludlow, 36 N. J. Eq. 597; Heyer v. Burger, 1 Hoffm. Ch. (N. Y.) 1.

A nuncupative testament, under private signature, must be written by the testator himself or by any other person from his dictation; or even by one of the witnesses, in the presence of five witnesses residing in the place where the will is received, or of seven witnesses residing out of that place. Or it will suffice if, in the presence of the same number of witnesses, the testator presents the paper, on which he has written his testament, or caused it to be written out of their presence, declaring to them that the paper contains his last will.

Louisiana Civil Code (1889), art. 1581. Under this article it has been held unnecessary for the testator to deliver the will to the witnesses with his own hand, and no particular words or set form of speech is necessary to constitute a declaration that the instrument is the testator's will. It is sufficient if the will, having been written by another at the request of the testator and out of the presence of the witnesses, shall have been read aloud by one of the witnesses in the presence and hearing of the testator and of the other witnesses, and is then held towards the testator by the writer of it who asks, "Is this paper that has just been read your will?" and the testator answers, "It is," and it is then signed by the testator and is attested by the witnesses in his and their presence. The object of the law is to guard against a false instrument being exhibited instead of the true will, and that object is accomplished by the formalities above recited. Bourke v. Wilson, 38 La. Ann. 320.

3. Rogers v. Diamond, 13 Ark. 474; Upchurch v. Upchurch, 16 B. Mon. (Ky.) 102; *In re* Maxwell, 8 N. J. Eq. 251; Mundy v. Mundy, 15 N. J. Eq. 290; Turnure v. Turnure, 35 N. J. Eq. 439; Ludlow v. Ludlow, 35 N. J. Eq. 480; Baskin v. Baskin, 36 N. Y. 416; Ludlow v. Ludlow, 36 N. J. Eq. 597; Hildreth v. Marshall, 51 N. J. Eq. 241; Den v. Mitton, 12 N. J. L. 70; Elkin-ton v. Brick, 44 N. J. Eq. 154; Robbins v. Robbins, 50 N. J. Eq. 742; Darnell v. Buzby, 50 N. J. Eq. 725; Seymour v. Van Wyck, 6 N. Y. 120; Lewis v. Lewis, 11 N. Y. 220; Coffin v. Coffin, 23 N. Y. 9; 80 Am. Dec. 235; Gilbert v. Knox, 52 N. Y. 125; Thompson v. Stevens, 62 N. Y. 634; Matter of Beckett, 103 N. Y. 167; Matter of Hunt, 110 N. Y. 278; Doe v. Roe, 2 Barb. (N. Y.) 200; Seguire v. Seguire, 2 Barb. (N. Y.) 385; Whitbeck v. Patterson, 10

Barb. (N. Y.) 608; *Torrey v. Bowen*, 15 Barb. (N. Y.) 304; *Burritt v. Silliman*, 16 Barb. (N. Y.) 198; *Baskin v. Baskin*, 48 Barb. (N. Y.) 200; *Abbey v. Christy*, 49 Barb. (N. Y.) 276; *Auburn Theological Seminary v. Calhoun*, 62 Barb. (N. Y.) 381; *E* p. Beers*, 2 Bradf. (N. Y.) 163; *Wilson v. Hetterich*, 2 Bradf. (N. Y.) 427; *Carle v. Underhill*, 3 Bradf. (N. Y.) 101; *Rieben v. Hicks*, 3 Bradf. (N. Y.) 353; *Tunison v. Tunison*, 4 Bradf. (N. Y.) 138; *Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 226; *Brown v. De Selding*, 4 Sandf. (N. Y.) 10; *Porteus v. Holm*, 4 Dem. (N. Y.) 14; *Heyer v. Burger*, 1 Hoffm. Ch. (N. Y.) 1; *Hollenbeck v. Van Valkenburgh*, 5 How. Pr. (N. Y. Supreme Ct.) 281; *Darling v. Arthur*, 22 Hun (N. Y.) 84; *Thompson v. Leastedt*, 3 Hun (N. Y.) 395; *Remsen v. Brinckerhoof*, 8 Paige (N. Y.) 488; *Hunn v. Case*, 1 Redf. (N. Y.) 307; *Van Hooser v. Van Hooser*, 1 Redf. (N. Y.) 365; *Van Hoffman v. Ward*, 4 Redf. (N. Y.) 244; *Remsen v. Brinckerhoff*, 26 Wend. (N. Y.) 325; 37 Am. Dec. 251; *Bagley v. Blackman*, 2 Lans. (N. Y.) 41; *Belding v. Leichardt*, 2 Thomp. & C. (N. Y.) 52; *Eelbeck v. Granberry*, 2 Hayw. (N. Car.) 232; 2 Am. Dec. 624; *Hogan v. Grosvenor*, 10 Met. (Mass.) 54; 43 Am. Dec. 414; *Loy v. Kennedy*, 1 W. & S. (Pa.) 399.

In *Lewis v. Lewis*, 11 N. Y. 220, the words "I declare the within to be my will and deed" were held insufficient, the court, by Allen, J., saying: "To satisfy the statute the testator must in some manner communicate to the attesting witnesses, at the time they are called to sign as witnesses, the information that the instrument then present is of a testamentary character, and that he then recognizes it as his will and intends to give it effect as such. It must be declared to be his last will and testament by some assertion or some clear assent in words or signs, and the declaration must be unequivocal. (*Brinckerhoof v. Remsen*, 8 Paige (N. Y.) 488; *Rutherford v. Rutherford*, 1 Den. (N. Y.) 33; 43 Am. Dec. 644.) The policy and object of the statute require this, and nothing short of this will prevent the mischief and fraud which were designed to be reached by it. It will not suffice that the witnesses have elsewhere and from other sources learned that the document which they are called to attest is a will, or that they suspect or infer from the circumstances and occasion that such is the character

of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they may not only know the fact, but that they may know it from him, and that he understands it, and, at the time of its execution, which includes publication, designs to give effect to it as his will, and to this, among other things, they are required by statute to attest. Every fact is important in view of the position of the attesting witnesses. They should be satisfied that the instrument is in truth the last will and testament of the party, and is executed and published as such, and that he is of sound and disposing mind and memory, and in all respects competent to perform the act. The law simply prescribes those forms which it was supposed were best calculated to enable the witnesses to fulfill their office and attest the due execution of the will. The declaration that the instrument was his free will and deed, was equivocal, and would be satisfied by a deed executed voluntarily. It did not necessarily inform the witnesses that it was a will by excluding every other instrument from the mind. From the expression they could not know that the testator did not suppose the instrument was a deed. It is a very common form of acknowledgment of the execution of a deed to acknowledge it as the 'free act and deed' of the party, and the expression of the decedent varied but little from this form."

But it is not essential to the due publication of a will that the testator shall declare in express terms in the presence of the subscribing witnesses that the instrument is his last will; it is sufficient if he in some way makes known to them, by acts or conduct, if not by words, that it is intended and understood by him to be his will. Where, therefore, a testator whose vocal organs were paralyzed, subscribed the will in the presence of the witnesses, and by his conduct made known to them its nature, and requested their attestation, it was held that there was a substantial compliance with the statute sufficient to entitle the will to probate. In *Lane v. Lane*, 95 N. Y. 404, the court, by Danforth, J., said: "It is well settled that the necessary publication may be discovered by circumstances as well as words (*Lewis v. Lewis*, 11 N. Y. 220), and inferred from the conduct and acts of the testator and that of the attesting

witnesses in his presence, as well as established by their direct and positive evidence. Even a person both deaf and dumb may by writing or signs make his will and declare it. The testator in this case was in full possession of all his senses. He could both see and hear, and was not dumb. Partial paralysis of the vocal organs prevented him from uttering words, but he made sounds intelligible to those familiar with him, and signs which, to some extent, all could interpret. There was no difficulty with his understanding. The uncontradicted evidence shows that he set about making his will in a serious and determined manner. He went with his wife and son from his own to the house of the scrivener, Nichols, and there, Nichols says, 'his wife, speaking in his presence, informed me that Mr. Lane wanted me to write his will, and I did so in his presence.' As the scrivener wrote each section, he read it aloud to the testator, who nodded approval each time. While writing, something was said about a witness for the will, and, says Nichols, 'I suggested Wakelee, and Lane assenting, he was sent for and came.' . . . 'I introduced Wakelee to Lane, and informed him that I was writing Mr. Lane's will, and we had sent for him as a witness.' This was before the will was completed, and after it had occurred, Nichols finished writing, and then the testator, took it and read it himself. As this happened while the will was in preparation, it is obvious that Wakelee was present when it was finished, and when the last of it was read to the testator, and also while he himself read it. The testator and both witnesses all sat at one table when the will was subscribed and witnessed.

"This was done by the testator immediately after reading it; and in the presence of each and both witnesses; they saw him read the will and subscribe it. He 'shoved' the will to Nichols, who signed it and then got up and Wakelee sat down 'in Nichols' chair' and signed it. The testator left the will with Nichols several months, and then, by his directions he gave it to Mrs. Lane.

"From the situation of the parties, and the circumstances surrounding them, it seems to us that the jury were fully justified in saying that the testator made the required declaration to Nichols, and we think their verdict should have been the same as to

Wakelee. They were present and together during both events of executing and attesting the will, and the conduct of the testator upon that occasion amounted to a declaration that the instrument was his will and testament. Such also is the meaning of the attestation clause, and this, upon such a question, may be referred to *Brown v. Clark*, 77 N. Y. 369; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 85; 40 Am. Dec. 225. It is not in the usual form, but recites that 'as witnesses to this last will and testament of Frederick F. Lane, we have signed our names . . . by his request, in his presence, and in the presence of each other.' The request covers the act of the parties, and embodies a description of the instrument when declaring the character in which the witnesses attest it. It is as if the testator had said, I request you to sign as witnesses to my will. Two facts are involved, a statement of the paper, and a desire on his part. Such declaration may also be inferred from his conduct. He knew the paper was his will; he had directed its preparation; it was written in his presence, read to him and read by him. He had desired Wakelee's presence to witness the will, and, sitting by him, and by the other witness, after signing it, passes it to one for signature, and sees first that one to whom he had declared the paper to be his will, and then the other, sign as attesting witnesses. For what purpose and with what intelligence this was done the jury have found; they say that at the time of the execution of the paper writing purporting to be the last will and testament of Frederick F. Lane, he fully comprehended the effect of his said act in so subscribing the same, and that (*i. e.*, the effect of the act) of the subscribing witnesses thereto. They have said, moreover, that 'he then understood that this paper was his last will and testament,' and that the witnesses subscribed 'said paper purporting to be said will, as attesting witnesses, at the request of the testator.'

"We find no room for doubt or mistake. The testator knew, and the witnesses understood from his acts and conduct, as he intended they should, that the instrument then executed was his will. The statute upon this point exacts nothing more, and it is not denied by the respondent that on every

other there was strict compliance with its terms. We find then that the testator subscribed the will in the presence of the witnesses, made known to them its nature, and requested their attestation. On his part nothing more was required, and on their part was attestation of the will at his request. Thus every safeguard prescribed by statute against improvidence and fraud was substantially observed."

Where both the subscribing witnesses to a will testified that they saw the testatrix sign the will, and that they became subscribing witnesses at her request, and one of them stated that a short time before the testatrix signed it, it had been put into her hands to read; that she read it, and then requested some one else to read it, and that S. then read it aloud in the presence of the testatrix and the witnesses; that about an hour afterwards the testatrix requested to have the will brought that she might sign it, and, on its being brought, she signed it, the subscribing witnesses attaching their signatures, upon her suggestion and at her request; and that the other subscribing witness testified that after the reading of the will the testatrix said "Bring me the will and I will write my name;" that after her signature had been completed, and those of the attesting witnesses had been attached, she declared she was glad it was done with and off her mind; and the will was thereupon folded up and handed to G. for safe keeping. It was held that this was a valid publication and execution of the will. *Nipper v. Groesbeck*, 22 Barb. (N. Y.) 670.

In matter of McKenna's Will (Surrogate Ct.), 4 N. Y. Supp. 458, the lawyer who prepared the will of the decedent testified that he drew it according to orders, read it to the decedent, and asked him if it was right, and the decedent said that it was; that a third person was then called in as a witness, and the lawyer told the decedent to sign the will in their presence, which he did; that the decedent was then asked if he signed, sealed, published, and declared the paper to be his will, and requested them to sign their names as witnesses, and he said, "I do;" that the witnesses then signed their names and residences; and that he then handed the will to the decedent's wife. The other witness contradicted some of this testimony, but she manifested much hostility to the proponent, and admitted that she did not at the time regard the matter as of any

importance. It was held that the will was properly executed.

In *Denny v. Pinney*, 60 Vt. 524, the testatrix and attesting witnesses severally signed a will in the presence of each other; and the scrivener announced to the witnesses, in the presence of the testatrix, that it was her will, and requested them to sign as witnesses, though the testatrix did not personally say it was her will. This was held a sufficient publication.

In *Louisiana*, to constitute a presentation of a will in the sense of the code, it is not necessary that it should be delivered to the witnesses by the testator with his own hand, and no particular words or set form of speech is necessary to constitute a declaration that the instrument is the testator's will.

It is sufficient if the will, having been written by another at the request of the testator and out of the presence of the witnesses, shall have been read aloud by one of the witnesses in the presence and hearing of the testator and of the other witnesses, and is then held towards the testator by the writer of it who asks, "Is this paper that has just been read your will?" and the testator answers, "It is," and it is then signed by the testator and is attested by the witnesses in his and their presence. *Bourke v. Wilson*, 38 La. Ann. 321.

The testator's requesting one of the witnesses to read the will, which was done; and then declaring that it was his will, was held, a sufficient presenting of the will to the witnesses to satisfy the requirements of the *Louisiana* statute. *Buntin v. Johnson*, 28 La. Ann. 796.

The answer "yes" to a question put as to one's testamentary intentions, was held as unequivocal manifestation of purpose as a declaration in full, formal words would be. *Harrington v. Stees*, 82 Ill. 50.

Where a testator is asked if the instrument is his will, and he answers in the affirmative, it is a sufficient declaration. *Reeve v. Crosby*, 3 Redf. (N. Y.) 74; *Coffin v. Coffin*, 23 N. Y. 15; 80 Am. Dec. 235; *Matter of Voorhis' Will*, 125 N. Y. 765. *Compare Matter of Look's Will* (Surrogate Ct.), 5 N. Y. Supp. 50; *Larabee v. Ballard*, 1 Dem. (N. Y.) 496. See also *Pfarr v. Belmont*, 39 La. Ann. 294.

So a declaration by the scrivener, in the presence of the testator, to the witness, "This is the will of A B and he desires you to witness it," has been held sufficient. *Mundy v. Mundy*, 15

"Signed, sealed, published, and declared," and, even if unnecessary, it is natural and prudent for the testator to make formal publication before the witnesses when they attest.¹ The failure of the witnesses to remember whether publication was made, does not defeat the will when the attestation clause recites the fact.² Publication may be established by the testimony of one attesting wit-

N. J. Eq. 290. See *Elkinton v. Brick*, 44 N. J. Eq. 154.

In *Matter of Kane's Will* (Surrogate Ct.), 20 N. Y. Supp. 123, it was held that the publication of a will is sufficiently established where it appears that the testatrix acknowledged to the witnesses that she had heard the will read, and it was signed by the attesting witnesses in the testatrix's presence, though at the request of the scrivener.

The words, "Will you witness my will?" or, "I want you to witness my will," addressed by the decedent to and heard by both the subscribing witnesses, constitutes a sufficient acknowledgment, declaration, and rogation. *Matter of Harder's Will*, 1 Tuck. (N. Y.) 426.

Where, after the testator had signed the will in the presence of the witnesses, one of them, in the presence of the other, asked if the paper was all right, and the testator replied, "That is all right, John, that is my will," it was held that the instrument was sufficiently declared to be the testator's last will. *Ayres v. Ayres*, 43 N. J. Eq. 566.

The declaration may be made to the attesting witnesses separately. *Barry v. Brown*, 2 Dem. (N. Y.) 309; *Hoysradt v. Kingman*, 22 N. Y. 372.

Holographic Wills.—While holographic wills are not excepted from the terms of the statute requiring and prescribing the method of publication, in case of such a will, criticism of the terms and manner of what is claimed to be a sufficient publication need not be so close or severe as where the question as to whether the testator knew that he was executing a will depends solely upon the fact of publication. In any case a substantial compliance with the statute is sufficient; the necessary information to the subscribing witnesses, as to the character of the instrument, may be given in any manner which conveys to their minds the testator's consciousness that it is a will. It is not essential to a valid publication that the words of publication be at the time complete in and of them-

selves. It is sufficient if the declaration is made definite and complete by reference on the part of the testator to a former conversation between him and the witness. Where, at the time of the execution of a will written by the testatrix, she said to one of the witnesses, "This is the paper I spoke to you about signing," referring to former conversations between them in which she had stated that she was going to make a will which she wished the witness to sign as a witness, and which the latter had promised to do, it was held this was a sufficient publication as to that witness. The other witness had been a witness to a former will which the testatrix had explicitly declared to be her will. She had also been advised by the testatrix that she desired to make an alteration therein, because of the sickness of A., the principal beneficiary. Being sent for by the testatrix she found her with the alleged will before her, and was asked by her if she would sign it on account of the sickness of A., the testatrix adding that she was sorry to trouble the witness "again to sign the paper." This was held a sufficient publication. *Matter of Beckett's Will*, 103 N. Y. 167. *Matter of Dale's Will*, 56 Hun (N. Y.) 169; *Matter of Hunt*, 110 N. Y. 281.

1. *Schouler on Wills* (2d ed.), § 326.

2. *Remsen v. Brinckershoff*, 26 Wend. (N. Y.) 325; 37 Am. Dec. 251.

But where the attestation clause was not read to or by the witnesses, of whom one did not remember that the character of the instrument was stated, while the other testified positively that the word "will" was not mentioned at the interview, although L. swore that he asked the decedent, in the witnesses' presence, whether he wished them to witness his "last will and testament," and received an affirmative answer, which conversation, however, was not shown to have been heard by the witnesses, it was held that probate must be refused for want of due publication. *McCord v. Lounsbury*, 5 Dem. (N. Y.) 68.

ness in opposition to the other, the presumption being in its favor.¹ In *New Jersey*, it has been held essential to good pleading to aver that the will was duly published by the testator in the presence of the required number of witnesses, although the contrary appears to have been the practice in *England*.² Whether the will

1. Auburn Theological Seminary v. Calhoun, 25 N. Y. 422.

2. Morehouse v. Cotheal, 21 N. J. L. 488. In this case the court, by Green, C. J., said: "The declaration avers that the will was in writing, but not that it was signed and published by the testator, in the presence of three subscribing witnesses. The authorities are very generally agreed that, in pleading a will, it must be pleaded to be in writing, pursuant to the Statute of Wills, 32 Hen. VIII. Anonymous, 2 Salk. 519, pl. 17; Birch v. Bellamy, 12 Mod. 540; 1 Saund. 276, note; 2 Bac. Abr. 'Stat.,' L. 3; Stephen's Plead. 332; Gould's Plead. IV., § 47. And both the early and the latter precedents conform to this requirement. The rule is stated to be, that when a statute makes writing necessary to a common-law matter, where writing was not necessary at common law, you need not plead the thing to be in writing; but where a thing is originally made by statute, and required to be in writing, you must plead it, with all the circumstances required by the act.

"If the principle be sound (and I do not find it anywhere questioned), it would seem to be equally necessary to state all the circumstances required by the original act, not only—but all the circumstances required by subsequent acts upon the same subject.

"We find it, accordingly, laid down that where the power to do an act was originally granted by a statute, it must be shown in pleading that the act was done according to the direction of the statute, and of every subsequent statute relative to the subject. If a will of lands be pleaded, it must be shown that the will is in writing, as by the 32d Hen. VIII., ch. 1 (by which power to make such will was first given) is directed. And it must likewise be shown that the requisites made necessary to the validity of such will by the 20th Car. II., ch. 3, have been complied with. Bac. Abr. 'Statutes,' L. 3.

"The same reasons," says Judge Gould, "which require a devise to be pleaded as being in writing, render it equally necessary to allege an observ-

ance of all the other requisites prescribed by statute as essential to its validity." These requisites being expressly made as indispensable to the validity of such instruments as writing itself. And hence, he who now pleads a devise, must aver not only that it is in writing, as provided by the Statute of Wills (32 Hen. VIII.), but also that it is signed and attested according to the provision of the Statute of Frauds (29 Car. II., ch. 2, § 5). For this latter enactment relating to the same subject-matter as that of the Statute of Wills, and being in effect only supplementary to it, is to be taken notice of in pleading, as if it formed a part of the elder statute. Gould's Pl. ch. IV., § 48.

"These authorities, standing uncontradicted, would seem to be decisive of the question, and yet it is worthy of notice that with a single exception, to be found in 2 Chitty 591, the precedents in the English books simply aver the will to be writing, without mention of the requisites prescribed by the statute of Charles. Greene v. Cole, 1 Saund. 250; 2 Saund. 234; 1 Lilly's Ent. 207; 3 Went. Pl. 492; 3 Chitty's Pl. 1361.

"The earlier and more authoritative precedents, to be found in Saunders, are prior in point of time to the Statute of Frauds, and of course shed no light directly upon the question; and yet it is remarkable that so distinguished and accurate a pleader as Sergeant Williams, in his notes to these precedents, written after the enactment of the Statute of Frauds, should have made no allusion whatever to the important changes introduced by this statute, if he regarded the statute as rendering the averment necessary. His statement that it is necessary to aver that the will is in writing, as required by the Statute of Wills, and his entire silence in respect to the requisites of the Statute of Frauds, would seem to be indicative of his opinion upon the point.

"In Everard v. Patterson, 6 Taunt. 645, one of the counsel is reported as saying, in argument, that 'though in an anonymous case it was once said that in pleading a will of land, it was necessary to show it was executed according

was published before or after the subscribing witnesses signed it, is immaterial, provided publication and subscription are on the same occasion.¹

3. Acknowledgment.—Before the passage of 1 Vict., ch. 26, § 9, which applies to wills made after January 1, 1838, subscribing

to the statute, because a will is wholly the creature of a statute, yet it is unnecessary so to do, and the practice is universally contrary.' 'To which' the report adds 'the court assented.'

"In a note to 2 Chitty's Pl. 591, it is said that it is not necessary in pleading a will to state that the solemnities required by the statutes against frauds have been observed, and the case of *Davis v. Reeves*, Vern. & Scriv. 497, is cited in support of the position.

"Whatever doubts may be created by this conflict of opinion as to the proper practice under the English statutes, none I think, can exist under our act. In this state the same statute, and the same clause of the statute, which requires the will to be in writing, requires also that it should be signed and published in the presence of three subscribing witnesses. If it be necessary to aver in pleading the existence of the one requisite, it must be equally essential to aver the existence of the other. Both authority and precedent concur in this conclusion, that it is essential in good pleading to aver the will of real estate to be in writing, and I am of opinion that it is equally essential to aver that the will was signed and published by the testator, in the presence of three subscribing witnesses. If this were a new question I should be disposed to hold the declaration good, and adopting the views of an eminent legal tribunal upon an analogous point to say that it is enough in pleading to aver that the land was devised by will, without averring that the will was executed in pursuance of the requirements of the statute, because it could not be such a will as to pass the title, unless it conformed to all the requirements of the statute. *Elliott v. Cowper*, 1 Stra. 609.

"But I cannot disregard the uniform practice of two hundred years, and sitting here I do not feel myself at liberty to say anything calculated to disturb it.

"Upon this point I am of opinion that judgment must be for the demurrant."

1. *Doe v. Roe*, 2 Barb. (N. Y.) 200; *Jackson v. Jackson*, 39 N. Y. 153; *Matter of Collins*, 5 Redf. (N. Y.) 20. See

Matter of Dale's Will, 56 Hun (N. Y.) 169; *Walsh v. Laffan*, 2 Dem. (N. Y.) 498.

The clear intent of the statute, so far as respects publication, is that the testator shall not sign the will at one time or on one occasion, and at another time, or on another occasion, declare it to be his will. Both must be done at the same time, on the same occasion; but which shall be done first in the order of time—whether the testator shall declare the instrument he is about to sign to be his last will and testament, or shall first subscribe the paper, and then make the declaration of his purpose—is immaterial. It is enough that the two things are not done at different times. *Doe v. Roe*, 2 Barb. (N. Y.) 200. See also *Gamble v. Gamble*, 39 Barb. (N. Y.) 373.

The decedent who was ill was asked by L. what he intended to do with his money, and he replied that he would leave a certain sum to his sister. L. withdrew from the room, wrote a short will, signed the decedent's name, and, together with C., signed the paper as witnesses, returned, and read it aloud to the decedent, who, thereupon, signed his name. The whole paper was read, inclusive of the names of the attesting witnesses, and both the reading and the signature by the decedent were in the presence of the witnesses. It was held that the instrument was validly executed as a last will and testament. The witnesses may be said to have signed at the decedent's request, when, their names having been read over to him and seen by him, he signed the document. The reading aloud followed by the act of signature, constituted a testamentary declaration. The particular order of the several requisites to the valid execution of a testament is not at all material, provided they be done at the same time and as part of the same transaction. What is the same time and the same transaction is the subject of judicial determination, in each particular case, depending upon the facts, and incapable of being governed by any general rule. *Vaughan v. Burford*, 3 Bradf. (N. Y.) 78.

witnesses were unnecessary to the validity of wills of personalty.¹ In regard to devises of realty, the Statute of Frauds² required that a will of lands should be signed by the devisor, or by some other person, in his presence and by his express direction, and "attested and subscribed in his presence by three or four credible witnesses."³ Under this provision it was held unnecessary for the testator actually to sign the will in the presence of the subscribing witnesses, but that any acknowledgment before them, either of the will⁴ or the signature, made their attestation and subscription complete; and furthermore, that a due acknowledgment in fact did not require the use of the words "This is my will," or "This is my signature," or other equivalent expression, provided the testator's conduct was such as to amount, in common understanding and reasonable construction, to an acknowledgment that the instrument was his will or that the signature was his, although the witnesses did not see the signature and were not aware of the nature of the instrument.⁵ The fact that the attestation clause distinctly

1. Wms. on Exrs. (8th Eng. ed.), pt. I, bk. II, ch. II, § II; Brett v. Brett, 3 Add. 224.

2. 29 Car. II., ch. 3, § 5.

3. Wms. on Exrs. (9th ed.) 116.

4. Ellis v. Smith, 1 Ves. Jr. 11; Addy v. Grix, 8 Ves. Jr. 504; Morison v. Tournour, 18 Ves. Jr. 175.

5. White v. British Museum, 6 Bing. 310. See Johnson v. Johnson, 1 C. & M. 140; Wright v. Wright, 5 M. & P. 319; 7 Bing. 457; Butler v. Benson, 1 Barb. (N. Y.) 526; Raudebough v. Shelley, 6 Ohio St. 307; Buckhout v. Fisher, 4 Dem. (N. Y.) 277; *In re Porter*, 9 Mackey (D. C.) 493.

In *White v. British Museum*, 6 Bing. 310, it was held that a will of lands subscribed by three witnesses, in the presence and at the request of the testator, was sufficiently attested within the Statute of Frauds, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was. In this case the court, by Tindal, C. J., said: "It has been held in so many cases that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same; but that any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. . . . The objection, therefore, to the execution of the

present will, does not rest upon the fact that it was not signed by W. White in their presence; but that with respect to two of the witnesses, Hormslow and Bristow, there was no acknowledgment of his signature, nor any declaration that it was his will; but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued that if such subscription of their names satisfies the intention of the statute, the word attested will have no force whatever, and may be considered as if it had never been inserted.

"The question, however, appears to us to be, whether, upon this special verdict, the finding of the jury establishes, although not an acknowledgment in words, yet an acknowledgment in fact, by the devisor to the subscribing witnesses, that this instrument was his will? For if, by what the devisor has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, we think the attestation of the will must be considered as complete, and that this case falls within the principle and authority of that of *Ellis v. Smith*, 1 Ves. Jr. 11.

"In the execution of wills, as well as that of deeds, the maxim will hold good '*non quod dictum, sed quod factum est, inspicitur*.'

"Now, in the first place, there is no doubt upon the identity of the instru-

sets forth that the instrument is the testator's will has been held in itself a sufficient acknowledgment, although the witnesses did not see the signature, and were not otherwise informed as to the nature of the instrument.¹ Under the Statute 1 Vict., ch. 26, § 9, which provides that "the signature shall be made or acknowledged by the testator," it has been held that there is no sufficient acknowledgment unless the witnesses either saw or might have seen

ment. The paper in question is the very paper writing which was produced by the testator to the three witnesses. The great object of the direction of the statute, that witnesses shall subscribe in the presence of the deviser, was to prevent the possibility of the witnesses returning to his hands any other instrument than the very instrument which he delivered to them to attest. This object has been attained in the present case, and the identity of the instrument is beyond dispute. In the next place, it appears from the special verdict that the deviser was conscious himself that this instrument was his will. For the verdict finds that he was of sound and disposing mind, both at the time he signed it himself, and also at the time when the witnesses subscribed their names.

"But further it appears from the inspection of the instrument set out in the special verdict, that the signature of the three names could not possibly inure to charge themselves, or any other person, and could not have been done for any other purpose, whatever, than simply to make them witnesses to the will. And, lastly, it appears, from the same inspection, that immediately above the names of the witnesses there was written, in the handwriting of the testator, these words, 'In the presence of us as witnesses thereto,' which do amount to a clear and unequivocal indication of the testator's intention that they should be witnesses to his will.

"When, therefore, we find the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him, we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the statute, if the case were *res integra*, yet, as the law is now fully settled that the testator need

not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing, we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and we do, therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the statute."

In *Dudleys v. Dudleys*, 3 Leigh (Va.) 436, the testator's will was written for him by R. P., who testified that he also signed the testator's name thereto, in the presence of, and at the request of the testator, and then subscribed his own name as a witness in the testator's presence; and another witness, B. H., testified that some years afterwards, the witness being at the testator's house, it was suggested to the testator that that was a favorable time to have that will witnessed; the testator assented; the paper in question was produced; the witness took it near to the testator, and inquired whether he acknowledged it; the testator said he did, upon which, this witness subscribed as a witness in the testator's presence. It was held that, the acknowledgment of the paper by the testator to the second witness was a recognition of the signature thereto as his own, and evidence from which a court of probate might well infer that the testator's signature to the will was written by his authority; and so there were two witnesses to the execution of the will, as required by the statute.

1. *Eelbeck v. Granberry*, 2 Hayw. (N. Car.) 232; 2 Am. Dec. 624; *Wright v. Wright*, 5 M. & P. 319 n. But see *Matter of Van Geison*, 47 Hun (N. Y.) 5, criticised in *Matter of Graham*, 30 N. Y. St. Rep. 292.

the signature,¹ although the testator expressly declared that the paper to be attested by them is his will,² but that where the testator produces the will with his signature on the face of it visibly

1. Jarm. on Wills (5th ed.) *108; *In re Harrison*, 2 Curt. 863; *Ilott v. Genge*, 3 Curt. 160; 4 Moo. P. C. C. 265; *In re Swinford*, L. R., 1 P. & D. 631; *Morrill v. Douglass*, L. R., 3 P. & M. 1; *Pearson v. Pearson*, L. R., 2 P. & M. 451.

2. Jarm. on Wills (5th ed.) *108; *Hudson v. Parker*, 1 Rob. 14; 8 Jur. 786; *Shaw v. Neville*, 1 Jur. N. S. 408; *Goods of Gunstan*, 7 Prob. Div. 102.

Two persons, present at the same time, subscribed a paper at the request and in the presence of a party who told them it was his will. They did not see him sign it, nor did he acknowledge any signature, the writing on the paper being concealed from them. It was held, that the 9th section of 1 Vict., ch. 26, had not been complied with. *Hudson v. Parker*, 8 Jur. 786. The court, by Dr. Lushington, said: "Now, before reading the words of that statute applicable to the present case, it may be expedient to consider what are the rules of construction to be used as guides in ascertaining its meaning. The first and cardinal rule is this: Is there any plain and evident meaning arising from the words used, taking them in their ordinary acceptation in conjunction with known rules of grammar? If there be no difficulty in arriving at a rational meaning in conformity to these principles, there is nothing more to be done; for nothing is more contrary to sound reason or safe principle, than to attempt, by the exercise of ingenuity, to attach to words a far-fetched meaning contrary to common sense and common perception. If there be any doubt after applying these simple rules, in ascertaining the intention of the legislature, the next step is, upon consideration of the whole statute, to determine its character, and especially whether it be remedial or not, and then cautiously to use the rules which authority has prescribed as the truest expositors of a statute of that character. Thirdly, it is expedient, where there have been no decisions as to the statute in question, to examine with care decisions which have taken place as to preceding statutes *in pari materia*; but great caution is necessary in the use of such last materials, for the

minutest diversity of words may make a distinction, or such decisions may be founded on erroneous principles, and, if so, however sanctioned by use, are not to be implicitly followed. There are, of course, many other known rules of construction, which, as occasions arise, may advantageously be followed; but, for the present purpose, those referred to may suffice. The words of which we now wish to understand the meaning are the following: 'Such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.' The previous part of the clause having required the signature to be affixed 'at the foot of the will,' the section goes on, 'and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.' First, then, as to the plain meaning of these words, 'that the signature of the testator shall be made in the presence of two witnesses;' will the statute be satisfied if the signature be made in their presence, if they are in ignorance of the fact? I am of opinion, under such circumstances, that the statute is not complied with. It is obvious that the solution of this question must mainly depend on the meaning which the legislature intended to convey by the use of the word 'presence' in this and in the other clauses of the statute. What could possibly be the object of the legislature, except that the witnesses should see and be conscious of the act done, and be able to prove it by their own evidence? If the witnesses are not to be mentally as well as bodily present, they might be asleep, or intoxicated, or of unsound mind. Again, how is the signature so made to be proved, except by parol evidence?—to exclude which was one great object of the statute. In support of this view of the question, let us call to mind how the word 'presence' is received in its common acceptation.

"*Loquendum est ut vulgus*, says Lord Coke (4 Rep. 47). If, in the course of common conversation, a person wishes to support the truth of a statement, does he not say, 'Such a one was present, and he will vouch for the truth?'

If a statement be questioned, does not a person say, 'I was present, and can attest its correctness?' And does not the whole world understand by this mental, not bodily, presence? Would not a contrary construction lead to absurdity, and defeat the plain intention of the statute? Then, if the witnesses are to be cognizant of the making of the signature when the execution is in that form, must they not see and be cognizant of the signature when the will is to be executed in the alternative form, by acknowledging the signature? The alternative form of execution by acknowledgment is to answer the same purpose; it is to be equivalent in effect to actual signing; and ought not the acknowledged signature to be proved by the same mode of evidence, namely, by the subscribing witnesses? What is the plain meaning of acknowledging a signature in the presence of witnesses? What do the words import but this: 'Here is my name written, I acknowledge that name so written to have been written by me,—bear witness?' How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it? They might swear that the testator said he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged. It is quite true that acknowledgment may be expressed in any words which will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word 'acknowledge,' or by the exigency of the act to be done. It would be quite sufficient to say, 'that is my will,'—the signature being there, and seen at the time,—for such words do import an owning thereof. Indeed, it may be done by any other words which naturally include within their true meaning acknowledgment and approbation. Still further to elucidate the question, . . . will proceed to consider the remaining part of the section: 'Such witnesses shall attest, and shall subscribe the will in the presence of the testator.' Here are two things which the witnesses are to do, they are to attest, and they are to subscribe; mark the words,—shall attest, and shall subscribe; the word 'shall' is repeated. Subscription alone will not do,—it will not satisfy the statute; and it is a well established rule that you are to give, if possible, a rational meaning to every

word of a statute. Then, if 'attest' means something more than subscription, what does it mean? 'To attest,' is to bear witness to a fact. Take a common example: A notary public attests a protest, he bears witness not to the statements in that protest, but to the fact of the making of those statements; so I conceive the witnesses in a will bear witness to all that the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence. The statute does say, 'That no form of attestation shall be necessary;' still the witnesses must attest, although the outward work of attestation may be subscription only. If more be wanted to explain the meaning of the word 'attest,' the old form of attestation clause will show that it comprehended more than bare subscription of the will itself. It has been held, in the execution of a power, that subscription is merely the form of bearing witness to the facts required by the instrument creating the power; it was so held in *Doe v. Burdett*, 7 Scott N. C. 66. If this be so, how shall a witness attest who never was cognizant of the signature of the testator, or whether it was made before or after his own subscription? Now, lest this should appear a harsh construction of the statute, let us look to its whole purview, in order to ascertain its legal character. I apprehend that it is a remedial statute, standing on the same principles as the Statute of Frauds, which, as its name denotes, was passed partly for the object of preventing the setting up of fraudulent wills of real estate. The present statute was intended to effect the same object as to wills of personal estate, and to secure further objects, especially that the testamentary act to be done should be deliberate, and that no doubt should exist as to its finality. The safeguards provided by the act are contained in the 9th section. To relax such provisions would be to break up the foundation of the statute, which, being a remedial statute, must according to the soundest rules of construction, be so interpreted as to prevent the evil and advance the remedy. Upon what principle could this be done? It is said, by the equity of the statute,—by the substitution of supposed equivalents. Perhaps I do not altogether comprehend so accurately as I might do what is meant by the equity of the statute; it may be

apparent to the witnesses, and requests them to subscribe it, an express acknowledgment of the signature itself is unnecessary.¹

something which the ordinary meaning of its words does not express, something which the legislature has not said, but which they might have said had they so intended, and which some persons are, therefore, inclined to put into the statute, because they think that, had attention been called to it, the legislature would have done so. I must here express my cordial concurrence in the opinion of Lord Tenterden, in the case cited by Dr. Nicholl; the very words it is not necessary to state at length, but it is quite clear that Lord Tenterden was satisfied in his own mind of the infinite mischief which has resulted from judges, in the constructions which have been put on various statutes, departing from the plain import of words, in order to soften the rigor of particular enactments, which appeared harsh and strict when applied to particular cases. That opinion is of great value, and it is not the opinion of Lord Tenterden alone, but of many high legal authorities, who have at various times expressed their disapprobation of such a mode of construction. I next proceed to inquire, whether the decisions under the Statute of Frauds, and those which have taken place under this present Statute of Wills, militate against, and how far such decisions ought to control, my opinion. In the first place, the decisions under the Statute of Frauds which have any reference to this case arise upon a section of an act differently worded in some respects, and, so far as this difference makes a distinction, I am clearly exonerated from the duty of following them. In the next place, where these decisions are founded on great and acknowledged principles, it would be folly and presumption to depart from them; but, if the force and efficacy of the Statute of Frauds has, step by step, been departed from by a series of decisions, each departing from the plain import of the act, and if such departure, although fettering the judgments of great legal authorities, has been lamented by them as encroachments upon the statute, I am not prepared to say, that, in the exposition of the present statute, such decisions are now absolutely binding. If the contrary were the case, what would it be but to perpetuate a mode of construction which so many of the

lights of the law have lamented and deplored, as being counter to the soundest rules for the construction of statutes? What would it be but to shut the door upon experience, and to canonize error; and, instead of improvement, to combine the failures of the past with the failures of the present? It would be to adhere to the admitted errors of those who have gone before, and to adopt one of the most fallacious modes of solving difficulties."

This case was approved and followed in *Goods of Gunstan*, 7 Prob. Div. 102, where it was held that to constitute a sufficient acknowledgment, within section 9 of the Wills Act, the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator, and, if such is not the case it is immaterial whether the signature is, in fact, there at the time of attestation, or whether the testator says that the paper to be attested is his will, or that his signature is inside the paper.

Whether the witnesses either actually saw the signature, or had the opportunity of seeing it, is to be determined by the court from the circumstances of the particular case, in the absence of positive evidence one way or the other. *Goods of Huckvale*, L. R., 1 P. & D. 375; *Goods of Gunstan*, 7 Prob. Div. 102; *Gwillim v. Gwillim*, 3 S. & T. 200; *Cooper v. Bockett*, 4 Moo. P. C. C. 419. Compare *Goods of Hammond*, 3 S. & T. 90; *Goods of Archer*, L. R., 2 P. & M. 252.

1. 1 Wms. on Exrs. (9th Eng. ed.) 122; *Gaze v. Gaze*, 3 Curt. 451; *Blake v. Knight*, 3 Curt. 547; *Keigwin v. Keigwin*, 3 Curt. 611; *In re Davis*, 3 Curt. 748; *In re Ashmore*, 3 Curt. 756; *In re Bosanquet*, 2 Rob. 577; *In re Dinmore*, 2 Rob. 641; *Goods of Huckvale*, L. R., 1 P. & D. 378; *Daintree v. Butcher*, 13 Prob. Div. 102.

The following decisions have been made with regard to acknowledgment under the Victorian statute:

"(a) The signature to be acknowledged may be made by the testator, or by another for him. *In re Regan*, 1 Curt. 908.

"(b) A testator, whether speechless or not, may acknowledge his signature by gestures. *In re Davies*, 2 Rob. 337.

In nearly all the states of the union, acknowledgment is the recognized substitute for signing in the presence of the witnesses,¹ and where the will was signed by another than the testator, it has been

And see *Parker v. Parker*, Milw. Ir. Eccl. Rep. 545.

"(c) There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature. (*In re Harrison*, 2 Curt. 863; *Ilott v. Genge*, 3 Curt. 160; 4 Moo. P. C. C. 265; 8 Jur. 323; *Goods of Swinford*, L. R., 1 P. & D. 631. And see *Faulds v. Jackson*, 6 No. Cas. Sup. 1,) not even though the testator should expressly declare that the paper to be attested by them is his will. *Hudson v. Parker*, 1 Rob. 14; 8 Jur. 786; *Shaw v. Neville*, 1 Jur. N. S. 408; *Beckett v. Howe*, L. R., 2 P. & D. 1, is *contra: sed qu.*

"(d) When the witnesses either saw or might have seen the signature, an express acknowledgment of the signature itself is not necessary, a mere statement that the paper is his will, *In re Davis*, 3 Curt. 748; *In re Ashmore*, 3 Curt. 756; 7 Jur. 1045; *Gwillim v. Gwillim*, 3 S. & T. 200; 29 L. J. P. 31; *Goods of Huckvale*, L. R., 1 P. & D. 375; or a direction to them to put their names under his, *In re Philpot*, 3 No. Cas. 2; *Gaze v. Gaze*, 3 Curt. 451; 7 Jur. 803. (And see other cases cited by Lord St. Leonard's R. P. Stat., p. 338 *et seq.*; *Wms. on Exrs.*, pt. I, bk. II, ch. II, § II;) or even a request by the testator, *Keigwin v. Keigwin*, 3 Curt. 607; 7 Jur. 840; or by some person in his presence, *In re Bosanquet*, 2 Rob. 577; *Faulds v. Jackson*, 6 No. Cas. Sup. 1; *In re Jones*, 1 Deane 3; 1 Jur. N. S. 1096; *Inglesant v. Inglesant*, L. R., 3 P. & D. 172. But see *Morritt v. Douglass*, L. R., 3 P. & D. 1, to sign the paper, is sufficient.

"(e) When the signature is seen or expressly acknowledged, it is not material that the witnesses are not told that the instrument is a will. *Keigwin v. Keigwin*, 3 Curt. 607; 7 Jur. 840; *Faulds v. Jackson*, 6 No. Cas. Sup. 1; or are deceived into thinking that it is a deed. *Sugd. R. P. Stat.*, p. 340. But see the observations of Sir H. J. Fust in *Willis v. Lowe*, 5 No. Cas. 432.

"(f) It is of course sufficient, on a re-execution, merely to acknowledge the signature made on a former execution. *In re Dewell*, 17 Jur. 1130." 1 *Jarm. on Wills* (5th ed.) *108.

1. *Chase v. Kittredge*, 11 Allen

(Mass.) 49; 87 Am. Rep. 687; *Ela v. Edwards*, 16 Gray (Mass.) 91; *Sechrest v. Edwards*, 4 Metc. (Ky.) 163; *Reed v. Watson*, 27 Ind. 443; *Adams v. Field*, 21 Vt. 256; *Cravens v. Faulconer*, 28 Mo. 19; *Parramore v. Taylor*, 11 Gratt. (Va.) 220; *Rosser v. Franklin*, 6 Gratt. (Va.) 1; 52 Am. Dec. 97; *Webb v. Fleming*, 30 Ga. 808; 76 Am. Dec. 675; *Yoe v. McCord*, 74 Ill. 33; *Crowley v. Crowley*, 80 Ill. 469; *Abraham v. Wilkins*, 17 Ark. 292; *Lewis v. Lewis*, 11 N. Y. 220; *Canada's Appeal*, 47 Conn. 450; *In re Convey's Will*, 52 Iowa 197; *Stirling v. Stirling*, 64 Md. 144; *Welch v. Adams*, 63 N. H. 344; 56 Am. Rep. 521; *Allen v. Griffin*, 69 Wis. 529; *Deering's Cal. Civ. Code*, § 1276. See *Crittenden's Estate*, Myr. Prob. (Cal.) 50; *Taney's Estate*, Myr. Prob. (Cal.) 210; *Allison v. Allison*, 46 Ill. 61; 92 Am. Dec. 237; *Eelbeck v. Granberry*, 2 Hayw. (N. Car.) 232; 2 Am. Dec. 624; *Baskin v. Baskin*, 48 Barb. (N. Y.) 200; *Van Hooser v. Van Hooser*, 1 Redf. (N. Y.) 365; *Beane v. Yerley*, 12 Gratt. (Va.) 239; *Sutton v. Sutton*, 5 Harr. (Del.) 459; *Rigg v. Wilton*, 13 Ill. 15; *Beall v. Mann*, 5 Ga. 456; *Gaither v. Gaither*, 20 Ga. 709; *Vernon v. Kirk*, 30 Pa. St. 218; *Denton v. Franklin*, 9 B. Mon. (Ky.) 28; *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *Butler v. Benson*, 1 Barb. (N. Y.) 526; *Robins v. Coryell*, 27 Barb. (N. Y.) 556.

In *Roberts v. Welch*, 46 Vt. 164, it was held that although it is not necessary that the testator should sign the will in the presence of the witnesses, and it would be enough that he declared the instrument which the witnesses were called to attest, to be his will, or his instrument, which he wished them to attest, yet it is necessary that the subscribing witnesses should know the character of the act which they are called upon to perform; and that, by affixing their names to the instrument, they are thereby attesting the execution thereof by the testator.

In *Matter of Simmon's Will* (Supreme Ct.), 9 N. Y. Supp. 352, it was held that under 3 *New York Rev. Stat.* (7th ed.), p. 2285, § 40, requiring a testator to sign his will in the presence of the attesting witnesses, or to acknowledge the signature to each of them, and

held unnecessary that the testator should state in his acknowledgment that the other person signed the instrument at his request.¹ In some states, as is the case in *Massachusetts* and others, in which the local statute is framed upon the Statute of Frauds, the English decisions under that act are of authority, and it has been held that the validity of the acknowledgment will depend upon the conduct of the testator, rather than his language, and that anything which amounts in common understanding and reasonable construction to an acknowledgment that the instrument is his will or the signature is his, is sufficient, although the witnesses did not know what the paper was, and did not see the signature.² In

to declare at the time that the instrument subscribed is his last will, probate of a will is properly revoked when the name of the testator was not signed in the presence of either of the attesting witnesses, and he did not acknowledge the signature to be his to either of them, and did not declare the instrument to be his last will and testament beyond answering "Yes" to the question of one of the witnesses as to whether the testator and his wife were making their wills.

In *Matter of Merchant's Will*, 1 Tuck. (N. Y.) 151, it was held, that though the signature to the will was not written with the testator's own hand, it was competent for him, under the statute, to have made it his, and to have "subscribed" the document, in contemplation of law, by acknowledging his name written there by another person. The testator need not have touched the paper with his own hand or with the point of his own pen, if the subscription of his name thereto be adopted by his acknowledgment and declaration.

Utah.—Signing and acknowledging in the presence of witnesses are both necessary. Comp. Laws (1888), § 2651.

Pennsylvania.—The statute in this state requires the will to be "proved by oaths or affirmations" of two or more competent witnesses, and neither subscription nor acknowledgment is necessary. Purd. Dig. (11th ed.), p. 1710, ¶ 6.

New Jersey.—See *In re Alpaugh*, 23 N. J. Eq. 507; *Combs v. Jolly*, 3 N. J. Eq. 625; *Den v. Mitton*, 12 N. J. L. 70; *Mickle v. Matlack*, 17 N. J. L. 86; *Ludlow v. Ludlow*, 35 N. J. Eq. 480; *In re McElwaine*, 18 N. J. Eq. 449.

In *Illinois*, it is immaterial whether the attesting witnesses were present when the testator signed the will, if he

acknowledged it as his will and requested them to sign as witnesses. *Holloway v. Galloway*, 51 Ill. 159.

1. *Haynes v. Haynes*, 33 Ohio St. 598; 31 Am. Rep. 579. See *Rosser v. Franklin*, 6 Gratt. (Va.) 1; 52 Am. Dec. 97.

2. *Hogan v. Grosvenor*, 10 Met. (Mass.) 56; 43 Am. Dec. 414; *Osborn v. Cook*, 11 Cush. (Mass.) 532; 59 Am. Dec. 155; *Ela v. Edwards*, 16 Gray (Mass.) 92; *Tilden v. Tilden*, 13 Gray (Mass.) 110; *Allison v. Allison*, 46 Ill. 61; 92 Am. Dec. 237; *Turner v. Cook*, 36 Ind. 129; *Canada's Appeal*, 47 Conn. 450; *Flood v. Pragoff*, 79 Ky. 607; *Allen v. Griffin*, 69 Wis. 529; *Haynes v. Haynes*, 33 Ohio St. 598; 31 Am. Rep. 579. See *Adams v. Norris*, 23 How. (U. S.) 353; *Raudebaugh v. Shelley*, 6 Ohio St. 307; *Leverett v. Carlisle*, 19 Ala. 80; *Nickerson v. Buck*, 12 Cush. (Mass.) 332.

In *Canada's Appeal*, 47 Conn. 450, the trial judge charged that if the subscribing witness, "from the effects of intoxication, or from any other cause, was ignorant of the nature and character of the instrument he was signing, and was not informed and did not know that it was intended as a will, but ignorantly put his name to it merely because he was told to do so, without comprehending the nature and character of the transaction, the document was not legally executed as a will." This was held to be error, the court, by Pardee, J., saying: "The statute requires a will to be 'in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence and in the presence of each other.' The charge declares the law to be, that the signature of a testator to a will is not duly attested unless at the time of attestation the attesting witness knows that the in-

New York, where the statute requires subscription in the presence of the attesting witnesses "or an acknowledgment of the making of the same to them," it has been held, in analogy to the English

strument is a will. This attributes too much meaning to the word 'attestation;' more than has been given to it by courts which have been called upon to define it where used in similar statutes. . . . The primary reason for the presence of the witness is not that he has known the testator long or intimately; not that he is required to use or have any skill in detecting the presence of insanity or other forms of mental disease or weakness; not that he is to have any opportunity for discovering the fraudulent scheme which has culminated in the act of the testator. If the presence of one or three witnesses provides any degree of security against the procurement of a will from a competent testator by fraud, or against the procurement of one from a testator without mental capacity, it is an incidental benefit; it was not in the mind of the law; that only intended that the witness should be able, with a great degree of certainty at all times, possibly at a great length of time after his attestation, to testify that the testator put his name upon the identical piece of paper upon which he placed his own. He identifies the paper by the conjunction of the two signatures, not the character of the contents; only the paper, whatever the contents may prove to be."

The fact that the testator produced his will with his name upon it for attestation, and requested the witnesses to sign it, has been held sufficient. *Green v. Crain*, 12 Gratt. (Va.) 252; *Denton v. Franklin*, 9 B. Mon. (Ky.) 28; *Small v. Small*, 4 Me. 220; 16 Am. Dec. 253; *Tilden v. Tilden*, 13 Gray (Mass.) 110; *Nickerson v. Buck*, 12 Cush. (Mass.) 342; *Rucker v. Lambdin*, 12 Smed. & M. (Miss.) 230; *Rav v. Walton*, 2 A. K. Marsh. (Ky.) 74; *Higgins v. Carlton*, 28 Md. 117; 92 Am. Dec. 666; *Eelbeck v. Granberry*, 2 Hayw. (N. Car.) 232.

But in *Luper v. Werts*, 19 Oregon 122, it was held that mere silence was insufficient.

Illinois.—The *Illinois* statute does not require the acknowledgment of a will by the testator to be in language. Any act, which indicates the same thing with unmistakable certainty, is sufficient; nor is it necessary that the

attesting witnesses to a will should actually see the testator sign it; it is a sufficient acknowledgment of it by him, where, in the hearing of the testator and the witnesses, the attesting clause is read, reciting that he had executed the instrument as his will, and the testator thereupon handed the subscribing witnesses the pen, and saw them sign as such, although the testator uttered not a word during the whole time the witnesses were present. In matters of this character, clear and explicit acts are to be regarded, rather than mere form. *Allison v. Allison*, 46 Ill. 61; 92 Am. Dec. 237.

Missouri.—Under a statute which is nearly a transcript of the Statute of Frauds, it has been held that there must be some declaration by the testator that the paper was his will, and a communication made by him to the witnesses that he desires them to attest it as such. But this need not be verbal. An act or a sign is enough. If the scrivener says this to the witnesses in the presence of the testator, it will do. The witnesses must know that it is the will of the testator, and witness it at his request. *Odenwaelder v. Schorr*, 8 Mo. App. 458. See also *Grimm v. Tittman*, 113 Mo. 56.

South Carolina.—Where the will was attested by the three subscribing witnesses at different times, the one of the three who attested in the presence but not very near the testatrix, did not see her sign the will, nor hear her acknowledge her signature. It was held that the will was not proved. *Tucker v. Oxner*, 12 Rich. (S. Car.) 141.

Vermont.—It is not necessary that a testator should sign his will in the presence of the subscribing witness thereto. It is sufficient if he declares the instrument which the witnesses are called upon to attest to be his will, which he wishes them to attest. But it is necessary that the witnesses know the character of the act which they are called upon to perform, and that, by affixing their names to instrument, they are thereby attesting the execution thereof by the testator. They must subscribe their names *animo testandi*, and in the presence of each other. *Roberts v. Welch*, 46 Vt. 164.

decisions under the Statute of Victoria, that the witness must either see or have the opportunity of seeing the signature,¹ but

1. *Matter of MacKay's Will*, 110 N. Y. 611; *Lewis v. Lewis*, 11 N. Y. 220. See *Baskin v. Baskin*, 36 N. Y. 416; *Sisters of Charity v. Kelly*, 67 N. Y. 409.

Where, therefore, it appeared that, at the time of the alleged publication of an instrument presented for probate as a last will, the decedent stated to the witnesses that he had sent for them to sign his last will; that he then presented the instrument, stating that it was his will and was all ready awaiting their signatures, but he handed it to the witnesses so folded that they could not, and they did not, see his signature or any part thereof except the attestation clause, it was held that the will was not properly executed. *Matter of MacKay's Will*, 110 N. Y. 611. In this case the court, by Earl, J., said: "There would undoubtedly have been a formal execution of the will in compliance with the statutes if the witnesses had, at the time, seen the signature of the testator to the will. Subscribing witnesses to a will are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it. And so it has been held in this court. In *Lewis v. Lewis*, 11 N. Y. 221, where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names to it, it was so folded that they could not see whether it was signed by him or not, and the only acknowledgment or declaration made by him to them or in their presence as to the instrument was: 'I declare the within to be my will and deed,' it was held that this was not a sufficient acknowledgment of his subscription to the witnesses, within the statute. In that case Allen, J., writing the opinion, said: 'A signature neither seen, identified, or in any manner referred to as a separate and distinct thing, cannot, in any just sense, be said to be acknowledged by a reference to the entire instrument by name to which the signature may or may not be at the time subscribed.' In *Mitchell v. Mitchell*, 16 Hun (N. Y.) 97; *affirmed*, in this court, in 77 N. Y. 596, the deceased came into a store where two persons were and pro-

duced a paper and said: 'I have a paper which I want you to sign.' One of the persons took the paper and saw what it was and the signature of the deceased. The testator then said: 'This is my will, I want you to witness it.' Both of the persons thereupon signed the paper as witnesses under the attestation clause. The deceased then took the paper and said: 'I declare this to be my last will and testament,' and delivered it to one of the witnesses for safe-keeping. At the time when this took place, the paper had the name of the deceased at the end thereof. It was held that the will was not properly executed for the reason that one of the witnesses did not see the testator's signature, and as to that witness there was not a sufficient acknowledgment of the signature or a proper attestation. It is true that in *Willis v. Mott*, 36 N. Y. 491, *Davies, C. J.*, writing the opinion of the court, said that 'the statute does not require that the testator shall exhibit his subscription to the will at the time he makes the acknowledgment. It would, therefore, follow that when the subscription is acknowledged to an attesting witness it is not essential that the signature be exhibited to the witness.' This is a mere *dictum*, unnecessary to the decision in that case, and, therefore, cannot have weight as authority. The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witness should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature. Otherwise imposition might be possible and sometimes the purpose of the statute might be frustrated."

Where the subscription to a will was not made by the testatrix in the presence of the attesting witnesses, nor of either of them; neither was it acknowledged by her to them, or either of them; and to one of the attesting witnesses there was no declaration by the testatrix, or anyone in her presence, that the instrument was her will, it was held that the requirements of the statute in respect to execution were neither formally nor substantially complied

that when a testator produces a paper to which he has personally affixed his signature, plainly apparent, requests the witnesses to attest it, and declares it to be his last will and testament, it is a substantial compliance with the requirements of the statute.¹ In *New Jersey*, there is a similar provision which would probably receive a like construction.²

4. *Sealing*.—Sealing, except in *Nevada*, where the statute provides that the will shall be sealed by the testator's seal,³ is unnecessary,⁴ unless the will is executed by virtue of a power

with. *Baker v. Woodbridge*, 66 Barb. (N. Y.) 261.

After testator had signed his will, he went with the draftsman to the store of one of the attesting witnesses, where, after he had declared it to be his will, he laid it on a table for the witnesses to sign. The will was folded, but in such way that the signature, as well as the attestation clause, was in sight of the witnesses. The attestation clause recited the testator's acknowledgment of his signature to both the witnesses, but (16 years having elapsed) neither witness was certain that the testator did so acknowledge it. The draftsman, however, swore positively that he did. It was held that it was properly executed. *Matter of Lantry's Will* (Supreme Ct.), 5 N. Y. Supp. 501.

1. *Baskin v. Baskin*, 36 N. Y. 416; *Gilbert v. Knox*, 52 N. Y. 125; *Matter of Look* (Supreme Ct.), 7 N. Y. Supp. 208; *Matter of Austin*, 45 Hun (N. Y.) 1. Compare *Matter of Van Geison*, 47 Hun (N. Y.) 5; *Matter of Simmon's Will* (Supreme Ct.), 9 N. Y. Supp. 352; *Matter of Trenor's Estate* (Surrogate Ct.), 4 N. Y. Supp. 466.

In *Baskin v. Baskin*, 36 N. Y. 418, Porter, J. said: "The subscription and publication of a testamentary instrument are independent facts, each of which is essential to its complete execution. (2 *New York Rev. Stat.* 63, § 40.) The requirement that the first shall be made or acknowledged in the presence of each of the witnesses who attest it, is to identify and authenticate the instrument as one subscribed by the party. The requirement of publication in presence of each is to prevent imposition upon the testator by procuring him to execute and acknowledge a will or codicil, under pretense that it is a paper of a different nature. The two prerequisites are distinct in their nature, as well as their purpose, and an omission to comply with either is fatal to the validity of the instrument. There

must be satisfactory proof of the subscription and publication of the will in the presence of two witnesses. In respect to the subscription, it is sufficient that it be either made, or acknowledged, in the presence of those who attest it. If it be unsigned, it is no will; and in that case, publication and attestation are alike unavailing. If signed by another than the testator, and the signature be purposely concealed from his view and that of the attesting witnesses, the mere publication of the instrument as his last will and testament cannot fairly be deemed an acknowledgment that the unseen subscription was made by his direction. *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 91; 40 Am. Dec. 225; *Lewis v. Lewis*, 11 N. Y. 220; *Rutherford v. Rutherford*, 1 Den. (N. Y.) 33; 43 Am. Dec. 644. When, however, the testator produces a paper, to which he has personally affixed his signature, requests the witnesses to attest it, and declares it to be his last will and testament, he does all that the law requires. It is enough that he verifies the subscription as authentic, without reference to the form in which the acknowledgment is made; and there could be no more unequivocal acknowledgment of a signature thus affixed, than presenting it to the witnesses for attestation, and publishing the paper so subscribed as his will." See also *Sisters of Charity v. Kelly*, 67 N. Y. 409.

2. *Ludlow v. Ludlow*, 35 N. J. Eq. 489. Compare *Booth v. Timoney*, 3 Dem. (N. Y.) 416; 6 N. Y. Supp. 41.

3. *Nevada Gen. Stat.* (1886), § 3002.

A similar provision once existed in *New Hampshire*, but has been repealed. *Gen. Laws* (1878), ch. 193, § 6; *Act. of Sept. 30, 1887*.

4. 1 Jarm. on Wills (5th ed.) 78; *Schouler on Wills* (2d ed.), § 309; *Ketchum v. Stearns*, 8 Mo. App. 66; *Doe v. Pattison*, 2 Blackf. (Ind.) 355;

requiring such paper to be under hand and seal, in which case it is essential to a valid execution of the power.¹

Sealing is not signing, and does not cure the want of signature by testator² or subscription by witnesses.³

5. Attestation and Subscription—*a*. DISTINGUISHED.—Attestation consists in the act of witnessing the performance of the statutory requirements to valid execution. Subscription is the signing of the witnesses' names upon the same paper, for the sole purpose of identification, and implies that attestation has been performed. The one is mental, the other mechanical; there may be perfect attestation without subscription.⁴

***b*. IN THE ABSENCE OF LEGISLATION.**—In the absence of legislation, attestation and subscription are unnecessary.⁵

Matter of Diez's Will, 50 N. Y. 88; Pollock v. Glassell, 2 Gratt. (Va.) 452. See Wright v. Wakeford, 17 Ves. 434; Williams v. Burnett, Wright (Ohio) 53; Smith v. Evans, 1 Wils. 313; Platt v. McCullough, 1 McLean (U. S.) 69; Grubbs v. McDonald, 91 Pa. St. 236; Avery v. Pixley, 4 Mass. 460; Hight v. Wilson, 1 Dall. (Pa.) 94; Rohrer v. Stehman, 1 Watts (Pa.) 442.

1. Dormer v. Thurland, 2 P. Wms. 506. See Hight v. Wilson, 1 Dall. (Pa.) 94; Arndt v. Arndt, 1 S. & R. (Pa.) 256; Pollock v. Glassell, 2 Gratt. (Va.) 439; POWERS, vol. 18, p. 920 *et seq*.

2. 1 Jarm. on Wills (5th ed.) 78; Schouler on Wills (2d ed.), § 307; Smith v. Evans, 1 Wils. 313; Wright v. Wakeford, 17 Ves. 434; Pollock v. Glassell, 2 Gratt. (Va.) 452.

3. Goods of Byrd, 3 Curt. 117.

Tearing off Seal—Revocation.—Tearing off the seal has been held to work a revocation. Avery v. Pixley, 4 Mass. 462.

4. 1 Jarm. on Wills (5th ed.) 109, 110; Ricketts v. Loftus, 4 Y. & C. 519; Swift v. Wiley, 1 B. Mon. (Ky.) 117. See Hudson v. Parker, 1 Rob. 14; 8 Jur. 788; Burdett v. Spilsbury, 10 Cl. & F. 340; Freshfield v. Reed, 9 M. & W. 404; Gerrish v. Nason, 22 Me. 441; 39 Am. Dec. 589; Reed v. Watson, 27 Ind. 448.

Attestation and Subscription Distinguished.—In Swift v. Wiley, 1 B. Mon. (Ky.) 117, Robertson, C. J., said: "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other

mechanical, and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification. There may be a perfect attestation in fact, without subscription."

Where by the terms of a power the instrument by which it is executed is to be sealed and delivered in the presence of, and attested by, two or more credible witnesses, it is sufficient *prima facie* evidence of attestation if on the instrument there appears an indorsement to the effect that it has been sealed and delivered in the presence of two persons, although such two persons are not named as witnesses, either in the body of the instrument or the attestation. Ricketts v. Loftus, 4 Y. & C. 519.

5. Such at least is the case in *Pennsylvania*, under a statute which requires the will to be "proved by the oaths or affirmations of two or more competent witnesses." Purd. Dig. (11th ed.) 1710, ¶ 6, and notes. Rohrer v. Stehman, 1 Watts (Pa.) 463.

In Frew v. Clarke, 80 Pa. St. 170, it was held sufficient to prove the signature, although there were no subscribing witnesses, and only one of the witnesses called had actually seen the testator sign.

Moreover, the witnesses who prove the will need not be those who signed it. Rohrer v. Stehman, 1 Watts (Pa.) 463; Hight v. Wilson, 1 Dall. (Pa.) 94; Arndt v. Arndt, 1 S. & R. (Pa.) 256.

In *England*, prior to the passage of 1 Vict., ch. 26, § 9, in 1837, wills of personality required neither attestation nor

c. EFFECT OF LEGISLATION.—Under the Statute of Frauds, 29 Car. II, ch. 3, § 5, a will of lands must be “attested and subscribed in the presence of the deviser by three or four credible witnesses.”¹ The Statute of Victoria, 1 Vict., ch. 26, § 9, extended the same rule to wills of personalty by providing that no will made on or after January 1, 1838, should be valid unless the signature be “made or acknowledged by the testator in the presence of two or more witnesses present at the same time,” who are to attest and subscribe the will “in the presence of the testator,” no particular form of attestation, however, being necessary.² In all the states of the Union except *Pennsylvania*, the local statute requires wills of real or personal property to be attested and subscribed by witnesses to pass any estate.³ In most states, with the exception of *New York* and *New Jersey*, whose wills acts bear a strong analogy to the Statute of Victoria, the local wills act seems framed upon the model of the Statute of Frauds, rather

subscription. *High, Appellant*, 2 Dougl. (Mich.) 515; *Leathers v. Greenacre*, 53 Me. 561; *Parker v. Brown*, 6 Gratt. (Va.) 554.

And this is the law in the *United States* in the absence of statutes to the contrary. *McGrews v. McGrews*, 1 Stew. & P. (Ala.) 30; *Ex p. Henry*, 24 Ala. 638; *Hilliard v. Binford*, 10 Ala. 977; *Mealing v. Pace*, 14 Ga. 596; *Leathers v. Greenacre*, 53 Me. 561; *High, Appellant*, 2 Dougl. (Mich.) 515; *Marston v. Marston*, 17 N. H. 503; 43 Am. Dec. 611; *Brown v. Shand*, 1 McCord (S. Car.) 409; *McGee v. McCants*, 1 McCord (S. Car.) 517. See also *Lake v. Warner*, 34 Conn. 483; *Plater v. Grome*, 3 Md. 142; *Guthrie v. Owen*, 2 Humph. (Tenn.) 207; 36 Am. Dec. 311.

In regard to such wills it is said: “Wills and codicils of personal estate need not any witness of their publication. See *Allen v. Hill*, Gieb. Rep. 260; *Wright v. Walthoe*, and other cases cited in *Simbrey v. Mason*, Comyns’ Rep. 452; *Cunningham v. Ross*, 2 Cas. temp. Lee 478. Custody is a sufficient publication of them, *Miller v. Brown*, 2 Hagg. 211; although it is safer and more prudent, and leaves less in the breast of the ecclesiastical judge, if they be published in the presence of witnesses. 2 Bl. Com. 502. Indeed, some of the older authorities have been supposed to lay it down that such a publication before two sufficient witnesses is absolutely necessary. 1 Roberts on Wills 183. But on a closer inspection of the passages cited, as containing such a doctrine, it should seem

that in some, Bracton, lib. 2, f. 61; Fleta, lib. 2, f. 125, such publication is only recommended; while in others, Swimb. pt. 1, § 3, pl. 13; Godolph. pt. 1, ch. 21, § 1, it is meant not that the will must be proved by two witnesses present at its publication, but that two witnesses are necessary for the due proof of a testament, as they are for the proof of any other fact by the rules of the civil law. Still less are any subscribing witnesses necessary for the giving full force and effect to a mere testament. *Brett v. Brett*, 3 Add. 224.” Wms. on Exrs. (8th ed.), pt. I, bk. II, ch. II, § II.

1. 1 Jarm. on Wills (8th ed.) 77.

2. Schouler on Wills (2d ed.), Appendix, p. 691.

3. Lawson Rights, Rem. & Pr., vol. 6, § 3173; Stimson’s Am. Stat. Law 2644; 1 Jarm. on Wills (5th ed.) 77 note 1, by Randolph and Talcott; *Sutton v. Sutton*, 5 Harr. (Del.) 459; *Owens v. Bennett*, 5 Harr. (Del.) 367; *Hooks v. Stamper*, 18 Ga. 471; *Rigg v. Wilton*, 13 Ill. 15; *Doe v. Pattison*, 2 Blackf. (Ind.) 355; *In re Boyens*, 23 Iowa 354; *Devecmon v. Devecmon*, 43 Md. 335; *Rose v. Allen*, 1 Coldw. (Tenn.) 23; *Davis v. Davis*, 6 Lea (Tenn.) 546. Compare *Rossetter v. Simmons*, 6 S. & R. (Pa.) 452.

A will of personalty wholly in the handwriting of the testator, and subscribed by him, is valid in the *District of Columbia*, without the attestation of subscribing witnesses or other formality. *McIntire v. McIntire*, 8 Mackey (D. C.) 482. See also *Morris v. Morton* (Ky. 1892), 20 S. W. Rep. 287.

than the Victorian Statute.¹ In regard to the number of witnesses required and slight variations in detail, the local statute should be consulted.²

1. 1 Jarm. on Wills (5th ed.) 77, note 1; Schouler on Wills (2d ed.), § 319. And see the statutes of the various states.

2. **Instances Where the Strictness of the Law Has Been Relaxed as to Number of Subscribing Witnesses.**—In *Maryland* it has been held that where a will made two years and a half after the enactment of an act of parliament relating to frauds and perjuries of 29 Charles II., was not executed in the presence of the prescribed number of witnesses, it was not thereby rendered invalid, since it was executed before the publication of the statute in that province, and before the making of the Act of Assembly directing the manner of pleading the laws of *England* in the commissary's court, and also in the infancy of the country, when evidences were harder to come by than now. *Clayland v. Pearce*, 1 Harr. & M. (Md.) 29. See also *Castro v. Castro*, 6 Cal. 158, where the strictness of the rules of the civil law was relaxed in favor of remote districts.

A will made in the country in the presence of only four witnesses residing in the place is valid, where, from the violence of the testator's sickness and the distance at which other credible witnesses resided, a larger number could not be obtained. *Henriette v. Duplessis*, 3 La. Ann. 658; *Graves v. Graves*, 10 La. Ann. 212.

Where More than Required Number Subscribe.—Where the statute requires only two subscribing witnesses, a will subscribed by three, one of whom is incompetent, is valid. *Ackless v. Seekright*, 1 Ill. 76. See also *Carroll v. Norton*, 3 Bradf. (N. Y.) 291.

Whether All Subscribing Witnesses Need Be Called at Probate.—In the absence of special statutory requirement, less than the required number of subscribing witnesses may suffice to establish the bill at probate. Thus, in *Virginia*, though the statute requires at least two witnesses to a will, it may be proved by one of them, he proving the attestation of the other. *Lamberts v. Cooper*, 29 Gratt. (Va.) 61.

So, in *Connecticut*, where the statute requires three witnesses, the court said, in *Field's Appeal*, 36 Conn. 279: "To

prove the execution of the will merely, the statute does not expressly require the examination of all the witnesses, nor do we think such requirement is necessarily implied. It is true the statute authorizing the proof of wills at the time of their execution, or afterwards, before the death of the testator, seems to require that all the witnesses should be sworn; but that is a special provision, applying only to such cases, and was not designed as a rule to govern the action of the court of probate or the superior court. Nor does the fact that three competent witnesses are required, authorize the inference that all must be produced and examined. The argument in behalf of the appellants, in this part of the case, seems to confound the attestation with the method of proving the attestation. The attestation is only complete when made by three witnesses. When so made, it may be proved, upon common-law principles, by one credible witness. We see no reason or propriety, therefore, in requiring the testimony of all the witnesses for the purpose of proving the mere act of signing and attesting the will."

It has been held that a will with two witnesses is sufficient to pass real property in *Kentucky*, but the will may be proved by the evidence of one. *Davis v. Mason*, 1 Pet. (U. S.) 503; *Harper v. Wilson*, 2 A. K. Marsh. (Ky.) 465; *Griffith v. Griffith*, 5 B. Mon. (Ky.) 511.

In *Mickle v. Matlack*, 17 N. J. L. 86, it was held that although three subscribing witnesses are necessary to the attestation of will of real estate in *New Jersey*, one of them is sufficient to prove its execution.

See further, on this point, *Lindsay v. M'Cormack*, 2 A. K. Marsh. (Ky.) 229; 12 Am. Dec. 387; *Turner v. Turner*, 1 Litt. (Ky.) 101; *Hall v. Sims*, 2 J. J. Marsh. (Ky.) 509; *Overall v. Overall*, 1 Litt. Sel. Cas. (Ky.) 501; *Welch v. Welch*, 2 T. B. Mon. (Ky.) 83; 15 Am. Dec. 126; *Walker v. Hunter*, 17 Ga. 364; *Barney v. Chittenden*, 2 Greene (Iowa) 165; *Crusoe v. Butler*, 36 Miss. 150; *Graham v. O'Fallon*, 3 Mo. 507; *Jackson v. Thompson*, 6 Cow. (N. Y.) 178; *McKeen v. Frost*, 46 Me. 239; *Deakins v. Hollis*, 7 Gill & J. (Md.)

d. EFFECT OF UNSIGNED ATTESTATION CLAUSE IN JURISDICTIONS IN WHICH SUBSCRIPTION IS UNNECESSARY.—In jurisdictions in which subscribing witnesses are not essential to the validity of the will, an unsigned attestation clause raises a presumption that the testamentary intention never took full effect.¹ This presumption, however, is based upon the theory that the incomplete execution shows an incomplete purpose, and may be repelled by slight evidence showing that the testator did in fact intend it to operate without an attestation, or was prevented by act of God from completing the instrument to which his mind had fully and finally assented.²

311; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Bailey v. Stiles*, 2 N. J. Eq. 220; *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401; *Den v. Mitton*, 12 N. J. Eq. 70; *Jackson v. Van Dyke*, 1 N. J. L. 29; *Harrison v. Burgess*, 1 Hawks (N. Car.) 384; *Doe v. Springs*, 10 Ired. (N. Car.) 180; *Brown v. Beaver*, 3 Jones (N. Car.) 516; 67 Am. Dec. 255; *Hight v. Wilson*, 1 Dall. (U. S.) 94; *Watkins v. Watkins*, 13 Rich. (S. Car.) 66. *Compare* *Jackson v. Vickory*, 1 Wend. (N. Y.) 406; 19 Am. Dec. 522; *Evans v. Evans*, 12 Smed. & M. (Miss.) 402; *Lewis v. Maris*, 1 Dall. (U. S.) 278; *Hylton v. Brown*, 1 Wash. (U. S.) 298; *Weigel v. Weigel*, 5 Watts (Pa.) 486; *Hock v. Hock*, 6 S. & R. (Pa.) 47.

The practice of the ecclesiastical courts, however, was to require at least two witnesses to prove a will of personality. Wms. on Exrs. (8th ed.), pt. I, bk. II, ch. II, § II.

In *Pennsylvania*, the will must be proved by two witnesses, under the act of April 8, 1833. *Purd. Dig.* (11th ed.) 1710, § 6; *Rossetter v. Simmons*, 6 S. & R. (Pa.) 452.

In *Mississippi*, it has been held that a will of personality may be proved by one witness. *Kirk v. State*, 13 Smed. & M. (Miss.) 406.

So in *Tennessee*, if there be no contest as to its validity. *Rogers v. Winton*, 2 Humph. (Tenn.) 178.

It was held in *Worsham v. Worsham*, 5 Leigh (Va.) 589, that in *Virginia*, before the Statute of 1834-35, ch. 60, a testament of personal estate might be well proved by a single witness.

In *Massachusetts*, the testimony of one of the subscribing witnesses is sufficient to justify probate, if it appears to the satisfaction of the court that no one interested in the estate objects. *Massachusetts Pub. Stat.* (1882), ch. 129, § 1. But in case of con-

test, all required by the statute must be produced. *Chase v. Lincoln*, 3 Mass. 236.

In *New York*, it was held that a will executed previously to the revised statutes, although attested by only two witnesses, if the testator died after the statute went into effect, is sufficiently attested as a will of real estate. *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252.

In *South Carolina*, it was held that a will executed in the presence of two subscribing witnesses is not such an execution under the statute as will pass real estate, although the penner of the will was present at the execution; and a codicil executed in the presence of two subscribing witnesses, one of whom was different from the two witnesses to the will, does not give effect to the will as to the real estate. *Dunlop v. Dunlop*, 4 Desaus. (S. Car.) 305.

1. *Schouler on Wills* (2d ed.), § 318; *Beaty v. Beaty*, 1 Add. 154; *Walker v. Walker*, 1 Meriv. 503; *Scott v. Rhodes*, 1 Ph. 19; *Harris v. Bedford*, 2 Ph. 177; *Mathews v. Warner*, 4 Ves. 186; *Watts v. Public Administrator*, 4 Wend. (N. Y.) 168. See *Jekyll v. Jekyll*, 1 Cas. temp. Lee 419.

Holographic Wills.—The principle in the text has been held not to apply to holographic wills. *Perkins v. Jones*, 84 Va. 361; *Brown v. Beaver*, 3 Jones (N. Car.) 516; 67 Am. Dec. 255; *Harrison v. Burgess*, 1 Hawks (N. Car.) 384; *Hill v. Bell*, Phil. (N. Car.) 122; 93 Am. Dec. 583; *contra*, *Power v. Davis*, 3 McArthur (D. C.) 162.

As to the *Maryland* rule, see *Devecmon v. Devecmon*, 43 Md. 335; *Plater v. Groome*, 3 Md. 134; *Brown v. Tilden*, 5 Har. & J. (Md.) 371; *Barnes v. Syester*, 14 Md. 509.

If the attestation clause is signed by one witness, the presumption does not arise. *In re Soher's Estate*, 78 Cal. 477.

2. *Buckle v. Buckle*, 3 Ph. 323; *Stew-*

c. **ESSENTIALITY OF ATTESTATION CLAUSE.**—Provided the will is attested and subscribed as required by the local statute, a formal attestation clause is not essential to its validity.¹ It is sufficient that the witnesses subscribe *animo attestandi*, under or against the word "witnesses" or other corresponding expression, or simply subscribe their names without any such expression at all.²

art *v. Stewart*, 2 Moo. P. C. C. 193; *Salteman v. Pennington*, 3 Moo. P. C. C. 223; *Goods of Gerram*, 1 Hagg. 550; *Goods of Thomas*, 1 Hagg. 596; *Goods of Edmonds*, 1 Hagg. 698; *Bragge v. Dyer*, 3 Hagg. 207; *Pett v. Hake*, 3 Cart. 612; *Watts v. Public Administrator*, 4 Wend. (N. Y.) 168.

A Slight Presumption.—The rule is, that the presumption, though slight, must be rebutted by some extrinsic evidence. *Wms on Exrs.* (8th ed.), pt. I, bk. II, ch. II, § II; *Harris v. Bedford*, 2 Ph. 178.

The fact that the testamentary paper was found sealed up at the death of the testator, in such a way as to indicate that he did not intend to open it again, has been held sufficient. *Buckle v. Buckle*, 3 Ph. 323.

Any recognition by the testator will suffice. *Goods of Gerram*, 1 Hagg. 550; *Goods of Vauhagen*, 1 Hagg. 478; *Goods of Sparrow*, 1 Hagg. 479.

A paper was propounded for probate as to personality, in which the testatrix, among other things, directed her executor to sell all her real estate in Washington county, *Maryland*, and apply the proceeds to the payment of certain specified legacies. It was written in her own hand and signed and sealed by her. There were no dates in it, blanks being left for the purpose, and there was an attestation clause in the usual form, but no witnesses. The paper was written about two years before her death, which occurred about two hours after a sudden attack, during which she was unconscious. She was a woman of intelligence, strong mind and will, of good business habits, and had been specially instructed by counsel as to the necessity of having three witnesses to a will to pass real estate. At the time this paper was written, she had real estate in Washington county, all of which she subsequently sold and disposed of, and was about to execute the necessary papers to consummate, in legal form, the disposition of a part of it, when she was overtaken by the

sudden illness which resulted in her death. The paper was indorsed as her will and was found near the top of her traveling trunk, in the room at a hotel where she was staying at the time of her death, and this trunk also contained other papers, her watch, jewelry, and clothing. There was evidence that she had said frequently, that all persons should make wills, and that she intended to make hers, and that, at another time, she said she had made her will, but whether this last declaration had reference to this paper or to one that she had executed some years before, does not clearly appear. It was held that probate of this paper must be refused. An attestation clause without witnesses, makes the paper an unfinished testament, even when the party has signed it, and the presumption of law is against such papers, and though a slight presumption it must be rebutted by extrinsic circumstances before the paper can be admitted to probate. *Barnes v. Syester*, 14 Md. 507.

1. 1 Jarm. on Wills (5th ed.) *85; *Roberts v. Phillips*, 4 El. & Bl. 450; *Bryan v. White*, 5 Eng. L. & Eq. 579. See *Leaycraft v. Simmons*, 3 Bradf. (N. Y.) 35; *Baskin v. Baskin*, 36 N. Y. 416; *Jackson v. Jackson*, 39 N. Y. 153; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 85; 40 Am. Dec. 225; *Ela v. Edwards*, 16 Gray (Mass.) 97; *Fatheree v. Lawrence*, 33 Miss. 585.

Although the statute expressly requires that the attestation shall be in the presence of the testator, that fact must not necessarily be stated in the attestation, and it is sufficient if it can be proved by the attesting witnesses at the trial. *Fatheree v. Lawrence*, 33 Miss. 585.

2. *Bryan v. White*, 2 Robt. (N. Y.) 315; *Roberts v. Phillips*, 4 El. & Bl. 450; *Fry's Will*, 2 R. I. 88; *Osborn v. Cook*, 11 Cush. (Mass.) 532; 59 Am. Dec. 155. See *Taylor v. Brodhead*, 5 Redf. (N. Y.) 624. See also *Robinson v. Brewster*, 140 Ill. 649.

f. ATTESTATION CLAUSE FOLLOWING OR PRECEDING SIGNATURE.—When the attestation clause follows the signature, it cannot be taken as a part of the will; but if inserted before the signature, it becomes a part of the instrument.¹

g. VALUE OF ATTESTATION CLAUSE AS EVIDENCE.—On the death or absence of subscribing witnesses, the attestation clause becomes *prima facie* evidence that the will was executed with the formalities therein recited;² while in case of a contest it is very

1. *Jackson v. Jackson*, 39 N. Y. 153; *Younger v. Duffie*, 94 N. Y. 540; 46 Am. Rep. 156.

2. Schouler on Wills (2d ed.), §§ 346, 347; *Jackson v. Jackson*, 39 N. Y. 153; *Ela v. Edwards*, 16 Gray (Mass.) 97. See *Tilden v. Tilden*, 13 Gray (Mass.) 110; *Barnes v. Barnes*, 66 Me. 286; *Taylor v. Brodhead*, 5 Redf. (N. Y.) 624; *Walsh v. Walsh*, 4 Redf. (N. Y.) 165; *Matter of Cottrell*, 95 N. Y. 329; *Matter of Kellum's Will*, 52 N. Y. 517; *Rugg v. Rugg*, 83 N. Y. 592; *Matter of Hunt*, 42 Hun (N. Y.) 434; *In re Alpaugh*, 23 N. J. Eq. 507; *Farley v. Farley*, 50 N. J. Eq. 434; *Clarke v. Dunnivant*, 10 Leigh (Va.) 14; *Welch v. Welch*, 9 Rich. (S. Car.) 133; *Deupree v. Deupree*, 45 Ga. 415.

The presumption of due execution may be rebutted. *Rumsey v. Goldsmith*, 3 Dem. (N. Y.) 494.

In *England*, a well-drawn attestation clause reciting proper formalities, enables the executor to obtain probate on his own oath. Wms. on Exrs. 93.

In *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 89; 40 Am. Dec. 225. *Walworth, Ch.*, said: "An attestation clause, showing upon its face that all the forms required by the statute have been complied with, is not absolutely necessary to the validity of a will; as the witnesses will be permitted to prove that the forms were in fact all complied with, although the attestation clause is silent on the subject. Indeed it has been decided that a formality of this kind, not noticed in the attestation clause, may even be presumed by circumstances, after the witnesses to the will are dead. (*Croft v. Pawlet*, 2 Stra. 1109; *Brice v. Smith*, Willes 1; *Hands v. James*, Comyns' Rep. 531.) The statute does not require an attestation clause showing that the proper legal formalities were complied with; and although upon the face of the instrument those formalities are stated to have taken place, the fact may be disproved by the witnesses. But

prudence requires that a proper attestation clause should be drawn, showing that all the statute formalities were complied with; not only as presumptive evidence of the fact in case of the death of the witnesses, or where from lapse of time they cannot recollect what did take place, but also for the purpose of showing that the person who prepared the will knew what the requisite formalities were, and therefore gave the proper information to the testator, or saw that they were complied with, if he was present. To impress the more strongly upon the memory of the witnesses the important fact that all the legal forms requisite to a due execution of the will were complied with, at the time when they subscribed their names as witnesses to such execution, the safer course always is to read over the whole of the attestation clause in the presence and hearing of the witnesses and of the testator. And where the person executing the will is not known to the subscribing witnesses to be capable of reading and writing, especially if he executes the will as a marksman, it would be proper that the whole will should be deliberately read over to him in the presence and hearing of the witnesses, and the fact of such reading in his presence should be stated in the attestation clause. Or at least the witnesses ought, by inquiries of the illiterate testator himself, to ascertain the fact that he was fully apprized of the contents of the instrument which he executed and published as his will, as well as that he was of competent understanding to make a testamentary disposition of his property. All these things, however, are matters of precaution and prudence, to prevent any well-founded doubt upon matters of fact; and where they are neglected, it does not necessarily render the will invalid, if the court or jury which is to pass upon the question of its validity is satisfied, upon the whole evidence, that the will was duly exe-

persuasive evidence that whoever directed the execution understood what formalities were needful and saw them pursued,¹ also the clause serves as a useful memorandum to aid the subscribing witnesses to recall what occurred at the time of execution.² A regular attestation clause shown to have been signed by the witnesses, and corroborated by the circumstances surrounding the execution or other competent evidence, has been held sufficient to establish the execution of a will duly signed by the testator, even against the positive testimony of the subscribing witnesses.³ But where there was nothing but a formal attestation

cuted, and that the testator understood its contents."

In *Matter of Cottrell*, 95 N. Y. 329, citing *Blake v. Knight*, 3 Curt. 547; *Orser v. Orser*, 24 N. Y. 55, the court, by Ruger, C. J., said: "The precise force which should be accorded to a full attestation clause regularly authenticated, is not very clearly defined in the cases, but they all agree in the conclusion that it is entitled to great weight in the determination of the question of fact involved."

1. *Walworth, Ch.*, in *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 85; 40 Am. Dec. 225. See *Gwillim v. Gwillim*, 3 S. & T. 200; *Goods of Huckvale, L. R.*, 1 P. & D. 375; *Matter of Pepoon's Will*, 91 N. Y. 255; *Matter of Lantry's Will* (Supreme Ct.), 5 N. Y. Supp. 501.

2. *Roberts v. Phillips*, 4 El. & Bl. 457; *Taylor v. Brodhead*, 5 Redf. (N. Y.) 624.

3. *Leach v. Bates*, 6 No. Cas. 699; *Matter of Cottrell*, 95 N. Y. 330.

In proceedings for the probate of a will, the two persons purporting to have signed as subscribing witnesses testified that none of the formalities required by the statute in its execution were complied with in their presence, and denied that either of them was present at its execution or signed the attestation clause. Said clause was in due form, and it was proved that it, as well as the body of the will, was wholly in the handwriting of the testator; that the signature to the will was his; that the testator boarded with the alleged subscribing witnesses, who were husband and wife; that he had previously executed in due form another will, to which the husband was a subscribing witness; that the will in question was found among the papers of the testator after his decease; that during his last sickness he declared that his will,

which he described as executed with said persons as witnesses, was either among his papers or in the hands of his executor. Specimens of the handwriting of each of the subscribing witnesses were then put in evidence, and from a comparison thereof with the signatures to the attestation clause experts testified that such signatures were in the handwriting of said subscribing witnesses respectively. The surrogate found that the said witnesses signed the attestation clause, and that the will was properly executed. It was held that the evidence was sufficient to justify the findings, and the same were not reviewable here; that no greater weight could be given to that part of the testimony of the subscribing witnesses, denying that the requisite formalities were performed, than to that denying that they were present and signed, and if they were mistaken as to the latter, it was a reasonable conclusion that they were mistaken as to the former. *Matter of Cottrell*, 95 N. Y. 330. In this case the court, by Ruger, C. J., said: "The surrogate has found as a fact, upon conflicting yet competent evidence, that the subscribing witnesses to the will in question in fact signed the attestation clause.

"We thus have an holographic will, not only properly signed and executed by the testator, but also signed by the witnesses, and appearing upon its face to be entirely regular, and purporting to have been executed with all of the formalities and in the manner required by the law to make a good and valid will.

"The witnesses to the will have, by signing the attestation clause, certified to facts taking place upon its execution, directly conflicting with the evidence given by them upon the trial. To believe this evidence requires us to suppose that the testator deliberately forged the

clause on one side and the adverse testimony of both subscribing witnesses on the other, probate was refused.¹ Where the

names of witnesses to his will at a time and under circumstances when it was just as convenient for him to have obtained their genuine signatures thereto. Upon this evidence the surrogate has refused to give credit to their testimony, and must, we think, necessarily have found, for reasons appearing sufficient to him, that none of the evidence given by them was entitled to belief. While no motive or reason appears upon the face of the evidence incorporated in the record before us, for imputing corruption or perjury to the subscribing witnesses in giving such evidence, yet to believe what they testify to on the subject involves consequences so unnatural and improbable that we are constrained to hold that the surrogate was justified in discrediting their testimony.

"The affirmative evidence tending to show an omission on the part of the testator and witnesses to comply with the requirements of the law, in the execution of the will, having been thus discredited by the court below, it only remains to determine whether there was, within the rule, sufficient evidence of the facts to authorize the surrogate to find the due execution of the will.

"It would seem from the language of the code that proof of the handwriting of the testator, and of the subscribing witnesses, to a proper attestation clause, was regarded as the most important and conclusive fact on the trial of an issue as to a proper execution of a will. Such evidence, in connection with other circumstances tending to prove its due execution, would seem, within all the authorities, to justify a decree admitting it to probate, even against the positive evidence of the subscribing witnesses. It was always considered to afford a strong presumption of compliance with the requirements of the statute, in relation to the execution of wills, that they had been conducted under the supervision of experienced persons, familiar not only with the forms required by the law, but also with the importance of a strict adherence thereto. *Chambers v. Queen's Proctor*, 2 Curt. 415; *Matter of Kelum's Will*, 52 N. Y. 519; *Gove v. Gawen*, 3 Curt. 151; *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220.

"We think that that presumption also arises in this case. The testator had

not only once correctly gone through the ceremony of executing a will, but by drawing the attestation clause in question he had at the time necessarily brought before his mind each one of the conditions imposed by the statute as necessary to its valid execution. It is quite unreasonable to suppose that such a person, having drawn and signed a will, and having added thereto a proper attestation clause, should have provided witnesses therefor, and required them to sign a certificate to the effect that each of the required formalities had then been observed, without also providing for their actual performance. He had knowledge of the necessity of the act required, to the validity of the business he was then transacting, and to hold that he omitted it would oblige us to ascribe to him the intention of performing a vain and useless ceremony, at the expense of time and labor to himself and the commission of a motiveless crime. The presumptions arising from the certificate of the subscribing witnesses, and the supervision of an experienced person that the requisite formalities were complied with, are fortified by the acts and conduct of the testator. Nearly three years elapsed between the date of the will and the death of the testator, and he had, therefore, ample time and opportunity to supply any defects in its execution, if any existed, but at the last moment, when the subject of a will was brought to his attention, he evidently supposed that he had made a valid testamentary disposition of his property. It also appears that it was executed while the testator was living in the family of the alleged witnesses; that one of them had formerly acted in a similar capacity for him, and that they were both persons who, for convenience, as well as from their relations to the testator, would naturally have been selected as witnesses to a will drawn by himself, and whose execution he personally supervised. We think the various circumstances to which we have referred, in connection with the full and regular attestation clause in the handwriting of the testator, proved to have been signed by the witnesses, were sufficient to authorize the finding by the court below establishing the will."

1. *Croft v. Croft*, 4 S. & T. 10; *Woolley v. Woolley*, 95 N. Y. 231.

persuasive evidence that whoever directed the execution understood what formalities were needful and saw them pursued,¹ also the clause serves as a useful memorandum to aid the subscribing witnesses to recall what occurred at the time of execution.² A regular attestation clause shown to have been signed by the witnesses, and corroborated by the circumstances surrounding the execution or other competent evidence, has been held sufficient to establish the execution of a will duly signed by the testator, even against the positive testimony of the subscribing witnesses.³ But where there was nothing but a formal attestation

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1. *Croft v. Croft*, 4 S. & T. 10; *Woolley v. Woolley*, 95 N. Y. 231.

attestation clause is clear and regular, the fact that subscribing witnesses, when called upon to prove the execution of the will, have forgotten the facts recited, is not alone sufficient to overcome the presumption of their truth.¹ So where one of the subscribing witnesses testifies in corroboration of the accuracy of the recitals in the attestation clause, the testimony of the other in suggestion of doubt or of his own want of recollection is not enough to justify the denial of probate.² In no case, however, will the presumption of compliance with the statutory formalities recited arise unless the will appears upon its face to have been duly executed.³

The attestation to the codicil to a will, presented for probate, was in due form, and beneath it were the signatures of the two witnesses, with their places of residence; one of them testified that he did not see the testatrix sign the codicil and did not think she acknowledged to him that she had signed it, that the signature beneath the attestation clause was his; that he did not know, but presumed the clause was there when he signed; that he signed in the presence of the testatrix and of the other witness at her request, and the other witness then signed in his presence; that he was a lawyer and knew it was not customary, unless the instrument was a will, to place the residence of a witness after his name. The other witness testified that one of the signatures following the attestation clause was hers; that she did not remember seeing the testator sign the paper; that the latter did not, in the presence of the witness, acknowledge it to be a codicil to her will, and the witness did not remember her saying anything about it. The witness further testified that she remembered signing and that the other witness was present and signed; that she signed at the request of the testatrix who said: "I have a paper here I want you to sign;" that she put her place of residence after her name, because the other witness told her it was necessary, or because she saw he had added his place of residence; that she knew the testatrix did not state it was a codicil, and that the witness did not know it was, but supposed she knew she was signing as a witness. The testimony was given within a year after the alleged codicil was executed. It was held that the testimony was insufficient to authorize the admission of the codicil to probate. *Woolley v. Woolley*, 95 N. Y. 231.

1. *Meurer's Will*, 44 Wis. 302; 28 Am. Rep. 591; *O'Hagan's Will*, 73

Wis. 78; *Rugg v. Rugg*, 83 N. Y. 592; *Brown v. Clark*, 77 N. Y. 369; *Matter of Pepoon's Will*, 91 N. Y. 255; *Rolla v. Wright*, 2 Dem. (N. Y.) 482; *Matter of Wright's Estate*, 67 How. Pr. (N. Y. Surrogate Ct.) 117; *Walsh v. Walsh*, 4 Redf. (N. Y.) 165; *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220; *McCurdy v. Neall*, 42 N. J. Eq. 333; *Tappen v. Davidson*, 27 N. J. Eq. 459. Compare *Webb v. Dye*, 18 W. Va. 376.

The witnesses to a will, the attestation clause to which was in due form, and which was executed more than fourteen years before the death of the testatrix, testified in substance that they had not a clear recollection of what occurred at the time of the execution, that they must have read or heard read and understood the purport of the attestation clause, as they never signed any document without knowing its contents, and that they would not have signed if the facts stated in said clause had not occurred; one of them also testified that the signatures of the testatrix and the two witnesses were made in the presence of each other, and that he recollected that the said clause was read or that he heard it read. It was held that the evidence justified the admission of the will to probate. *Matter of Pepoon's Will*, 91 N. Y. 256.

Proof by subscribing witnesses that they signed the will in the testator's presence and at his request, and that he declared it to be his will, although they could not recollect that he signed it in their presence, is sufficient. *Leckey v. Cunningham*, 56 Pa. St. 370.

2. *McCurdy v. Neall*, 42 N. J. Eq. 333. See *Wright v. Rogers*, L. R., 1 P. & M. 678. See also *Matter of Bedell's Will* (Surrogate Ct.), 12 N. Y. Supp. 96; *Matter of Bernsee's Will*, 71 Hun (N. Y.) 27.

3. *Schouler on Wills* (2d ed.), § 347; 1 *Jarm. on Wills* (5th ed.), § 86.

h. VALUE OF TESTIMONY OF SUBSCRIBING WITNESSES.—The testimony of a subscribing witness, in favor of the validity of the will he attested, is entitled to peculiar consideration; but his testimony against its validity should be viewed with suspicion.¹ While

The presumption is rebutted where it is shown that the names of the subscribing witnesses were fictitious, and in the testator's own handwriting. *Goods of Lee*, 4 Jur. (N. S.) 790.

1. *Wright v. Rogers*, L. R., 1 P. & M. 678; *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42; *Matter of Higgin's Will*, 94 N. Y. 554; *Brown v. Clark*, 77 N. Y. 369; *Colvin v. Warford*, 20 Md. 357; *Abbott v. Abbott*, 41 Mich. 540; *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56; 32 Am. Rep. 650; *Hughes v. Hughes*, 31 Ala. 519. See *Webb v. Dye*, 18 W. Va. 376; *Marx v. McGlynn*, 88 N. Y. 357; *Tilden v. Tilden*, 13 Gray (Mass.) 110; *Stephenson v. Stephenson*, 62 Iowa 163; *Matter of Nelson's Will* (Supreme Ct.), 16 N. Y. Supp. 690; *Needham v. Ide*, 5 Pick. (Mass.) 510; *Lawyer v. Smith*, 8 Mich. 411; 77 Am. Dec. 460; *Jackson v. Le Grange*, 19 Johns. (N. Y.) 386; 10 Am. Dec. 237; *Dan v. Brown*, 4 Cow. (N. Y.) 483; 15 Am. Dec. 395; *Orser v. Orser*, 24 N. Y. 51; *Crispell v. Dubois*, 4 Barb. (N. Y.) 393; *Auburn Theological Seminary v. Calhoun*, 38 Barb. (N. Y.) 148.

Presumption of Validity of Will.—In proceedings for the probate of the will of H., it appeared that the testator presented the will, which was written by himself, to J., who drew the attestation clause and signed it as a subscribing witness, as did also S. The latter testified that the testator, in answer to questions of J., stated that the instrument was his last will and testament, and thereupon, at his request, the two witnesses signed their names in his presence and in the presence of each other, and that at that time it had been signed by the testator. J. testified he did not recollect all that occurred, but that the testator came to him with a paper which he thought was the one in question, and desired him to witness his will, and in answer to questions put by the witness he acknowledged it to be his last will and testament, and requested the witness and S. to sign, and both did so in the presence of the testator and of each other; that he could not swear the testator said that was his signature. It was held that the evi-

dence sufficiently established the due execution of the will to authorize its admission to probate; and this, although other witnesses who were present contradicted the testimony of the subscribing witnesses. *Higgin's Will*, 94 N. Y. 554. In this case the court, by Miller, J., said: "It is insisted that the testimony of the subscribing witnesses was contradicted by persons who were present at the time. These witnesses had nothing to do with the execution of the will, were present accidentally, and, the presumption is, did not give the same attention to what transpired as the subscribing witnesses did. Their testimony must be taken, therefore, with considerable allowance and is not entitled to the same weight as the evidence given by those whose business it was, and who were called upon to witness the execution of the will."

In *Wright v. Rogers*, L. R., 1 P. & M. 678, the deceased signed his will in the presence of two witnesses, an attorney and his clerk, whose names were written at the foot of a full attestation clause. After the death of the deceased, an affidavit was required as to certain interlineations which appeared on the face of the will, and such affidavit was prepared by the clerk on a printed form, the blanks being filled in by him. This affidavit was sworn to by the attorney and contained the usual clause of due execution, more especially that the witnesses had signed their names in the presence of the deceased. After the death of the attorney, the clerk for the first time gave information that the will was not signed by the witnesses in the presence of the deceased, but in the attorney's office, and at the trial gave evidence to the same effect. No other witness, either to disprove or corroborate this statement, was produced. The court, on a review of all the circumstances, declined to act upon the recollection of the surviving witness, and decreed probate of the will, as duly executed.

In *Matter of Boardman's Will* (Surrogate Ct.), 20 N. Y. Supp. 60, one of the witnesses to the will offered for

subscribing witnesses are the most proper to establish the execution of the will, and the failure to call one within reach, is a circumstance worthy of consideration, yet, in case of their death, non-residence, failure to remember the circumstances of the execution, or unfavorable testimony, the will may be established by other evidence.¹

probate, which had been executed ten years before, testified explicitly that the testator signed the will in the presence of both the witnesses, while the other had no definite recollection, but an impression that it was not signed by the testator in their presence, and that he did not observe his signature. It appeared that this witness had written the date of the will immediately preceding the signature of the testator, and could not have failed to observe its absence at the time. It was held that the probate of the will should be allowed.

A subscribing witness ought not to be allowed to testify that the instrument was executed merely to amuse the testator. *Stephenson v. Stephenson*, 62 Iowa 163.

1. *Abbott v. Abbott*, 41 Mich. 540; *Howard's Will*, 5 T. B. Mon. (Ky.) 199; 17 Am. Dec. 60; *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56; 32 Am. Rep. 650; *Eliot v. Eliot*, 10 Allen (Mass.) 357; *Cadams v. Oakley*, 2 Dem. (N. Y.) 298; *Lewis v. Lewis*, 11 N. Y. 220; *Reeve v. Crosby*, 3 Redf. (N. Y.) 74; *Spencer v. Moore*, 4 Call (Va.) 423; *Givin v. Green*, 10 Phila. (Pa.) 99; *Beadles v. Alexander*, 9 Baxt. (Tenn.) 604. See also *Hight v. Wilson*, 1 Dall. (U. S.) 94. Compare *Butler v. Benson*, 1 Barb. (N. Y.) 526; *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236; *Wilson v. Hetterick*, 2 Bradf. (N. Y.) 427.

In *Abbott v. Abbott*, 41 Mich. 542, the court, by Campbell, C. J., said: "We know of no rule of law which makes the probate of a will depend upon the recollection or even the veracity of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud. But if the forgetfulness or falsehood of a subscribing witness can invalidate a will, it would be easy in many cases to use such artifices or corruption as would render the best will nugatory. Their evidence is not conclusive either way, nor does the law presume that they are either more or less truthful than others.

It presumes they had, when they signed, full knowledge of what they were doing, and in case they are dead their attestation when proved is *prima facie* evidence that all was done as it should be. But in all contested will cases the case is open for general witnesses, and when the testimony is all in, each witness is credited according to the impression he leaves of candor and intelligence, and not according to his being or not being an attesting witness. Our statute does not in terms require all the subscribing witnesses to be sworn on a contest, except inferentially in the probate court. Comp. Law, §4339. This requirement, if it exists, is only implied, and we are not called on now to determine in what cases and to what extent it is imperative. The failure to produce such witnesses in the probate court or on appeal, if the witnesses were within the jurisdiction and could be reasonably produced, would be at least a very suspicious omission, which should have its weight. But where the will has once been admitted to probate, and that order is appealed from, and both witnesses are actually produced in court and examined, the failure to ask a particular question of one witness—when the door is wide open for cross-examination—does not deprive the contestant of the means of bringing out the knowledge or ignorance of such witness, and can do no practical harm to anyone."

Section 2620, *New York Code of Civ. Proc.*, provides: "If all the subscribing witnesses to a written will are, or if a subscribing witness whose testimony is required, is dead, or incompetent, by reason of lunacy or otherwise, to testify, or unable to testify, or if such a subscribing witness is absent from the state, or if such a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, the will may, nevertheless, be established upon proof of the handwriting of the testator and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon trial of an action." It was

i. KNOWLEDGE OF WITNESSES AS TO CONTENTS OR NATURE OF PAPER.—The subscribing witnesses need not know the contents of the paper they attest,¹ and, in the absence of statutes requiring publication,² need not even be informed that it is a will.³

j. ATTESTATION AS TO SANITY.—Since from the mere fact of attestation and subscription an inference arises that the subscribing witnesses were of opinion that the testator possessed testamentary capacity at the time of execution,⁴ a formal recital to that effect in the attestation clause may be dispensed with, in the absence of statutory requirements to the contrary.⁵

k. REQUEST TO WITNESSES TO SIGN.—The request to the witnesses to attest and subscribe the will may be implied from the testator's acts, gestures, or conduct, or, in fact, from anything which conveys to the witnesses the idea that he desires them to attest and subscribe the will.⁶ The request may even be made

held that where the handwriting of a deceased witness is proven, and that the deceased witness wrote the name of the testatrix, who signed by her mark, and the surviving witness testifies that he saw the testatrix take the pen in her hand, and "sit down to the table and put the pen upon the paper," the execution of the will is sufficiently shown. *Matter of Kane's Will* (Surrogate Ct.), 20 N. Y. Supp. 123.

In *Reeve v. Crosby*, 3 Redf. (N. Y.) 77, it was held that on the probate of a will, other testimony than that of the subscribing witnesses might be adduced to prove its execution, although they were neither dead, non-resident, nor insane. See *Auburn Theological Seminary v. Calhoun*, 25 N. Y. 422; *Peebles v. Case*, 2 Bradf. (N. Y.) 226.

A contrary view appears to have been entertained in *Graber v. Haaz*, 2 Dem. (N. Y.) 216, under *New York Code Civ. Proc.*, §§ 2618-2620.

1. *Lawson Rights, Remedies, and Practice*, vol. 6, § 3175; *Schouler on Wills* (2d ed.), § 348; *Schouler on Exrs. and Adms.*, § 75; *Flood v. Pragoff*, 79 Ky. 607; *Higdon's Will*, 6 J. J. Marsh. (Ky.) 444; 22 Am. Dec. 84; *Dickie v. Carter*, 42 Ill. 376; *Bott v. Wood*, 56 Miss. 137; *Leverett v. Carlisle*, 19 Ala. 80; *Baker's Appeal*, 107 Pa. St. 381; 52 Am. Rep. 478; *Linton's Appeal*, 104 Pa. St. 228; *Turner v. Cook*, 36 Ind. 136. See also *Allen v. Griffin*, 69 Wis. 529.

2. See *supra*, this title, *Formal Requisites—Publication*.

3. *Flood v. Pragoff*, 79 Ky. 607; *Osborn v. Cook*, 11 Cush. (Mass.) 532; 59

Am. Dec. 155; *Turner v. Cook*, 36 Ind. 136. Compare *Odenwaelder v. Schorr*, 8 Mo. App. 458; *White v. British Museum*, 6 Bing. 310. But see *Luper v. Werts*, 19 Oregon 122.

See *supra*, this title, *Formal Requisites—Acknowledgment*. See also *In re Porter*, 9 Mackey (D. C.) 493.

4. *Heyward v. Hazard*, 1 Bay (S. Car.) 349; *Withinton v. Withinton*, 7 Mo. 592. See *Field's Appeal*, 26 Conn. 279; *Stephenson v. Stephenson*, 62 Iowa 163; *Rucker v. Lambdin*, 12 Smed. & M. (Miss.) 230; *Allison v. Allison*, 46 Ill. 61; 92 Am. Dec. 237. Compare *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Heyward v. Hazard*, 1 Bay (S. Car.) 349, the court said: "The true construction of the law under this head (attestation) had always been, that the act called the attention of the witnesses to the situation of the testator himself; and this particularly relates to his sanity. The witnesses are not called upon by the act to attest the mere *factum* of signing, but the capacity of the testator. The business, then, of the persons required by the statute to be present at executing a will, is not barely to attest the corporal act of signing, but to try, judge, and determine, whether the testator is *compos* to sign; that is, of a sound mind, as every will, upon the face of it, imports." But compare *supra*, this title, *Formal Requisites—Acknowledgments*.

5. *Schouler on Wills* (2d ed.), § 349; *Murphy v. Murphy*, 24 Mo. 526. But see *Withinton v. Withinton*, 7 Mo. 589.

6. *Crittenden's Estate*, Myr. Prob. (Cal.) 54; *Higgins v. Carlton*, 28 Md.

117; 92 Am. Dec. 666; *Moore v. Moore*, 2 Bradf. (N. Y.) 261; *Allen's Will*, 25 Minn. 39; *Rogers v. Diamond*, 13 Ark. 474; *Allison v. Allison*, 46 Ill. 61; 92 Am. Dec. 237; *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235; *Gilbert v. Knox*, 52 N. Y. 125; *Hutchings v. Cochran*, 2 Bradf. (N. Y.) 295; *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Sequine v. Sequine*, 2 Barb. (N. Y.) 385; *Brown v. De Selding*, 4 Sandf. (N. Y.) 10; *Payne v. Payne*, 54 Ark. 415; *Whitenack v. Stryker*, 2 N. J. Eq. 9.

Where a will, prepared by the counsel of the decedent, pursuant to her directions, was handed to her by one of the subscribing witnesses, who stated that he came "to witness her signing her will" and the testatrix, having read it, declared it to be her will, signed it, and both witnesses subscribed their names in her presence, it was held that there was sufficient evidence of a request to the witnesses to attest the instrument. *Hutchings v. Cochran*, 2 Bradf. (N. Y.) 295. In this case Bradford, Sur., said: "There was no formal express request. But is it necessary the request required by the statute should be made by word of mouth? Certainly not; the letter of the statute does not define the mode in which the request must be made. It may be communicated by signs, or may be implied from the acts of the parties. When all the circumstances show the design of the testator to execute his will, his knowledge of the character of the instrument, and the purpose for which the witnesses attend, I am clearly of opinion that his signing the instrument, and acknowledging it to be his will, observing the witnesses sign, and then taking the executed paper into his own possession, without objection or comment, sufficiently establish and imply a request to the attesting witnesses to join in the necessary formalities. The request is contained in the present sanction then given to the act, by the conduct of the testator in signing and making the testamentary declaration, and in the recognition of the attestation, not only by acquiescence, but by taking custody of the paper after execution. Any other construction would be narrow, unreasonably literal and technical, and utterly repugnant to that good sense by which the conduct and actions of men should be judged and interpreted."

Accordingly, where one of the witnesses, in the presence and hearing of the other, whose attendance was by the

testator's procurement, asked the testator, "do you request me to sign this [the paper lying before them] as your will, as a witness?" and the testator said "yes," it was held sufficient as a request to both the witnesses. *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235. The court, by Comstock, C. J., said: "The statute requires two witnesses, each of whom must sign his name at the end of the will, at the request of the testator. Confining ourselves to the evidence of these two witnesses, the facts appear to be these: They were present at the testator's house on the day in question by his own procurement, and for the purpose, as there is reason to believe, of witnessing his will. When the instrument was ready for execution and attestation, they were summoned to the room where the matter was transacted. They came there, saw the testator subscribe his name, and signed their names as witnesses. Before doing so, one of them asked the testator if he requested him to sign the will as a witness; to which he answered in the affirmative. Both the witnesses then proceeded to sign; the draftsman denoting the place where their names were to be written. The testator, the draftsman, and the witnesses were all at one table, and in close proximity to each other. The request to attest the will was in answer to the question thus put by one of the witnesses, and no other or different communication was made to the other. Taking this as substantially the true statement of the facts, the objection which has been urged is, that one of the witnesses attested the instrument without any request made by the testator. Now, the statute, it is true, declares that each witness must sign on such request. But the manner and form in which the request must be made, and the evidence by which it must be proved, are not prescribed. We apprehend it is clear that no precise form of words, addressed to each of the witnesses at the very time of the attestation, is required. Any communication importing such request, addressed to one of the witnesses in the presence of the other, and which, by a just construction of all the circumstances, is intended for both, is, we think, sufficient. In this case both the witnesses, by the direction or with the knowledge of the testator, were summoned to attend him for the purpose of attesting his will. They came into

by the draftsman, professional adviser, or other person present, provided the testator's intelligent acquiescence distinctly appears.¹

his presence accordingly, and, in answer to the inquiry of one of them, in which the singular, instead of a plural, pronoun was used, he desired the attestation to be made. In thus requiring both the witnesses to be present, and in thus answering the interrogatory addressed to him by one of them, we think that he did, in effect, request them both to become the subscribing witnesses to the instrument." For a somewhat similar case, see *Brady v. McCrossen*, 5 Redf. (N. Y.) 431.

Where a testator said to one of the subscribing witnesses, "Mr. McC. (the scrivener) will want you to be a witness to the will," and the scrivener read the attestation clause to the testator, and asked him whether he wished the persons present to be witnesses to the will, and he said he did, it was held that this was a sufficient request of the witnesses to become such. It is not necessary that a testator should himself formally repeat the words. It is enough if he directly and audibly adopts the language of another, used in his presence and hearing. *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238.

Where the subscribing witnesses to a will were told by another person, in the testator's presence, that they had been called in for the purpose of being witnesses to the execution of the will, and the instrument having the usual attestation clause subjoined, was read to the testator, in their presence, and was then subscribed by the testator, and by the witnesses in the presence of each other, it was held that these facts furnished sufficient evidence of a request by the testator that the witnesses should sign the will; or, at least, that there was sufficient evidence to be submitted to a jury upon the question whether there was a request or not. *Doe v. Roe*, 2 Barb. (N. Y.) 201. See also *Gamble v. Gamble*, 39 Barb. (N. Y.) 373; *Meurer's Will*, 44 Wis. 392; 28 Am. Rep. 591; *Lockwood v. Lockwood* (Supreme Ct.), 2 N. Y. Supp. 224.

1. *Inglesant v. Inglesant*, L. R., 3 P. & M. 172; *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220; *Gilbert v. Knox*, 52 N. Y. 125; *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56; 32 Am. Rep. 650; *Bundy v. McKnight*, 48 Ind. 502; *Dyer v. Dyer*, 87 Ind. 13; *Meurer's Will*, 44

Wis. 392; 28 Am. Rep. 591; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Whitenack v. Stryker*, 2 N. J. Eq. 9; *Etchison v. Etchison*, 53 Md. 348; *Huff v. Huff*, 41 Ga. 696.

The words of request or acknowledgment may proceed from another, and will be regarded as those of the testator if the circumstances show that he adopted them, and that the party speaking them was acting for him, with his assent. *Gilbert v. Knox*, 52 N. Y. 125. See also *Matter of Nelson's Will* (N. Y. 1894), 36 N. E. Rep. 3.

A testator and three other persons, M., H., and C., being together in the same room, the testator asked M. if he would witness his will, and if H. and C. would do so, also. M. answering that H. and C. had said they would, the testator produced and signed a paper, and declared it to be his will. M. then signed the attestation clause; after which, at the request of the testator, and in his hearing, he asked H. and C. to witness the will, in these words: "Mr. G. (the testator) requests you to witness his will;" the testator making no objection. The will was then signed by H. and C. as witnesses. It was held that the will was well executed. *Matter of Gilman*, 38 Barb. (N. Y.) 364.

In *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56; 32 Am. Rep. 650, it was said that a request to a witness to subscribe the will, made by a third person in the hearing of the testator, is, in law, the request of the testator, if he is conscious and does not dissent therefrom.

But in *Matter of McMulkin*, 6 Dem. (N. Y.) 347, it appeared from the depositions of B. and C., the subscribing witnesses, that they severally wrote their names as such, on the paper propounded, and that the decedent, in their presence, declared the same to be her will. The deposition of one S., further disclosed the facts that the decedent had acquainted him with her purpose "to settle" some money she had in America, and, on being informed that two witnesses would be necessary, had asked the deponent to find "two responsible workmen" to act in that capacity; that the deponent had waited upon B. and C., obtained their consent to witness the execution, and promised to notify them when to attend, afterward reporting the result to the decedent, who said, "all

But in such case the conduct from which his acquiescence is to be inferred requires the strictest scrutiny, for nothing done by others on his behalf, in a fraudulent, overpowering, or clandestine way,

right." There was no attestation clause. It was held in the absence of evidence that B. and C. had been actually summoned, that their subscription was personally observed or requested by the decedent, or that the latter took charge of, or even saw the paper after execution, probate must be refused for want of proof of the request required by the *New York* statute.

In *New Jersey*, it has been held that the attestation is deficient if the request is made by another than the testator in the first person. *Ludlow v. Ludlow*, 35 N. J. Eq. 480. In this case a testator went into a store to execute his will. His brother James was there, and also Mr. Harrison and Mr. Miller. James said to Harrison, in the hearing of the testator, "My brother has been making his will, and I would like to have you witness it," to which Harrison replied, "All right." The decedent, James and Harrison, then went into a small inclosure or desk, with glass around the top, so that inside of it they were visible to others in the store. James said to Harrison, "This is my brother's will, I would like to have you witness it," whereupon the decedent signed it, and Harrison, who saw him sign it, also signed as a witness. James then stepped out of the inclosure, and going to Miller, who was engaged at a counter about ten feet away, said, "Mr. Miller, Mr. Harrison has been kind enough to witness my brother's will, now I want you to," and then Miller went into the inclosure where the decedent remained (Harrison having stepped out to make room for Miller), and signed his name to the will as a witness. Before James asked Miller to sign, the latter did not know that the decedent was signing his will, although he surmised so because James had told him, a few weeks before, that his brother was coming there to execute his will, and that he (James) would like him (Miller) and Harrison to witness it. Miller testified that he thought the decedent heard James request him to witness the will. Miller did not see the decedent sign nor hear him acknowledge his signature to the will. It was held insufficient, the court saying: "Reference was made on the

hearing to the construction put upon a statute like ours by the courts of *New York*, who hold that where a testator produces a paper to which he has personally affixed his signature, requests the witnesses to witness it, and declares it to be his last will and testament, that is all that the law requires, and is a substantial acknowledgment of his signature. *Baskin v. Baskin*, 36 N. Y. 416; *Gilbert v. Knox*, 52 N. Y. 125. It is enough to say at this time, in that connection, that while I heartily approve of the principle which underlies and produced that construction—the principle of recognizing a substantial compliance with the statute as sufficient—there is no proof here of any acknowledgment whatever, either by word or in fact. The testator did not make the request, either to Mr. Miller or Mr. Harrison, but his brother did it. His brother, in making the request, in fact spoke in the first person. He said 'I want you,' etc. The testator does not appear to have uttered a single word in the whole matter, either to Harrison or Miller, except as he said 'Good morning,' in return to the salutation of the former. No assistance is to be had in this case from the attestation clause. It is merely 'in the presence of.' And obviously the affidavit made by Mr. Harrison before the surrogate to the effect that Mr. Miller was present when the testator signed the will, is of no importance." But compare *Whitenack v. Stryker*, 2 N. J. Eq. 9; *Elkinton v. Brick*, 44 N. J. Eq. 154. But see *Ayers v. Ayers*, 43 N. J. Eq. 565.

A will was drawn by a justice of the peace who was accustomed to draw such instruments. The testatrix, the two witnesses, and the draftsman were present at its execution. The testatrix, in the presence of the witnesses and of the draftsman, signed her name to the will. She then, in reply to a question put to her by the draftsman, acknowledged the instrument to be her will. This acknowledgment was also in the presence of the witnesses. The draftsman of the will then said to one of the witnesses, "Now, Mr. W.," and handed him the pen in the presence of all. W. signed as a witness and handed the pen to the other witness; he signed also in

can stand as the testator's own act, though done in his presence.¹

7. **TESTATOR MUST SIGN OR ACKNOWLEDGE BEFORE WITNESSES SUBSCRIBE.**—Under the Statute of Victoria, 1 Vict., ch. 26, signature or acknowledgment by the testator must precede subscription by the witnesses,² even though the testator immediately afterward signs the will in their presence,³ or the witnesses place seals opposite their names after the testator has signed,⁴ or formally acknowledged their signatures.⁵ Such is the rule also in *New York*,⁶ and it is sustained by the weight of authority in the *United States*,

the presence of all. The will was in possession of the testatrix at the time of her death. It was held that the will was duly published and executed. *Smith v. Smith*, 2 Lans. (N. Y.) 266.

1. Schouler on Wills (2d ed.), § 329.

In *Heath v. Cole*, 15 Hun (N. Y.) 103, the court, by Learned, P. J., said: "When a man is in full health and strength, with all his senses in vigor, whatever is said for him and in his presence, may, properly and without danger, be taken to be his act. The declaration that the instrument is the testator's will, and the request to witnesses to sign, may be made by another, under such circumstances, that they are plainly adopted by the testator and become his acts. But, when a man is feeble, and able to speak but faintly, at the very last of a sickness which has lasted eleven years, and within a few hours of his death, then it is necessary to examine more carefully what takes place before him. It will not answer then to assume, without some clear proof, that he adopts the acts of those about him, who pretend to speak for him. In his feeble condition he may be unable to express his dissent, and it is unsafe to take his silence as acquiescence."

2. 1 Jarm. on Wills (5th ed.) 109; *Goods of Olding*, 2 Curt. 865; *Goods of Byrd*, 3 Curt. 117; *Charlton v. Hindmarsh*, 1 L. & T. 433; 8 H. L. Cas. 160; *Goods of Summers*, 7 No. Cas. 562; 14 Jur. 791; 2 Rob. 295.

3. *Goods of Olding*, 2 Curt. 865.

Where a testator and the subscribing witnesses to his will were assembled around the same table at the same time, and all signed the will in the presence of each other, but the subscribing witnesses wrote their names before the testator wrote his, it was held that under the *Pennsylvania* Statute of Wills, this was a sufficient execution

and attestation of the will. *Miller v. McNeil*, 35 Pa. St. 217; 78 Am. Dec. 333.

4. *Goods of Byrd*, 3 Curt. 117.

5. *Charlton v. Hindmarsh*, 1 L. & T. 433; 8 H. L. Cas. 160; *Moore v. King*, 3 Curt. 243.

In *Hindmarsh v. Charlton*, 8 H. L. Cas. 160, a testator produced his will to A., and signed it in A.'s presence. A., whose name consisted of four words, the first of which began with "F.," then, in the testator's presence, signed his own name, but by accident left his first initial letter uncrossed, so that it stood as if it was "T." He afterward advised the testator that there ought to be two witnesses to the will, and in the afternoon of the same day, B. being present, the testator produced his will, and showed and acknowledged his signature in the presence of both A. and B. B. then wrote his name, and at his desire A., added the date, and then observed and corrected the first initial of his own name by crossing the T., and so making it F. It was held, affirming the judgment of the probate court, that the will was not duly attested within the 1 Vict., ch. 26, § 9.

So, passing over the signature with a dry pen amounts to no more than an acknowledgment, and does not serve as a subscription. *Playne v. Scriven*, 1 Rob. 772.

6. *New York*.—*Jackson v. Jackson*, 39 N. Y. 153; *Rugg v. Rugg*, 21 Hun (N. Y.) 383; *Matter of McMulkin*, 6 Dem. (N. Y.) 347; *Mitchell v. Mitchell*, 16 Hun (N. Y.) 97.

It is essential to the due execution of a will in *New York*, that the witnesses who are to attest the subscription and publication thereof by the testator, should sign the same, after the subscription by him. In respect to the subscription by the testator in the presence of the witnesses, and his declaration that the instrument is his last will

irrespective of whether the local statute is framed upon the Statute of Frauds or the Statute of Victoria.¹ In the absence of proof to the contrary, it may be presumed that the testator signed before the witnesses subscribed.²

m. SUBSCRIBING IN PRESENCE OF TESTATOR — ACKNOWLEDGMENT IN PRESENCE OF, SUBSCRIPTION IN ABSENCE.—Under

and testament, which the statute requires to be simultaneous, it is sufficient that they be on the same occasion, and it is not material that the declaration immediately precedes the subscription. *Jackson v. Jackson*, 39 N. Y. 153.

Thus, where one of the witnesses had commenced to sign as a witness to the instrument without knowing it was a will, and before he completed his signature the testator made the necessary declaration and acknowledgment, and thereupon the witness completed his signature as an attesting witness, it was held to be a sufficient compliance with the statute. *Matter of Phillips' Will*, 98 N. Y. 267.

1. *Chase v. Kittredge*, 11 Allen (Mass.) 49; 87 Am. Dec. 687; *Duffie v. Corridon*, 40 Ga. 122; *Chisholm v. Ben*, 7 B. Mon. (Ky.) 409; *Reed v. Watson*, 27 Ind. 443; *Eelbeck v. Granberry*, 2 Hayw. (N. Car.) 232; 2 Am. Dec. 624; *Fowler v. Stagner*, 55 Tex. 393; *Brooks v. Woodson*, 87 Ga. 379.

In *Chase v. Kittredge*, 11 Allen (Mass.) 63; 87 Am. Rep. 687, Gray, J., said: "The statute requires that the will shall 'be in writing and signed by the testator,' and shall be attested and subscribed, in the presence of the testator, by three or more competent witnesses." He is not required to write his signature in their presence, but it is his will which they are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must therefore be signed by him before it can be attested by the witnesses. He must either sign in their presence, or acknowledge his signature to them, before they can attest it. The statute not only requires them to attest, but to subscribe. It is not sufficient for the witnesses to be called upon to witness the testator's signature, or to stand by while he makes or acknowledges it, and be prepared to testify afterwards to his sanity and due execution of the instrument, but they must subscribe. This subscription is the evidence of their previous attestation, and to preserve the proof of that attestation in

case of their death or absence when after the testator's death the will shall be presented for probate. It is as difficult to see how they can subscribe in proof of their attestation before they have attested as it is to see how they can attest before the signature of the testator has made it his written will. The manifest intention of the statute is that, first, the will should be put in writing and signed by the testator; second, his will so written be attested by the witnesses; and third, the witnesses subscribe in his presence in evidence of their attestation to his written will."

A testamentary writing executed by a cross-mark, with no attestation clause, to which the name of the testatrix, with her mark, and the name of the subscribing witnesses, are signed in such order as to furnish no evidence as to which name was signed first, should be refused probate for want of proof that the signing of the testatrix preceded the subscription by the witnesses. *In re McMulkin*, 6 Dem. (N. Y.) 347.

Nevertheless, it should be observed that while the ground upon which the decisions proceeded in the above cases sustains the position in the text, many American cases hold that where the signature by the testator, and the subscriptions by the witnesses formed substantially one transaction, it is not material which preceded the other. *O'Brien v. Gallagher*, 25 Conn. 229; *Sechrest v. Edwards*, 4 Metc. (Ky.) 163; *Swift v. Wiley*, 1 B. Mon. (Ky.) 114; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 113; *Miller v. McNeill*, 35 Pa. St. 217; 78 Am. Dec. 333; *Rosser v. Franklin*, 6 Gratt. (Va.) 1; 52 Am. Dec. 97. See *Sturdivant v. Birchett*, 10 Gratt. (Va.) 67; *Moale v. Cutting*, 59 Md. 519. Effect of subsequent acknowledgment is insufficient to validate a subscription made before the testator signed. *Duffie v. Corridon*, 40 Ga. 122. See *infra*, this title, *Formal Requisites—Subscribing in Presence of Testator*.

2. *Allen v. Griffin*, 69 Wis. 520. See *Matter of Austin*, 45 Hun (N. Y.) 1. In *Simmons v. Leonard*, 91 Tenn.

the Statute of Frauds, 29 Car. II., ch. 29, and the Statute of Victoria, 1 Vict., ch. 26,¹ and the corresponding statutes in the *United States*, the witnesses must subscribe in the presence of the testator;² a subsequent acknowledgment in his presence of a subscription made in his absence is insufficient.³ The design of the Legislature in making this requisition was supposed to be that the testator might have ocular evidence of the identity of the instrument subscribed by the witnesses, and hence the generally accepted

183, a subscribing witness to a will testified that he did not know whether the testatrix had signed the paper or not before he witnessed it. He did not see her signature, and no one told him it was on the paper. The testatrix told the witness that she desired him "to sign a will" for her. Afterward a paper was produced from her bureau by a third person, and presented by the latter to the witness for signature. It was held that it did not sufficiently appear that the paper had been signed by the testatrix when the witness subscribed it.

1. Jarm. on Wills (5th ed.) *87.

2. See the statutes of the various states. For particulars of phraseology the local statute should be consulted. See *Rucker v. Lambdin*, 12 Smed. & M. (Miss.) 230; *Watson v. Pipes*, 32 Miss. 451; *Rose v. Allen*, 1 Coldw. (Tenn.) 23; *Snider v. Burks*, 84 Ala. 53; *Stirling v. Stirling*, 64 Md. 138; *Mays v. Mays*, 114 Mo. 536.

The object of a statute in requiring a will to be attested by the subscribing witnesses, in the presence of the testator, so far as the form of the attestation is concerned, is to identify the instrument, as that signed and published by the testator, and to prevent fraud and imposition in establishing spurious wills, and at the same time to show the persons, by whom the facts necessary to establish the will can be proven, when the will shall be propounded for probate; and all that is necessary for these purposes is, that the witnesses shall sign their names upon the paper in presence of the testator; and hence, it is well settled, that no particular form of words is necessary to constitute an attestation. *Fatheree v. Lawrence*, 33 Miss. 586.

New York—Presence of Testator.—The *New York Revised Statutes* merely provide that there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator, 2 Rev. Stat. 63, § 40; Birds-

eye's Edition (1890), vol. 3, p. 3343. Under which it has been held that the subscription need not be in the testator's presence. *Lyon v. Smith*, 11 Barb. (N. Y.) 124; *Ruddon v. McDonald*, 1 Bradf. (N. Y.) 352. See *Builer v. Benson*, 1 Barb. (N. Y.) 526; *Neugent v. Neugent*, 2 Redf. (N. Y.) 376.

Arkansas.—The *Arkansas* statute is a transcript of that of *New York*, *Arkansas Dig.* (1883), § 6492; and under it witnesses need not subscribe in the presence of testator. *In re Cornelius' Will*, 14 Ark. 675. See *Abraham v. Wilkins*, 17 Ark. 325.

Pennsylvania.—Subscribing witnesses are unnecessary. See *supra*, this title, *Attestation and Subscription—In the Absence of Legislation*.

3. *Moore v. King*, 3 Curt. 243; *In re Davis*, 3 Curt. 748; *In re Chamney*, 1 Rob. 757; *Charlton v. Hindmarsh*, 1 S. & T. 433; 8 H. L. Cas. 160; *Playne v. Scriven*, 1 Rob. 772; 7 No. Cas. 122; *In re Cunningham*, 1 S. & S. 132; 29 L. J. Ch. 71; *Chase v. Kittredge*, 11 Allen (Mass.) 49; 87 Am. Rep. 687; *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 276; *Den v. Mitton*, 12 N. J. L. 70; *Combs v. Jolly*, 2 N. J. Eq. 625; *In re Downie's Will*, 42 Wis. 66; *Reed v. Watson*, 27 Ind. 443; *Pawtucket v. Ballow*, 15 R. I. 58; *Duffie v. Corridon*, 40 Ga. 122. See *Den v. Matlack*, 17 N. J. L. 96; *Moale v. Cutting*, 59 Md. 510; *Rash v. Purnel*, 2 Harr. (Del.) 448; *Pennel v. Weyant*, 2 Harr. (Del.) 506.

Where it was proved by one of the only two subscribing witnesses to a will, offered as a will of real estate, that he was requested by the testator to prepare his will according to his instructions, and he did so, and signed his name as a witness before the testator signed, but not in his presence, and then read the will to the testator, and told him he had signed as a witness, and the testator approved and executed it, and the other witness then signed in presence of the testator, it was held that

this was not a valid execution of a will to pass real estate, the statute requiring both the witnesses to sign in the presence of the testator. *Ragland v. Huntington*, 1 Ired. (N. Car.) 561.

One of the subscribing witnesses to a script, propounded as the last will and testament of the deceased, drew up at his own house the paper writing in question, by a copy which he had, and at the same time wrote the attestation clause and subscribed his name as witness. Afterwards, on the same day, he took the paper over to the testator's house and read the same to him in the presence of the other subscribing witness. After he had finished reading the paper, the testator said he should want him to sign as a witness, when he told him that he had already done so, whereupon the testator said it would not make any difference he supposed, and then signed the paper in the presence of both witnesses, declaring it to be his last will and testament; and turning to the other witness, requested him to subscribe the same as a witness, which he did in the presence of the testator while the testator was looking on. After the testator had signed the will, he handed it to the witness who had subscribed it out of his presence and said: "I acknowledge this to be my will." The witness took it and kept possession of it for a moment, and then handed it to the other witness, who then subscribed it in the presence of the testator. It was held that the will was not executed according to the requirements of the act of assembly, because one of the subscribing witnesses did not sign in the presence of the testator. *In re Cox's Will*, 1 Jones (N. Car.) 321.

A will is executed by the testator, and certain persons are requested by him to attest it. For convenience, they take it into another room, out of the vision of the testator, and there subscribe their names to the paper as witnesses; and they immediately, within one or two minutes, return to the testator with the paper; and one of them, in the presence of the other, with the paper open in his hand, addresses the testator and says, "here is your will witnessed," and at the same time pointing to the names of the witnesses, which are on the same page and close to the name of the testator. The testator then takes the paper and looks at it as if examining it, and then folds it up, and speaks of it as his will. It was held that under these circumstances, the recognition of their

attestation by the witnesses to the testator, is a substantial subscribing of their names as witnesses in his presence. *Allen and Daniel, JJ., dissenting. Sturdivant v. Birchett*, 10 Gratt. (Va.) 67.

In *Chase v. Kittridge*, 11 Allen (Mass.) 51; 87 Am. Rep. 687, Gray, J., said: "By the original English statute for the prevention of frauds and perjuries, passed in 1676, it was enacted that 'all devises and bequests of any land or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect.' Stat. 29 Car. II., ch. 3, § 5. That act did not extend to the Colony of *Massachusetts*, which had been previously settled, and was not named therein. *Loyd v. Mansell*, 2 P. Wms. 75. Stat. 25 Geo. II., ch. 6, § 10. But the provision was re-enacted here in the same words in the first year after the Province Charter; and again in 1783, substituting only the words 'three or more' for 'three or four' witnesses. Prov. Stat. 4 W. & M. (ed. 1726), ch. 3, § 3, p. 5; Anc. Chart. 234. Stat. 1783, ch. 24, § 2. It was retained, and extended to personal estate, in 1836, in this form: 'No will' (excepting nuncupative wills) 'shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed, in the presence of the testator, by three or more competent witnesses.' *Massachusetts Rev. Stats.*, ch. 62, § 6. And the words just quoted have been incorporated, with trifling variations, into the General Statutes, ch. 92, § 6.

"This provision, it will be observed, does not expressly require that the testator should sign in the presence of the witnesses; nor that the witnesses should subscribe in the presence of each other, nor even that they should know that the instrument is a will. Courts will not require formalities which the statutes do not. It is accordingly the well settled construction, both in *England* and in this commonwealth, that it is sufficient for the testator to acknowledge or recognize his signature in the presence of the witnesses, either together or separately,

with no attestation clause beyond the single word 'witness,' and without their knowing what the instrument is. . . . The only case under the Stat. of 29 Car. II., which we have seen, in which it was even contended by counsel that an acknowledgment by a witness, in the presence of the testator, of a signature made in his absence, was equivalent to a subscription in his presence, arose only six years after the passage of the statute; and the point does not appear to have been then decided. *Risley v. Temple, Skin. 107.* But the difference in the two clauses of the statute, the one not requiring the testator to sign in the presence of the witnesses, while the other expressly required the witness to subscribe in the presence of the testator, soon came to be recognized, and does not appear to have been afterwards lost sight of. *Hoil v. Clark, 3 Mod. 220; Lee v. Libb, 1 Show. 69; Dormer v. Thurland, 2 P. Wms. 510; Stonehouse v. Evelyn, 3 P. Wms. 254; Bac. Ab. Wills, D, 2; 2 Bl. Com. 377; 1 Browne's Civ. & Adm. Law, ch. 10, note 27; 1 Roberts on Wills (Am. ed.) 131; Floyer's Proctor's Practice, 127.* The Statute of Frauds, while it required a will to be 'attested and subscribed in the presence of the deviser by three or four credible witnesses,' required a revocation to be by a written will, 'or other writing of the deviser, signed in the presence of three or four witnesses.' Stat. 29 Car. II., ch. 3, §§ 5, 6. The court of King's Bench in 1689 were of opinion that a will, to revoke a former will, must be 'signed and subscribed' by the witnesses in the presence of the testator. *Eccleston v. Speke, Carth. 81; Comb. 158.* And Lord Chancellor Cowper was of the same opinion. *Onions v. Tyrer, 1 P. Wms. 344.* Lord Hardwicke, Chief Justice Willes, Chief Baron Parker, and Sir John Strange, M. R., when holding, in accordance with earlier and later decisions, that a testator's acknowledgment of his signature before the witnesses was a sufficient signing by him, even of a will revoking an earlier one, and that the words 'signed in the presence of three or four witnesses,' in the section concerning revocations, were limited to the last antecedent, 'other writing,' clearly implied that those words would not be satisfied by acknowledging a signature, instead of actually signing in the presence of the witnesses. *Ellis v. Smith, 1 Ves. Jr. 11; 1 Dick. 225.* And see 1 Jarm.

on Wills (4th Am. ed.) 153. The English cases in which it has been held that the witnesses to a will are not required, by § 5 of Stat. 29 Car. II., to recite on the paper that they subscribe their names in the presence of the testator, declare that they must actually so sign in his presence. Thus the court of common bench, in 1735, as reported by Lord Chief Baron Comyns, said: 'The witnesses, by the Statute of Frauds, ought to set their names as witnesses in the presence of the testatrix.' *Hands v. James, Comyn 532.* And in a later case Lord Eldon said, in the House of Lords: 'Your lordships know that it is necessary that the three witnesses should sign in the presence of the testator. If it is proved that they did actually sign in the presence of the testator, the not recording that circumstance will not vitiate the will.' *Rancliffe v. Parkyns, 6 Dow. 149.*

"A new Statute of Wills was passed in England in 1837, requiring that the signature of a testator to a will, either of real or personal estate, shall be made or acknowledged by him 'in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator.' Stat. 1 Vict., ch. 26, § 9. The decisions under this statute are uniform that one witness does not 'attest and subscribe in the presence of' another, unless he actually affixes his signature in the presence of the other; and these decisions bear directly upon the construction of the same words in the English Stat. of 29 Car. II., and in our own statutes requiring the will to be 'attested and subscribed in the presence of' the testator, by the witnesses. The point was adjudged in the prerogative court of Canterbury by Sir Herbert Jenner Fust in several cases, the last of which, decided after full argument, and recognizing that 'this case must form a leading case of its class,' was strikingly analogous to the present. There the testator signed a codicil in the presence of one witness only, who at his request attested and subscribed it. Afterwards another witness, at the testator's request and in his presence, also attested and subscribed it, the first witness first pointing to her signature and saying, 'There is my signature, and you had better place yours underneath.' *In re Allen, 2 Curt. 331; In re Simmonds, 1 No. Cas. 409; 3 Curt. 79; Moore v. King, 3 Curt. 243; 2 No. Cas. 45.* In a

subsequent case the same able judge said of the witnesses: 'No authority is given to them, as in the instance of the testator, to acknowledge their signatures previously written. The witnesses are to subscribe, in other words they are required, I conceive, to do some act which shall be apparent on the face of the will. To pass over a signature, previously made, with a dry pen amounts, I think, to no more than an acknowledgment of a signature, which in the case of a witness has already been held not to be sufficient. *Moore v. King*, 3 Curt. 243. Saying and doing are not the same thing.' And he therefore held that upon the re-execution of a will an attesting witness did not 'subscribe' by tracing over his signature with a dry pen, 'as nothing in fact was written.' *Playne v. Scriven*, 1 Rob. 775; 7 No. Cas. 122. He also decided that it was not an attestation and subscription for a witness to add his residence after his name already subscribed on a previous day. *In re Trevanion*, 2 Rob. 311. Other decisions of Sir Herbert Jenner Fust are directly to the point that a signature by the testator after the witnesses have signed is insufficient, even if he has previously read the whole will to them, or they add seals to their names after he signs. In the first of these cases, the judge significantly asked, 'Is the paper a will before it is signed by the testator?' *In re Olding*, 2 Curt. 865; *In re Byrd*, 3 Curt. 117. In a later case, which was fully argued, he reaffirmed the rule, and gave his reasons more at length, saying, 'The words of the section are very precise, and I think it would be attended with dangerous consequences, if the court were to hold a will valid which has been signed in the presence of two witnesses who have attested it before the signature of the testator was affixed to the will; for where is the court to draw the line? Suppose the witnesses attested one hour before the testator signed, or a day, or a week, or any other time; where is the court to stop if it gave a latitude of construction to this section of the act? Suppose it were one month, or six months, or a twelvemonth, after the testator had signed the will; and whether it be at the time of the transaction, or some time before makes no difference.' *Cooper v. Bockett*, 3 Curt. 660. Dr. Lushington, sitting in the same court, held it to be a fatal objection to the validity of a will, that 'there is no proof that the signature was af-

fixed prior to the subscription of the witnesses.' *Hudson v. Parker*, 1 Rob. 39. And Sir John Dodson made a similar decision in *Shaw v. Neville*, 1 Jur. N. S. 408. . . . If the signature of a witness, made before that of the testator, is allowed to be sufficient upon proof of a later acknowledgment by the witness in the testator's presence, then the witnesses may subscribe an instrument not yet signed by the testator, and in his absence, with the honest intention of acknowledging their subscriptions to him after he shall have signed; his name may be signed at any time afterwards, without any witness to observe and testify whether it is affixed by him or by his authority or not, and, if it is, whether he is sane or insane; and the previous subscription of the witnesses be held after his death to be evidence of a due execution and attestation, when in fact his name is forged, or at least there has been no subscription or acknowledgment by the witnesses in his presence, and so, on the loosest interpretation, no compliance with the statute. . . . The manifest intention of the statute is that, first, the will should be put in writing and signed by the testator; second, his will so written be attested by the witnesses; and third, the witnesses subscribe in his presence in evidence of their attestation to his written will. There is less reason for requiring the testator to sign in the presence of the witnesses than for requiring them to sign in his presence. A testator may alter his will as he pleases at any time before it is formally attested. He may write it out in full and sign it, and it has no effect as a will until duly attested. It is unimportant whether it is or is not signed by the testator until it is produced to the witnesses. It is only important that it should be his will in writing and signed when they attest and subscribe it; and it is equally his will in writing, whether signed in their presence or at some previous time. It is the will of the testator, not of the witnesses. He must know its contents, but they need not. He has the contents, as well as his signature, by which to know that it is the instrument declaring his last wishes in respect to his estate. They need see nothing but his signature and their own. To allow them to acknowledge in his presence their names signed in his absence would open a door to mistake and fraud. If the witnesses might subscribe before

tests of presence, are vision and mental apprehension.¹ In the first place it is essential that the testator be mentally capable of recognizing the act which is being performed before him.² When, therefore, the testator, after signing and publishing his will, fell into a state of insensibility before the witnesses subscribed, the attestation was held insufficient.³ The witnesses must also subscribe with the testator's knowledge and consent, and not in a clandestine or fraudulent way, for such subscription is bad, even though in the same room.⁴ The true test of vision is not whether the testator actually saw the witnesses sign, but whether he might have seen them sign, considering his mental and physical condition, and his position at the time of subscription.⁵ Mere contiguity

they had attested his signature, and even before he had signed, of what weight could their subscription be as evidence, after their death, that the will had been duly signed and attested? But the controlling consideration is, that the statute in terms requires not only that the witnesses shall attest his will, but that they shall subscribe in his presence. The distinction in this respect between the signature of the testator and the subscription of the witnesses has existed in the statute law both of *England* and of *Massachusetts* for nearly two centuries, and been preserved in repeated enactments when other clauses have been altered. The court cannot presume so constant a difference in language to have been unintentional, or disregard it as immaterial. As it appears by the testimony stated in the report that one of the attesting witnesses subscribed his name before the testator signed and in his absence, the instrument offered for probate should have been disallowed."

Georgia.—Where a testator after signing his will in the presence of the subscribing witness, retired to his bed in an adjoining room, before the witnesses had affixed their signatures, it was held that the fact that at the time of attestation the testator was in a different room to that in which the will was signed by the witnesses, raised a presumption that the witnesses did not sign in his presence, as required by the *Georgia* Act of January 1, 1851, and that a subsequent recognition by the witnesses of their signatures, in the presence of the testator, did not cure the original omission. *Lamb v. Girtman*, 33 Ga. 289.

Connecticut and Kentucky.—A witness may subscribe his name in the presence of the testator, before the testator himself has signed, and ac-

knowledge his subscription afterward. *O'Brien v. Gallagher*, 25 Conn. 229; *Swift v. Wiley*, 1 B. Mon. (Ky.) 117; *Upchurch v. Uphurch*, 16 B. Mon. (Ky.) 113.

Virginia.—An acknowledgment by a witness, in the testator's presence, of a signature affixed in his absence, has been sustained. *Sturdivant v. Birchett*, 10 Gratt. (Va.) 67; *Parramore v. Taylor*, 11 Gratt. (Va.) 220.

As to the rule in *Michigan*, see *Cook v. Winchester*, 81 Mich. 581.

1. 1 Jarm. on Wills (5th ed.) *87; *Schouler on Wills* (2d ed.), § 341; 1 Redf. on Wills (4th ed.) 244.

2. Jarm. on Wills (5th ed.) *87; 1 Redf. Wills (4th ed.) 244. See *Hill v. Barge*, 12 Ala. 687; *Watson v. Pipes*, 32 Miss. 451; *Hall v. Hall*, 18 Ga. 40; *Meurer's Will*, 44 Wis. 392; 28 Am. Rep. 591; *Etchison v. Etchison*, 53 Md. 348; *Jackson v. Moore*, 14 La. Ann. 209.

3. *Right v. Price*, Doug. 241. See also *Vernam v. Spencer*, 3 Bradf. (N. Y.) 16; *Sanders v. Stiles*, 2 Redf. (N. Y.) 1.

4. *Longford v. Eyre*, 1 P. Wms. 741. *Schouler on Wills* (2d ed.), § 341.

5. *Hill v. Barge*, 12 Ala. 687; *Robinson v. King*, 6 Ga. 539; *Lamb v. Girtman*, 26 Ga. 625; *Reed v. Roberts*, 26 Ga. 294; 71 Am. Dec. 210; *Hamlin v. Fletcher*, 64 Ga. 549; *In re Storey's Will*, 20 Ill. App. 183; *McElfresh v. Guard*, 32 Ind. 408; *Turner v. Cook*, 36 Ind. 136; *Howard's Will*, 5 T. B. Mon. (Ky.) 199; 17 Am. Dec. 60; *Edden v. Hardey*, 7 Har. & J. (Md.) 61; 16 Am. Dec. 292; *Dewey v. Dewey*, 1 Met. (Mass.) 349; 35 Am. Dec. 367; *Boldry v. Parris*, 2 Cush. (Mass.) 433; *Allen's Will*, 25 Minn. 39; *Watson v. Pipes*, 32 Miss. 451; *Walker v. Walker*, 67 Miss. 529; *Ruddon v. McDonald*, 1 Bradf. (N. Y.) 352; *Jones v. Tuck*, 3

Jones (N. Car.) 202; Wright v. Lewis, 5 Rich. (S. Car.) 212; 55 Am. Dec. 714; Ray v. Hill, 3 Strobb. (S. Car.) 297; 49 Am. Dec. 647; Neil v. Neil, 1 Leigh (Va.) 6; Baldwin v. Baldwin, 81 Va. 405; 59 Am. Rep. 669; *In re Trimel*, 11 Jur. N. S. 248; *In re Killiek*, 3 S. & T. 578; Doe v. Manifold, 1 M. & S. 294; Norton v. Bassett, 1 D. & S. 259; 3 Jur. N. S. 1084.

If the testator is where, by mere act of volition, he could witness the attestation, the will is sufficiently attested in his presence. Spoonemore v. Cables, 66 Mo. 579. Otherwise, if he is not so placed. *In re Downie's Will*, 42 Wis. 66.

The witnesses to a will subscribe their names in another room from the testator, who, though lying on a bed, is able to walk about; but the witnesses are directly within the range of his vision, so that he can see all their persons except the forearm and writing hand; these being hid from him by the body of the witness whilst he is subscribing his name; it may be inferred too that he may see the paper as it lies on the bureau or desk where the witnesses subscribe their names. It was held that the witnesses subscribed their names in the presence of the testator, within the meaning of the statute. Nock v. Nock, 10 Gratt. (Va.) 106.

Where the script was attested by witnesses in the same room with the decedent, about eight feet to one side of him, but in a position to be seen by him in the act of attestation if he turned his head half round, and he was able so to turn his head without pain or inconvenience, it was held to be an attestation in the presence of the decedent. Cornelius v. Cornelius, 7 Jones (N. Car.) 593.

So, also, where a will was drawn and witnesses sent for at the request of a testator, and, after signing by him at his request, the witnesses went from the bedroom where he was, into a dining-room, to attest the same, on account of the want of conveniences for doing so in the bedroom, and he knew that the attestation was going on in the dining-room, and approved it, and from the position he occupied in the bed could have seen the witnesses while signing, it was held that the will was attested in the presence of the testator. Ambre v. Weishaar, 74 Ill. 109.

But where the witnesses to a will, after seeing the testator sign, withdrew into an adjoining room for the purpose of signing their names more conven-

iently, but out of the testator's eyesight, as he lay or stood at the moment of their signing, it was held not to be a good attestation within the meaning of the acts. The testator need not actually see the witnesses sign the will, yet they must have been in a position to let him see their subscribing; which means that they must not withdraw themselves from the continued observance of his senses, although the testator may himself refrain from using such senses. Reynolds v. Reynolds, 1 Spears (S. Car.) 253; 40 Am. Dec. 599.

The requirement of the *Michigan* statute, that all wills shall be subscribed in the presence of the testator by two or more competent witnesses, is sufficiently complied with if the condition and position of the testator, when his will is attested, with reference to the act of signing by the witnesses, and their locality when signing, is such that he has knowledge of what is going forward, and is mentally observant of the specific act in progress, and, unless he is blind, the signing by the witnesses must occur where the testator, as he is circumstanced, may see them sign if he choose to do so. If, in this state of things, some change in the testator's posture is requisite to bring the action of the witnesses within the scope of his vision, and such movement is not prevented by his physical infirmity, but is caused by an indisposition or indifference on his part to take visual notice of the proceeding, the act of witnessing it is to be considered as done in his presence, and in a case where the undisputed evidence shows this state of facts, it is error to submit this question to the jury. If, however, the testator's ability to see the witnesses subscribe their names is dependent on his ability to make the requisite physical movement, then, if his ailment so operate upon him as to prevent this movement, and on this account he does not see the witnesses subscribe, the will is not witnessed in his presence. Maynard v. Vinton, 59 Mich. 139; 60 Am. Rep. 276.

In Ayres v. Ayres, 43 N. J. Eq. 565, the attesting clause did not state that the witnesses subscribed their names in the presence of the testator, but the proofs established that they signed on a bureau, at the foot of the bed on which the testator lay, so supported that he could see the motion of the pen on the paper, although he could not distinguish the letters the pen was forming, and that

is not enough, if the testator, by reason of his position or intervening obstacles, could not see the witnesses subscribe.¹ A subscription made in the same room with the testator is treated as *prima facie* made in his presence, while a subscription made in another room is treated as *prima facie* not made in his presence.² But a subscription in another room is good if it can be shown that the testator either saw or might have seen it; as where the witnesses subscribed their names in a room opposite, within the testator's sight, the doors between being thrown open;³ but not where the

the testator's eyes were open during the signing, and that at its conclusion he instructed his uncle, who was named as an executor in the will, to take the custody of the paper. It was held that such signing was sufficient compliance with the requirement of the statute that the witnesses shall sign in the presence of the testator.

1. Hamlin v. Fletcher, 64 Ga. 549; Walker v. Walker, 67 Miss. 529; Neil v. Neil, 1 Leigh (Va.) 22; Doe v. Manifold, 1 M. & S. 294; Colman's Case, 3 Curt. 118; *In re Ellis*, 2 Curt. 395; Eccleston v. Petty, Carth. 79; 1 Show. 89.

It has been held of no avail that the testator saw the bodies of the witnesses as they wrote, if the will itself was out of sight. Graham v. Graham, 10 Ired. (N. Car.) 219. But see Bynum v. Bynum, 11 Ired. (N. Car.) 632; Ayres v. Ayres, 43 N. J. Eq. 565.

2. Morton v. Bassett, D. & S. 259; 3 Curt. 118; Neil v. Neil, 1 Leigh (Va.) 6; Edelen v. Hardey, 7 Har. & J. (Md.) 61; 16 Am. Dec. 292; Lamb v. Girtman, 33 Ga. 289; Mason v. Harrison, 5 Har. & J. (Md.) 480; Doe v. Pickett, 51 Ala. 584; Mandeville v. Parker, 31 N. J. Eq. 242; Ayres v. Ayres, 43 N. J. Eq. 565.

What Constitutes Presence of Testator.—In Neil v. Neil, 1 Leigh (Va.) 28, Cabell, J., said: "Presence is not defined in the statute; but a due attention to the object of the law in requiring it, will lead us to its true meaning. It cannot be synonymous with being in the same room with the testator; for a man may be so situated as to see what is passing in another room as accurately as if it were in the same room; and he may be so situated as to be as incapable of seeing what is transacting in the same room as if it were in a different room. The object of the law will be completely effected, and can only be effected by the testator's being in such a situation,

in relation to the will and the witnesses, that he may, if he will, see, from that situation, both the will and the witnesses in the act of attestation. This capacity in the testator is, unquestionably, the test of presence, in all cases of attestation out of the room in which the testator may be; for all the cases show that an attestation out of the room of the testator is held to be in his presence, if he might see it, and not in his presence, if he could not see it. Now, as the reason of the law in requiring an attestation to be in the presence of the testator is precisely the same, whether that attestation be in the same room, or in a different room, the law will apply the same test of presence to both cases. An attestation, therefore, in the same room with the testator, will, as in the case of an attestation in a different room, be held to be in his presence or not in his presence, according to the capacity or want of capacity in the testator to supervise the transaction. There is, however, one important difference between an attestation in the same room, and one not in the same room with the testator; in the absence of all proof, a man is presumed to be able to see what is done in the same room with him, and to be unable to see what is done in a different room. An attestation, therefore, in the same room, is *prima facie* good; an attestation in a different room, is *prima facie* bad. But this presumption must yield to positive proof. An attestation, therefore, out of the room of the testator, but proved to be within the scope of his vision, becomes good, as being in his presence; and an attestation in the same room, but proved to be out of the scope of his vision, becomes bad, as not being in his presence. And this is, as I take it, the substance of all the authorities." See Edelen v. Hardey, 7 Har. & J. (Md.) 67; 16 Am. Dec. 292.

3. Davy v. Smith, 3 Salk. 395; Shires

table at which the witnesses subscribed in the adjoining room was so placed that he could not see it, even though the door between stood open.¹ Nor is it enough to subscribe in the same room with the testator, if the latter's relative position or intervening obstacles prevent his perceiving it, and his condition is such that of his own volition he can neither change his position nor remove the obstacle.² Where the testator is blind, it has been held that

v. Glascock, 2 Salk. 688; *Tod v. Winchelsea*, 2 C. & P. 488; 12 E. C. L. 227; *In re Piercy*, 1 Rob. 278; *In re Trimel*, 11 Jur. N. S. 248; *Ambre v. Welshaar*, 74 Ill. 110; *Gallagher v. Kilkeary*, 29 Ill. App. 415; *Meurer's Will*, 44 Wis. 392; 28 Am. Rep. 591; *Nock v. Nock*, 10 Gratt. (Va.) 106; *Bynum v. Bynum*, 11 Ired. (N. Car.) 636; *McElfresh v. Guard*, 32 Ind. 408; *Turner v. Cook*, 36 Ind. 129. See *Wright v. Lewis*, 5 Rich. (S. Car.) 212; 55 Am. Dec. 714; *Ray v. Hill*, 3 Strobb. (S. Car.) 297; 49 Am. Dec. 647; *Tucker v. Oxner*, 12 Rich. (S. Car.) 141; *Cornelius v. Cornelius*, 7 Jones (N. Car.) 593; *Hill v. Barge*, 12 Ala. 687; *Moore v. Moore*, 8 Gratt. (Va.) 307.

So where the testatrix could see the witnesses through the windows of her carriage and of the attorney's office, the will was held well attested. *Casson v. Dade*, 1 Bro. C. C. 99.

1. *Clark v. Ward*, 1 Bro. C. C. 137; *Colman's Case*, 3 Curt. 118; *Morton v. Bassett*, D. & S. 259; *Tod v. Winchelsea*, 2 C. & P. 488; 12 E. C. L. 227; *Mandeville v. Parker*, 31 N. J. Eq. 242; *Edelen v. Hardey*, 7 Har. & J. (Md.) 61; 16 Am. Dec. 292. See *Lamb v. Girtman*, 33 Ga. 289; *Boldry v. Parris*, 2 Cush. (Mass.) 433; *Graham v. Graham*, 10 Ired. (N. Car.) 219; *Jones v. Tuck*, 3 Jones (N. Car.) 202; *Reynolds v. Reynolds*, 1 Spears (S. Car.) 253; 40 Am. Dec. 599; *Downie's Will*, 42 Wis. 66.

Where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room a person, by inclining himself forwards with his head out at the door, might have seen the witnesses, but that the testator was not in such a situation in the room that he might by so inclining have seen them, it was held that the will was not duly attested. *Doe v. Manifold*, 1 M. & S. 294.

Where the witnesses to a will, after seeing the testator sign, withdrew into

an adjoining room for the purpose of signing their names more conveniently, but out of the testator's eyesight, as he lay or stood at the moment of their signing, it was held not to be a good attestation within the meaning of the acts. *Reynolds v. Reynolds*, 1 Spears (S. Car.) 253; 40 Am. Dec. 599. In this case *Richardson, J.*, said: "The witnesses must subscribe their names within the sight of the testator, as he stood, and not as he might or might not stand. . . . Although the testator need not actually see the witnesses sign the will, yet they must have stood in a position to let him see their subscribing; which means, that they must not withdraw themselves from the continued observance of his senses, although the testator may, himself, refrain from using such senses. Such discretion is with him, but not for the witnesses to avoid the opportunity of his so doing." See *Jones v. Tuck*, 3 Jones (N. Car.) 202; *Russell v. Moor Falls*, 3 Har. & M. (Md.) 472. 2. *Tribe v. Tribe*, 1 Rob. 775; *Doe v. Therrian*, 1 Pugsley & B. (N. Bruns.) 395; *Neil v. Neil*, 1 Leigh (Va.) 6. See *Brooks v. Duffell*, 23 Ga. 441; *Reed v. Roberts*, 26 Ga. 294; 71 Am. Dec. 210. Compare *Aikin v. Weckerly*, 19 Mich. 482; *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 58; *Orndoff v. Hummer*, 12 B. Mon. (Ky.) 619.

In *Neil v. Neil*, 1 Leigh (Va.) 6, it was held that the subscription was bad, if the testator lay in bed with his back to the witnesses, and was unable to turn. *Coalter, J.*, said: "The object of the law, in requiring a will to be attested in the presence of the testator, is to prevent a surreptitious will being substituted and imposed on him for the will he intends to publish. To effect this object, the witnesses and the will must both be in the presence of the testator; he ought to see, or at least be able to see, both. He may, it is true, turn away his eyes, so as not to see what is doing, or he may look on, the whole time. It will rarely happen that the witnesses engaged in the

attestation are at the same time watching the testator, to see whether he is looking at them, so as to establish the fact that he saw them attest; and therefore the most that they can be required to prove is, that he was so present to them, and they to him, as that he might, and therefore probably did, see the attestation. Nothing less than this, it seems to me, can satisfy the words and intention of the statute.

"Suppose the witnesses retire to a table standing behind a desk in the testator's chamber, where he, lying sick in his bed, makes his will; and over which desk he can even see the heads of the witnesses, but neither the table, the will, nor the act of attestation; is this a good will within the act? and will it be considered as duly attested, unless it can be shown that they retired there for fraudulent purposes? Is the power to require the witnesses to come from behind the desk and expose their acts to view, though no such requisition be made, equivalent to the power of actually seeing them if he choose to cast his eyes on the scene of action?

"Suppose there is a folding screen, impervious to the sight, round the foot or side of the bed, and the witnesses retire behind that out of his view; is the power to direct it to be folded or shut up, so as to expose the table and witnesses to view, to be substituted for that power to supervise the transaction, which the simple act of casting his eyes on the spot affords? Must it be proved that they retired behind the screen in order to be out of view and for fraudulent purposes?

"Suppose the table, at which the witnesses subscribe, be just within the door of an adjoining room, a few feet from the testator's bed, who has his face to it, and when open, can as plainly see the table, as if it were in his chamber, or more so, there being more light there than is agreeable or proper in the bedroom of the sick; but in order to exclude this disagreeable light from the sick bed, the door is usually kept shut; and, without any real or apparent intention of fraud, it is actually shut at the time of attestation; is the power to require it to be opened, to be substituted for the power to see if the party had chosen to cast his eye that way?

"Could it be said of either of these cases, that as he might have seen, it is fairly to be presumed that he did see, and that consequently no imposition

was practiced? The object of the law being to prevent frauds, it prescribes the forms which are to be pursued, and which *prima facie* are sufficient to guard against fraud. All attestations not coming up to these requisites may be fraudulent, and are in fact so considered in law, without proof of actual fraud; and no proof of actual fairness can avail or supply the requisites of the law. The most credible witnesses who ever lived may prove that they saw the will subscribed, heard it read to the testator and approved of by him; that he requested them to attest; that they all took hold of the will, carried it into another room, having received it from the hands of the testator; that they all continued to hold it, until each attested it; and all returned with it and delivered it to the testator again; yet it is no will of lands unless he could see them attest. Say, that they attested it in the doorway, where their acts could have been seen, had not the door been closed to shut out offensive light from the sick bed; it is no will. According to all the cases, to make it an attestation in the presence, the door must be open; no case goes so far as to affirm that if the testator had had his suspicions awakened, and could have commanded the door to be opened, it is the same thing as if it had been opened.

"It is not to be supposed that testators, especially in their last illness, are suspicious of those around them, or that they are in a frame of mind, if they are of body, to guard, by any unusual effort, against frauds. The law undertakes to guard them. They may still be defrauded. But, if the attestation be according to law, the fraud must be proved; if not, the law avoids the will, as though actual fraud were proved, and no proof of fairness can make it good. The opinion of the judge below, in this case, makes this a good will, although the jury might believe not only that the testator did not actually see the attestation, but that he could not see it, any more than if it had been in another room with the door shut. Had his suspicions been aroused, and had he been turned, it is true he might have seen; and so he might, on being turned over, had the attestation been in an adjoining room, and in a part of it which would have been visible to him when he was so turned over. If the attestation had been in an adjoining room, at a table visible from the bed, had the testator been turned over, but

the position of the witnesses must be such that the testator, if he had his eyesight, might have seen them;¹ but the better opinion would seem to be that the subscription should be made where he may take cognizance of the act by his other senses.² In *Michigan*,

not visible to him as he lay unable to turn, this (as I think all the cases show) would not have been a good attestation. The power to have himself turned, and the power to see, if turned, is the same in both cases. Yet, in the one case, it is said to be a will, in the other, not so. A testator, not too ill to get up, acknowledges his will lying on his bed; he continues to lie there, and his will is attested in an adjoining room; he can, by getting up, and sitting on his bedside, and leaning forward, see what is done, and is fully able to do so without assistance, or much bodily pain; but he omits to do it, and the law protects him against any will made in such a situation. But the man who is laid with his back to the table, when his will is attested, and can no more see it, or what is doing, than if he was held there by superior force, unless he calls for assistance, is not protected by the law.

"It is true the cases say that proof of actual seeing is not necessary, the presence being such that he can see if he will; but where is the case which says that it is a good attestation, notwithstanding proof on the other side, that he not only did not see, but could not without assistance, any more than he could see through a panel door what was doing behind it, and which he was unable to open without assistance?

"If the doctrine contended for be tenable, why shall not a will, executed in an adjoining room, be good, where the testator could direct the table to be set out within his view whereat to attest it? Why not, if attested in an obscure corner in the same room, because he might have ordered it to be done in a part of the room where he could see what was doing? The law is not that it shall be attested in his presence, if he thinks it proper to superintend the act himself; otherwise he may trust to the honesty of his friends and the witnesses, to see for him that no fraud is done. No; the law requires him to be present himself, body and mind. If he can, by turning his eye, see what is doing, he will be presumed to have seen it, and no farther proof that he did see is necessary; but if interposing walls or other ob-

structions render it doubtful whether he could see or not, the power to see must be proved and made apparent; as, that a door or window was open (not that it might have been opened, if requested) and that his position in bed was such, (not might have been such had he desired to be raised or turned) as that he had it in his power, by simply looking on, to see. This is enough, and you need not prove that he actually did see.

"I can see no magic in the four walls of the testator's bed chamber, which shall make him more present at an act of attestation, which in reality he cannot see without calling for assistance, than he is at a similar act performed a few feet from him, which he can see, even without assistance, by a slight change in his position. Neither the law, nor the decisions under it, it seems to me, contemplate any such fictitious presence. If the act be done in the same room, *prima facie* he is really present; that is, he can really see, and nothing further being shown, he is presumed to have supervised the act. But if it is in a remote corner, though within the four walls, it must be shown that he was so situated, in point of position and light, as that he could see, or it is deemed in law fraudulent and void, without proof of actual intended fraud."

So in *Tribe v. Tribe*, 1 Rob. 775, a subscription was held bad though in the same room as the testatrix, who lay behind bed curtains which she was unable to draw aside; but in *Newton v. Clarke*, 2 Curt. 320, a subscription was sustained because the testator could have pushed the curtains aside.

In *Reed v. Roberts*, 26 Ga. 294; 71 Am. Dec. 210, it was held that the testator must be able to see the witnesses subscribe without changing his position.

1. *In re Piercy*, 1 Rob. 278; 4 No. Cas. 250.

2. *Will of Blind Testator*.—As the requirement of the statutes, that a will be subscribed by the attesting witnesses in the presence of the testator, has been construed to mean in the sight of the testator at reasonable proximity, some uncertainty has resulted as to

what is a compliance with the statute when the testator is blind. Manifestly, a different construction of the language of the statute is necessary in this case; and the most reasonable, and that which seems to have been adopted in the instances which have been noticed in which this point is actually adjudicated, seems to be that, under such circumstances, the act of subscription by the witnesses must be performed in such manner as to allow the testator, by the exercise of his remaining faculties, to perceive and ascertain that the document attested is the one which has been executed by him.

In *Ray v. Hill*, 3 Strobb. (S. Car.) 297; 49 Am. Dec. 647, which was a contest over the validity of a will executed by a blind testator, the trial court, in its instructions to the jury, thus construed the provision of the statute requiring the attestation of wills in the presence of the testator, as applicable to a will made by one deprived of the sense of sight: "The words 'in the presence of the testator' are usually, and in reference to ordinary men who can see, defined to mean within his sight at reasonable proximity. To cover the case of the blind man, that definition would be extended so as to be within the observation of the senses at reasonable distance. As, however, the will of one who can see is valid, although he may turn his head away while the witnesses are subscribing, so, in analogy, the will of a blind man is valid if he be aware that the witnesses are attesting and subscribing his will, and have the power, at his discretion, by his touch and other senses, to ascertain that they are subscribing the same paper which he signed, although he may not in fact exert his senses, when nothing hindered him. The question then carefully submitted to the jury (referring to the case under consideration) was whether the witnesses attested and subscribed the will within the reach of the testator's remaining senses, when he was conscious of what they were doing, and might, if he chose, have ascertained that they were subscribing his will. If nothing hindered him, his refraining from touching them and his will, or otherwise ascertaining for himself what they were subscribing, did not affect the validity of the will." The evidence in this case showed that the subscription by the witnesses was within two feet of the maker of the will; so near, in fact, that the testator

might have heard the scratching of the pen. It was also testified that the subscription by the witnesses was in such close proximity to the testator that he must have been aware of what was going on. He did not touch the witnesses during the act of subscription, but he might easily have done so. It was held, without hesitation, that all the requirements of the statute which made it necessary that the subscription by witness should take place in the presence of the testator were complied with.

In *Reynolds v. Reynolds*, 1 Spears (S. Car.) 253; 40 Am. Dec. 599, the opinion of the court, contains the following *dictum*, touching the execution and attestations of wills made by blind testators: "If, in the case of a blind testator, the witnesses were to withdraw their subscription from the observance of those senses by which, only, the testator could perceive their being present and were subscribing, and such a will were held to be good, the case would be analogous to the one before the court." (Where the will was held *bad* because attested out of testator's sight.) The judge continued, "I would not say that it is absolutely impossible (although it is so considered by great writers) that even a blind, and deaf and dumb man can make a will. But whenever such a case occurs, the three requisites of all wills must appear; that the testator signed the will, or expressly directed it to be signed for him, and three witnesses attested it in writing, and that the testator had been sensible that they signed their names in his presence. And of these three requisites, if there be any equality in their importance, the last is the most effectual to prevent the substitution of a fraudulent will in the place of the intended genuine will of the testator, which is the immediate object of our acts directing the manner of executing last wills and testaments."

In *Riggs v. Riggs*, 135 Mass. 238; 46 Am. Rep. 464, a testator, whose sight was unimpaired, was compelled to lie on his bed facing the ceiling, and was incapable of turning his head so as to see what took place at his side. The witnesses signed the will at a table, which was in an adjoining room, and nine feet distant from the testator. The door was open, and the table was in the line of vision of the testator if he had been able to look. He could hear all that was said, and knew and

vision, as the exclusive test of presence has been abandoned, in cases in which, though the witnesses sign out of the line of vision, the testator is within hearing distance, understands what is done, and expressly approves the whole transaction.¹ The nature of

understood all that was done, and after the witnesses had signed the will, it was handed to him, and he read their names as signed, and said he was glad it was done. A codicil to the will, which was executed while the testator was in the same condition, was attested by the witnesses at a table by the side of the bed, about four feet from his head. It was held that the will and codicil were attested in the "presence" of the testator. The court, by Morton, C. J., said: "It is true that it is stated in many cases that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence.

"In *England*, where the tendency of the courts has been to construe the statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. *In re Piercy*, 1 Rob. 278; *Fincham v. Edwards*, 3 Curt. 63. It would be against the spirit of our statutes to hold that, because a man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will.

"The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they must subscribe 'in his presence;' but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see,

and within his hearing, they subscribe in his presence; and the will, if otherwise duly executed, is valid. In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. We are of opinion, therefore, that the codicil was duly attested by the witnesses.

"The facts in regard to the attestation of the original will do not materially differ from those as to the codicil. The witnesses signed the will at a table nine feet distant from the testator, which was not in the same room, but near the door in an adjoining room. The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, and as a part of the *res gestæ*, it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient."

1. In *Cook v. Winchester*, 81 Mich. 581, the witnesses subscribed in another room, at a table so placed as to be beyond the line of vision of the testatrix, who could not move in bed, but within her hearing, knowledge, and understanding; after which they returned to her room, showed her their signatures, and had the will, which consisted of one sheet of paper, read over, and one of them told her, in the presence of the other, that the will had been signed by them, to which she replied: "It is all right, and just as I want it, the witnesses and everything are all right." It was held that the will was subscribed in the presence of the testatrix. The court said: "In the definition of the phrase 'in the presence of,' due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities

the occasion of the witnesses' absence, whether for the ease or at the solicitation of the testator, or otherwise, is immaterial.¹

2. **SIMULTANEOUS PRESENCE OF WITNESSES.**—Under the Statute of Frauds, 29 Car. II., ch. 3, which provided merely that the will should be "attested and subscribed in the presence of the devisor, by three or four credible witnesses," it was held that the witnesses need not subscribe in the presence of each other, and that the testator might either sign before one and acknowledge before the others, or acknowledge before each separately without signing before any of them.² Under the Statute of Victoria, 1 Vict., ch. 26, § 9, which provides that the signature shall be "made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary,"³ it was held that the signature must be made or acknowledged in the presence of the witnesses simultaneously and not at different times,⁴ and that they

that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If, as before shown, they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence.

"But we hold that the execution of this will was valid expressly upon the ground that not only was the act of signing by the witnesses within the hearing, knowledge, and understanding of the testatrix, but after such signing the witnesses came back into the room where she was with the will, which was on one sheet of paper; that the will was then again all read over to her by the scrivener, and the names of the witnesses read to her and their signatures shown to her, and she informed by the witnesses, or one of them in the presence of the other, that the will had been signed by them; and that she then said it was all right, 'just as she wanted it; witnesses and everything was all right.' This seems to us to have been a substantial compliance with the statute, and a witnessing in the presence of the testatrix." *Compare Sturdivant v. Birchett*, 10 Gratt. (Va.) 67.

1. *Broderick v. Broderick*, 1 P. Wms. 239; *Macell v. Temple*, 2 Show. 288. *Compare Edelen v. Hardey*, 7 Har. & J. (Md.) 61; 16 Am. Dec. 292; *Reynolds v. Reynolds*, 1 Spears (S. Car.) 253; 40 Am. Dec. 599.

2. *Ellis v. Smith*, 1 Ves. Jr. 11; *Wright v. Wright*, 7 Bing. 459 n; *Grayson v. Atkinson*, 2 Ves. 454; *Smith v. Codron*, 2 Ves. 454.

So, also, in *Kentucky*, it has been held that under *Kentucky Gen. Stat.*, ch. 113, § 5, which provides that if a will is not "wholly written by the testator the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses," the witnesses need not be present together when the acknowledgment is made. *Grubbs v. Marshall* (Ky. 1890), 13 S. W. Rep. 447.

3. *Thompson v. Davitte*, 59 Ga. 472.

4. 1 Jarm. on Wills (5th ed.) *109; *In re Allen*, 2 Curt. 331; *In re Simmonds*, 3 Curt. 79; *Moore v. King*, 3 Curt. 243.

In *Matter of Look* (Supreme Ct.), 7 N. Y. Supp. 298, a will was subscribed by the testatrix in the presence of one of the attesting witnesses, and was declared by her, in the presence of both of them, to be her last will and testament. The two witnesses subscribed it as such at her request. The signature of the testatrix was plainly visible to the attesting witnesses on the face of the will. It was held a sufficient compliance with 2 *New York Rev. Stat.*, p. 63, § 40, requiring the subscription to be made by the testator in the presence of each of the attesting witnesses, or to be acknowledged by him to have been so made to each of them, and that there shall be at least two attesting witnesses, each of whom shall sign, etc.

In *Matter of Bedell's Will* (Surrogate

must subscribe in the presence of the testator, though not necessarily in the presence of each other.¹ In *South Carolina*, *Vermont*, *West Virginia*, and *Utah*, statutes exist which require the witnesses to attest and subscribe in the presence of the testator and of each other.² In the absence of such statutory requirement, it is sufficient if each witness attests and subscribes in the presence of the testator.³

Ct.), 12 N. Y. Supp. 96, it was held that the presence of the subscribing witnesses to a will, in the same room with the testatrix at the time she signed, and in positions where they can actually see the testatrix write if they choose to do so, is a sufficient compliance with 2 *New York Rev. Stat.*, marg. p. 63, § 40, subd. 2, which requires a will to be executed in the presence of each of the subscribing witnesses; and the fact that one of them refrained from looking at the testatrix while she was signing, for fear that it would make her nervous, will not make the will void.

In *Moore v. King*, 3 Curt. 243, a testator signed a codicil in the presence of a witness (his sister), who, at his desire, attested and subscribed it. On a subsequent day, when his sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying, in the presence of both parties, and pointing to his signature, "This is a codicil signed by myself and by my sister you see; you will oblige me if you will add your signature, two witnesses being necessary." That person then subscribed in the presence of the testator and his sister, the latter, who was standing by him, pointing to her signature, and saying: "There is my signature, you had better place yours underneath," she did not however re-subscribe. It was held that the instrument was not sufficiently attested, under 1 Vict., ch. 26, § 9, Sir H. Jenner Fust saying: "Under the Statute of Frauds it had been held that the witnesses need not be all present at the same time; the signature might be acknowledged to the three or more witnesses at different times; again, by the present act, all doubt on that point is removed, the witnesses must be present 'at the same time.' Now when I clearly find that the object of this act is to remove every possible doubt, thereby taking away all latitude and discretion in the interpretation—and that it expressly provides that the two witnesses, who are to be present at the

same time, shall attest and subscribe, can I hold the one may attest and subscribe on one day, and acknowledge his or her signature on a subsequent day? I am inclined to think that the act is not complied with unless both witnesses shall attest and subscribe after the testator's signature shall have been made and acknowledged to them when both are actually present at the same time. If the one witness has previously subscribed the paper, and merely points out her signature when the testator acknowledges his signature in her presence, and in that of the other witness, which latter witness alone then subscribes, that I hold not sufficient; I have no explanation why the first witness did not re-subscribe. The act says the testator may acknowledge his signature, but does not say that the witnesses may acknowledge their subscriptions."

In *Green v. Crain*, 12 Gratt. (Va.) 252, it was held that this construction was not required by the act, and the court refused to follow it in construing a similar statute.

1. 1 Jarm. on Wills (5th ed.) *110; *Faulds v. Jackson*, 6 No. Cas. Sup. 1; *In re Webb*, 1 Deane 1; 1 Jur. N. S. 1096; *In re Porter*, 9 Mackey (D. C.) 493.

2. *South Carolina Gen. Stat.* (1882), § 1854; *Vermont Rev. Laws* (1880), § 2042; *West Virginia Code* (1887), ch. 77, § 3; *Utah Comp. Laws* (1888), § 2651. See *Roberts v. Welch*, 46 Vt. 164.

Formerly similar statutes existed in *Connecticut* and *Virginia*, *Stimson's Am. Stat. Law*, § 2644; but this requirement has been omitted from later revisions, *Connecticut Gen. Stat.* (1888), § 538; *Virginia Code* (1887), § 2514. See, as to the earlier statute, *Green v. Crain*, 12 Gratt. (Va.) 252.

3. *Willis v. Mott*, 36 N. Y. 486; *Matter of Bogart*, 67 How. Pr. (N. Y. Surrogate Ct.) 313; *Hoysradt v. Kingman*, 22 N. Y. 372; *Barry v. Brown*, 22 Dem. (N. Y.) 309; *Conselyea v. Walker*, 2 Dem. (N. Y.) 117; *Matter of Potter's Will* (Surrogate Ct.), 12 N. Y. Supp. 105; *Flinn v. Owen*, 58 Ill.

o. WHAT IS SUBSCRIPTION — ANIMUS ATTESTANDI — SUBSCRIBING BY MARK, INITIAL, SEAL, STAMP — SUBSCRIBING BY ANOTHER.— Provided the witness puts his name to the paper *animo attestandi*¹ he may subscribe by making his mark,² or he

111; Webb v. Fleming, 30 Ga. 808; 76 Am. Dec. 675; Johnson v. Johnson, 106 Ind. 475; 55 Am. Rep. 762; Eelbeck v. Granberry, 2 Hayw. (N. Car.) 232; 2 Am. Dec. 624; Beane v. Yerby, 12 Gratt. (Va.) 239; Parramore v. Taylor, 11 Gratt. (Va.) 220; Welch v. Adams, 63 N. H. 344; 56 Am. Rep. 521; Dewey v. Dewey, 1 Met. (Mass.) 349; 35 Am. Dec. 367; Chase v. Kittridge, 11 Allen (Mass.) 49; 87 Am. Rep. 687; Hogan v. Grosvenor, 10 Met. (Mass.) 54; Ela v. Edwards, 16 Gray (Mass.) 91; Grubbs v. Marshall (Ky. 1890), 13 S. W. Rep. 447; Simmons v. Leonard, 91 Tenn. 183; Rogers v. Diamond, 13 Ark. 474; Smithe's Will, 52 Wis. 543; Cravens v. Faulconer, 28 Mo. 19; Grimm v. Tittman, 113 Mo. 56; Blanchard v. Blanchard, 32 Vt. 62; 43 Am. Dec. 414; Woodcock v. McDonald, 30 Ala. 411; Hoffman v. Hoffman, 26 Ala. 535; Moore v. Spies, 80 Ala. 130. See Moale v. Cutting, 59 Md. 510.

It was formerly so in *Connecticut*, Lane's Appeal, 57 Conn. 182; but the late revision, Gen. Stat. (1888), § 538, restores the law as laid down in Gaylor's Appeal, 43 Conn. 82.

In *Gilman v. Gilman*, 1 Redf. (N. Y.) 354, the desk whereat the testator and one of the subscribing witnesses sat when the testator subscribed the will, and the witness signed, was separated from the desks where the two other witnesses sat by a brick wall or column, four feet broad; but it did not appear that their positions rendered their seeing the testator impossible, or that the two compartments were considered as separate offices. The witness who had already subscribed requested the two other witnesses to witness the will, at the request and in the hearing of the testator, in the words: "Mr. Gilman (the testator) requests you to witness his will." The instrument (already signed by the testator and attested by one of the witnesses) was then signed by the two other witnesses, in the presence of, but without any further request or declaration by, the testator. It was held that the witnesses all signed substantially in the presence of each other, and in the presence of the testator, within the meaning of the statute.

29 C. of L.—15

1. Schouler on Wills (2d ed.), §§ 333, 334; *In re Sharman*, L. R., 1 P. & M. 661; Goods of Wilson, L. R., 1 P. & M. 269; Dunn v. Dunn, L. R., 1 P. & M. 277; Hindmarsh v. Carlton, 8 H. L. Cas. 160; Pryor v. Pryor, 29 L. J. P. 114; Goods of Duggins, 39 L. J. P. & M. 24; Goods of Maddock, L. R., 3 P. & M. 169; Peake v. Jenkins, 80 Va. 293; Fowler v. Stagner, 55 Tex. 393; Boone v. Lewis, 103 N. Car. 40; Moale v. Cutting, 59 Md. 510.

But if one who subscribed with another purpose in view also intended his signature to serve for attestation as well, the co-existence of the other purpose does not destroy the *animo attestandi*. Thus, in *Griffiths v. Griffiths*, L. R., 2 P. & M. 300, the deceased executed his will in the presence of two witnesses, who signed their names in his presence, one opposite the word "executors," the other opposite the word "witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name in that character. The court held that such person did not sign the will exclusively as executor; but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the execution was valid.

If the witnesses sign *animo attestandi*, the validity of the signature is not affected by the fact that it is above instead of below the attestation clause. *Moale v. Cutting*, 59 Md. 510.

2. *Addy v. Grix*, 8 Vesey Jr. 504; *Harrison v. Harrison*, 8 Ves. 185; Goods of Ashmore, 3 Curt. 756; *Morris v. Kniffin*, 37 Barb. (N. Y.) 336; *Campbell v. Logan*, 2 Bradf. (N. Y.) 90; *Meehan v. Rourke*, 2 Bradf. (N. Y.) 385; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144; 4 Am. Dec. 330; *Thompson v. Davitte*, 59 Ga. 472; *Den v. Mitton*, 12 N. J. L. 70; *Pridgen v. Pridgen*, 13 Ired. (N. Car.) 259; *Adams v. Chaplin*, 1 Hill Eq. (S. Car.) 266; *Davis v. Semmes*, 51 Ark. 48; *Garrett v. Heflin*, 98 Ala. 615. *Compare Ford v. Ford*, 7 Humph. (Tenn.) 92.

What Mark Is Sufficient.—There need be no peculiarity in the mark of an

may subscribe by affixing his initials to the paper,¹ and perhaps by a stamp or device if illiteracy or some other good reason may be given for it,² and if necessary, his hand may even be guided by another.³ A witness may subscribe by a descriptive title, as "servant to A,"⁴ or by a fictitious name,⁵ unless used with intent to personate another.⁶ A marksman's signature is not avoided by the fact that a wrong surname is written against it by mistake.⁷ But where a witness intended to write his full name, and wrote only his Christian name, being too feeble to complete it, the subscription was held insufficient.⁸ The better opinion is that subscription requires some manual act on the part of the witness, apparent on the paper, and hence, unlike the testator, he cannot allow another to write his name.⁹ A witness cannot subscribe by merely

attesting witness to a will. It is only necessary that he be able to recognize it and swear to it when called upon to testify. *Thompson v. Davitte*, 59 Ga. 472.

1. *In re Christian*, 2 Rob. 110; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144; 4 Am. Dec. 330; *Adams v. Chaplin*, 1 Hill Eq. (S. Car.) 266. Otherwise, if merely placed in the margin to identify alterations. *In re Martin*, 6 No. Cas. 604; 1 Rob. 712; *In re Cunningham*, 1 S. & S. 132.

2. Schouler on Wills (2d ed.), § 331.

3. *Harrison v. Elvin*, 3 Q. B. 117; 2 G. & D. 769; *In re First*, 4 Jur. N. S. 288. In *Re Kilcher*, 6 No. Cas. 15, it was doubted whether, if the witness could write, it was sufficient for him to touch the top of the pen while another wrote his name.

4. *Goods of Sperling*, 3 S. & T. 272.

5. *In re Olliver*, 2 Spinks 57.

6. *Pryor v. Pryor*, 29 L. J. P. 114.

7. *In re Ashmore*, 3 Curt. 756.

8. *Goods of Maddock*, L. R., 3 P. & M. 169. See *Winslow's Estate*, Myr. Prob. (Cal.) 124.

In *Goods of Maddock*, L. R., 3 P. & M. 170, Sir J. Hannen said: "I take it, as a rule, that if a witness makes any mark with an intention thereby to subscribe the will, it will be sufficient. The very imperfect signatures of witnesses and testators to be found in wills are illustrations of this rule. But the statute requires that a party shall intend, by what he does, to subscribe, and in this case I think the witness has failed to do what was necessary. . . . I have come to the conclusion that I must reject this application, being of opinion that the witness did not put the word 'Sam'l' on the paper with the intention at the

time that it should be a perfect subscription to the will. Having done something, he broke off without completing the intention. In the case of *In the Goods of Sperling*, 3 S. & T. 273, the witness did not sign his name, but merely the words 'Servant to Mr. Sperling'; and the court thought the attestation sufficient, by reason that the witness wrote them intending thereby an identification of himself as the person attesting. The act in this case is not sufficient to show such an intention, so as to amount to a subscription to the will."

9. 1 Jarm. on Wills (5th ed.) 82; *In re Leverington*, 11 Pro. Div. 80; *Goods of Duggins*, 39 L. J. P. 24; *In re White*, 2 No. Cas. 461; *Playne v. Scriven*, 1 Rob. 774; *Riley v. Riley*, 36 Ala. 496; *Horton v. Johnson*, 18 Ga. 396.

In some states it has been held that the name of the witness may be written by another at his request, in his presence, and in the presence of the testator. *Lord v. Lord*, 58 N. H. 7; 42 Am. Rep. 565; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102; *Jesse v. Parker*, 6 Gratt. (Va.) 57; 52 Am. Dec. 102. See *Pollock v. Glassell*, 2 Gratt. (Va.) 439; *Matter of Strong's Will* (Surrogate Ct.), 16 N. Y. Supp. 104. *Compare Ex p. Leroy*, 3 Bradf. (N. Y.) 227.

In *Derry's Estate*, Myr. Prob. (Cal.) 202, a witness to a will did not sign his name, being unable to write. The other witness, besides signing as such, wrote the name of his associate witness, and wrote his own name as witness to the associate's mark. It was held that this was a good witnessing of the will.

In *Simmons v. Leonard*, 91 Tenn. 183, it was held that where the signature of a witness to a will, who is unable to see to write, is written by a third

affixing his seal, any more than the testator can sign by so doing.¹

p. WHERE WITNESSES SHOULD SUBSCRIBE — POSITION OF SIGNATURE.—In *Arkansas, California, Dakota, Montana, New York* and *Utah*, it is expressly provided by statute that the witnesses shall subscribe at the end of the will.² In *Kentucky*, the same result is attained through judicial construction of a statute which merely requires the witnesses to attest and subscribe the will, and any unreasonable gap between the signature of the testator and that of the witnesses may avoid the subscription.³ In

person at the request of the witness, but is not accompanied by some mark indicating his adoption of the writer's act, the subscription is insufficient.

A witness who signs by a guided hand or mark, signs by his own act, and one witness may help another in this way. *Harrison v. Elim*, 3 Q. B. 117; *Lewis v. Lewis*, 2 S. & T. 153; *Campbell v. Logan*, 2 Bradf. (N. Y.) 96; *Meehan v. Rourke*, 2 Bradf. (N. Y.) 393.

1. *In re Byrd*, 3 Curt. 117.

2. *Stimson's Am. Stat. Law*, § 2644; *Arkansas Dig.*, § 6492; *California Civ. Code*, § 6276; *Dakota Civ. Code*, § 691; *Montana Prob. Code*, § 438; *New York Rev. Stat.* (7th ed.), pt. 2, ch. 6, tit. 1, § 40; *Utah Biennial Laws* (1884), ch. 44, pt. 1, tit. 1, § 6. See *Matter of Conway's Will*, 124 N. Y. 455; *Matter of Case*, 4 Dem. (N. Y.) 124.

Under 2 *New York Rev. Stat.* 63, § 40, the subscribing witnesses of a will, as well as the testator, must put their signatures at the end of the will. Where the signatures of the witnesses, apparently by mistake in turning over the paper, were put on a blank page in the middle of the will, it was held that the will was not duly executed. *Matter of Heady's Will*, 15 Abb. Pr. N. S. (N. Y. Surrogate Ct.) 211. But see *Hitchcock v. Thompson*, 6 Hun (N. Y.) 279.

Where the subscribing witnesses to a will subscribe their names at the end of a memorandum of erasures and interlineations, which is immediately below the attestation clause, this is a sufficient signature by them. The memorandum is merely a part of the certificate, which, taken together, states that the paper as altered was executed by the testator and attested by the witnesses. *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238.

In *Matter of Dayger*, 47 Hun (N. Y.) 127, the will was written upon four half sheets of note paper, which were fastened together, end to end, with

mucilage. Upon one side of this strip of paper the will was written and signed by the testator; all that side, except two lines between the signature and the bottom of the sheet, being used. It also appeared that after the completion of the body of the will, the person preparing it folded this strip of paper with one fold, and then turned it over and wrote the attestation clause upon the other side. After the will was thus prepared, it was signed by the testator in the presence of the attesting witnesses, and then signed by them at the end of the attestation clause. It was held that the witnesses signed at the end of the will within the meaning of that term as used in section 40 of 3 *New York Revised Statutes* (7th ed.), p. 2285.

An instrument is signed at the end thereof when nothing intervenes between the instrument and the subscription. Accordingly it was held that a codicil was signed by the subscribing witnesses at the end thereof, although there was a blank space of four inches between the signature of the testator and the commencement of the attestation clause. *Matter of Gilman*, 38 Barb. (N. Y.) 364.

In *Gilman v. Gilman*, 1 Redf. (N. Y.) 354, the will and codicil were written on one side of the page of several sheets, which were folded and tied together in the form of a book, leaving alternate pages blank. The codicil following the will ended at the bottom of a page, where the testator signed his name, leaving no room for the attestation clause and signatures of the witnesses. To carry out the method of writing only on one side of each sheet, the attestation clause and subscription of the witnesses were written on the second page after the testator's signature, leaving an entire blank page between them. It was held that this was a subscription "at the end" within the meaning of the statute.

3. *Soward v. Soward*, 1 Duv. (Ky.)

the absence of an express statutory provision, however, the general rule is that the witnesses need not sign in any particular place, provided it can be shown that they signed *animo attestandi*;¹ but

126. In this case a paper purporting to be a will was written on the first, and a little over half of the second page of a sheet of cap paper. The sheet was then folded in the form of a letter so as to inclose the half which contained the writing within the other half. It was sealed with wax, and was afterwards presented by the person who had subscribed it, to three persons, to be by them witnessed as his will; they, at his request, wrote their names on the outside as witnesses, neither of them seeing or knowing the contents. Their names were on the fourth page, or outside of the sheet. It was held that this was not a sufficient attestation under the statute. The court said: "It results from what has been said that a will, to be valid under the fifth section of the present statute of wills, must be in writing, with the name of the testator subscribed thereto, or, in other words, with the name of the testator written at the foot or end thereof. Such, in our judgment, is the clear meaning of the word subscribe as here used; and such was the effect intended to be given it by the makers of the law. The same section further provides that if the will be not wholly written by the testator, 'the subscription shall be made, or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator.' . . . They are to perform this act by writing their names beneath, or at the foot, or close, of the will. No other mode is prescribed, nor is there a case to be found in which a different mode was ever recognized as sufficient. . . . The witnesses did not 'subscribe the will with their names,' in any rational or allowable acceptance of the language. Their names were not written beneath, or at the foot or close of the paper, or anywhere near the place so designated. Between the paper, as subscribed by Soward, and the names of the witnesses, there is an intervening space of nearly two blank pages. So far from subscribing their names to the will, it may be said, with much more propriety and accuracy of speech, that they merely indorsed the paper enveloping and inclosing the will, without any accompanying writing or memorandum to

indicate the purpose of the indorsement, or showing any connection whatever between the indorsement and the will. If the paper had been inclosed in a sealed envelope, and the witnesses had written their names on the envelope, it would have been quite as near an approximation to the requirements of the statute. There would also have been just as little room to doubt the identity of the paper in the one case as in the other. And whilst it is true that one of the chief objects of requiring the subscription of the names of the witnesses is to insure identity, it is equally true that another object is to prevent fraudulent additions to, or alterations of, the instrument to be subscribed."

1. *Roberts v. Phillips*, 4 El. & Bl. 450; *Goods of Braddock*, 1 Pro. Div. 433; *In re Davis*, 3 Curt. 748; *Moale v. Cutting*, 59 Md. 510; *Potts v. Felton*, 70 Ind. 166; *Murray v. Murphy*, 39 Miss. 214; *Matter of Collins*, 5 Redf. (N. Y.) 20; *Jones v. Habersham*, 63 La. 146.

In *Goods of Streatley P.* (1891) 172, the attesting witnesses to a will signed their names in the margin of the first and second sheets, opposite to certain amendments. It was held following *Roberts v. Phillips*, 4 El. & Bl. 450, on proof that the witnesses signed with the intention of attesting the testator's signature, that this was a valid subscription within the requirements of section 9 of the Wills Act, and that the will might be admitted to probate.

In *Goods of Braddock*, 1 Pro. Div. 433, the witnesses to the execution of a codicil signed their names on the back of a will, to which that codicil was attached by a pin. There was evidence which satisfied the court that the will and codicil were pinned together at the time of the execution of the codicil, and that the witnesses intended by their subscription on the back of the will, to attest the signature of the testatrix at the foot of the codicil. It was held that the codicil was entitled to probate. Sir J. Hannen said: "The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the court that the witnesses, in writing their names, had the intention of attesting. But the attestation, if not on the same sheet of paper as the signature of the testator,

in determining whether they did so sign, the position of their signatures may be most important.¹

9. SUBSCRIBING ON DIFFERENT PAPER FROM WILL.—The witnesses may subscribe upon a different sheet of paper from that which contains the testator's signature, provided the two sheets are physically connected at the time of subscription. No particular mode of connection is prescribed by law, and hence fastening by tape, eyelets, mucilage, or even a pin, seems unobjectionable.²

7. ATTESTATION OF WILL CONSISTING OF SEVERAL SHEETS—ADDITIONS SUBSEQUENT TO ATTESTATION.—Under the Statute

must be on a paper physically connected with that sheet. No particular mode of affixing one piece of paper to another is prescribed by law, and I cannot say that the fastening of two sheets of paper together by a pin is an insufficient mode of connection, or that it is less effectual than the lawyer's mode of fastening by a tape. Here I am satisfied by the evidence that the papers were connected together, and that, in writing their names on the back of the original will, the witnesses intended to attest the signature of the testatrix at the foot of the codicil."

But where the execution of his last will, by the testator, having been attested by but one witness, such testator afterward, at a different place, and in the absence of such witness, executed an indorsement upon the back of such will, reading, "The within is the basis on which I desire to have my affairs disposed of, should no other will be made by me," which indorsement was attested by another witness, to whom its contents had been made known, and the signatures to such will exhibited, by such testator. It was held in an action to contest the validity and resist the probate of such will, that it had not been executed according to law and was therefore invalid. It was held also, that it could not be established by parol evidence, that the signature of such witness, to such indorsement, was intended by the testator, and executed by such witness, as an attesting of such will. *Patterson v. Ransom*, 55 Ind. 402.

In *Franks v. Chapman*, 64 Tex. 159, the witnesses to the will each wrote his name where it occurred in the body of the will, and in the concluding sentence thereof, as follows: "And now, in the presence of H. L. Harrison, G. W. M. Duck, W. M. Smith, who I have requested to act as witnesses, I declare the writing contained in the foregoing

ten pages my last will and testament." (Signed) "G. W. Chapman." It was held that the signatures of the witnesses were sufficient, and that it was of no importance that the witnesses who signed the will as such at the request and in the presence of the testator, signed their names in the attestation clause and not after it.

1. *Goods of Wilson*, L. R., 1 P. & M. 269. See *Patterson v. Ransom*, 55 Ind. 402.

Where, therefore, a will was written on one page of a foolscap sheet of paper, and the testator's signature appeared at the end of that page, with the words—Witness, William Hatton, and the names of three persons were subscribed, under a memorandum not testamentary, at the top of the second page of the same sheet, the court came to the conclusion that, from the position of the three names and the circumstances of the case, they were not placed there for the purpose of attesting the will, and therefore pronounced the execution to be invalid. *Goods of Wilson*, L. R., 1 P. & M. 269. Sir J. P. Wilde said: "It is said that the position of the names of the witnesses is immaterial, provided they are in such a position as to show that they were placed there for the purpose of attesting the will. In considering whether persons have subscribed a will as attesting witnesses the position of the signatures may be most material. If they are written under an attestation clause, no difficulty arises, but if they are placed elsewhere, their position may be important, because if they are placed under a particular clause or statement, the inference is that *prima facie* they were put there to give effect or to testify to the words of the clause or statement."

2. *Schouler on Wills* (2d ed.), § 346; *Goods of Braddock*, 1 Pro. Div.

of Frauds, and similar statutes in the *United States*, it has been held that if a will be written on several disconnected sheets, each sheet need not be shown the witnesses, and the whole is well executed by a single subscription provided all the sheets were in the room,¹ and, in the absence of proof to the contrary, such is the presumption.² Sheets which are bound together and constitute the will at the testator's death, are presumed to have been so bound together at the time of attestation.³ Unattested provisions inserted by the testator after the witnesses have subscribed are not entitled to probate.⁴

5. NOTING INTERLINEATIONS.—To avoid question, interlineations made before execution should be noted in the attestation clause, although the failure to do so does not prevent probate.⁵

6. CERTIFICATE OF ACKNOWLEDGMENT.—A certificate of acknowledgment is superfluous and useless, but may have the effect of converting the magistrate or notary public who takes the acknowledgment, into a subscribing witness.⁶

433; *Matter of Collins*, 5 Redf. (N. Y.) 20.

1. *Bond v. Sewell*, 3 Burr. 1773; *Ela v. Edwards*, 16 Gray (Mass.) 99; *Gass v. Gass*, 3 Humph. (Tenn.) 278; *Wickoff's Appeal*, 15 Pa. St. 281; 53 Am. Dec. 597; *Jones v. Habersham*, 63 Ga. 146. See *Tonnele v. Hall*, 4 N. Y. 141.

2. 1 Wms. on Exrs. (9th Eng. ed.) 138.

3. *Rees v. Rees*, L. R., 3 P. & M. 86; *Gregory v. Queen's Proctor*, 4 No. Cas. 620; *Marsh v. Marsh*, 1 S. & T. 528. See *Ela v. Edwards*, 16 Gray (Mass.) 91; *Jones v. Habersham*, 63 Ga. 146.

The will of the deceased had been ingrossed by a law stationer on fifteen brief sheets of paper, consecutively numbered. On the sixteenth sheet the testator had written a codicil, and on the eighteenth and last a schedule of the property referred to in the will. On the death of the testator, it was found that the original fourth sheet had been removed and placed loose in his desk, and that the original seventeenth sheet had been used by the testator in substitution of the fourth. The several sheets were tied together with tape. It was held that the legal presumption that papers bound together and constituting the will, as found at testator's death, were so bound together at the time of execution and attestation was not rebutted by the circumstances of the case. *Rees v. Rees*, L. R., 3 P. & M. 84.

4. *Treloar v. Lean*, 14 Pro. Div. 49; *Stevens v. Stevens*, 6 Dem. (N. Y.)

262; 3 N. Y. Supp. 131. See *Dyer v. Erving*, 2 Dem. (N. Y.) 160; *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544.

5. *Schouler on Wills* (2d ed.), § 334; *Wright v. Wright*, 5 Ind. 389.

In *Matter of Vorhees*, 6 Dem. (N. Y.) 162, the testator, who left two sons and three daughters surviving him, gave a fifth part of his estate to each of four of his children by name. In the clause providing for his children was also a bequest to "my daughter Ariadna and her heirs one-fifth of my real and personal estate." Ariadna was the fifth child who was not elsewhere mentioned. It was held that the interlineation should be taken as part of the will, though not noted on the foot of it.

In *Matter of Wilcox's Will* (Surrogate Ct.), 20 N. Y. Supp. 131, it was held that where a will is altered after execution by interlineation or erasure, if the original language can be ascertained, the will may be admitted to probate and its provisions carried out in disregard of the alteration.

6. *Murray v. Murphy*, 39 Miss. 214. See *Franks v. Chapman*, 64 Tex. 159; *Payne v. Payne*, 54 Ark. 415.

In *Murray v. Murphy*, 39 Miss. 220, Handy, J., said: "The certificate was intended and signed by Grafton (the magistrate) as an attestation to the execution of the will; and the two other witnesses also signed their names to it for the same purpose, and all in the presence of the testator. Though the certificate is useless, yet the signature of Grafton as a

u. RE-EXECUTION.—Where a first attempt at execution fails, through some informality, care should be taken to perform the solemnity *de novo*, and not merely to piece out the imperfections of the first attempt.¹ Thus, a witness who has served before should resubscribe, for his acknowledgment of his signature is insufficient.²

v. QUALIFICATIONS OF ATTESTING WITNESSES—(1) "*Credible*" *Witnesses Construed to Mean "Competent" Witnesses*.—The term credible witnesses, as used in the Statute of Frauds relative to attesting witnesses to wills, means competent witnesses.³

(2) *Who Are Competent Attesting Witnesses*.—An attesting witness to a will, in order to possess the requisite competency, should be of such character and have such qualifications as would render his testimony admissible on occasions when the testimony of witnesses is ordinarily received.⁴

subscribing witness, which was the essential thing and that which was intended, is valid. The superfluous certificate cannot invalidate the regular signature, for *utile per inutile non vitiatur*. And as to the place of signature of the attesting witnesses, all that was necessary for that purpose was, that the witnesses should sign their names upon the paper, in the presence of the testator, in testimony of the fact that it was the paper signed and published by him as his will.⁵

1. In states in which witnesses are not required to sign in the presence of each other (see *supra*, this title, *Attestation and Subscription—Simultaneous Presence of Witnesses*) the testator may acknowledge his signature before each separately.

2. *Attestation—Subscribing in Presence of Testator—Acknowledgment of Previous Signature*.—Going over the signature with a dry pen, or adding the date to the subscription, merely amounts to an acknowledgment. *Casement v. Fulton*, 5 Moo. P. C. 130; *Goods of Maddock*, L. R., 3 P. & M. 169; *Hindmarsh v. Carlton*, 8 H. L. Cas. 160.

3. *Schouler on Wills* (2d ed.), §§ 350, 351, citing *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 155; *Haven v. Hilliard*, 23 Pick. (Mass.) 10; *Sullivan v. Sullivan*, 106 Mass. 474; *Eustis v. Parker*, 1 N. H. 273; *Rucker v. Lambdin*, 12 Smed. & M. (Miss.) 230; *Hall v. Hall*, 18 Ga. 40; *Lord v. Lord*, 58 N. H. 7; 42 Am. Rep. 565; *Warren v. Baxter*, 48 Me. 193. See *Fuller v. Fuller*, 83 Ky. 345; *In re Noble's Estate*, 22 Ill. App. 535; *In re Noble's Will*, 124 Ill. 266; *Comb's Appeal*, 105 Pa. St. 158; *Simmons v.*

Leonard, 91 Tenn. 183; *Vrooman v. Powers*, 47 Ohio St. 191; *Nixon v. Armstrong*, 38 Tex. 296; *Brown v. Pridgen*, 56 Tex. 124; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350; *Mars-ton, Petitioner*, 79 Me. 26; *Amory v. Fellowes*, 5 Mass. 219; *Sears v. Dillingham*, 12 Mass. 358; *Smalley v. Smalley*, 70 Me. 548; *Bacon v. Bacon*, 17 Pick. (Mass.) 134.

4. See 4 Min. Inst. (2d ed.) 90. *In re Holt's Will* (Minn. 1893), 57 N. W. Rep. 219.

In *Hitchcock v. Shaw*, 160 Mass. 140, it was held that the provision of the Public Statutes, ch. 169, § 18, that no person of sufficient understanding should be excluded from giving evidence as a witness, by the express provision of section 21, does not apply to the attesting witnesses, to a will; the competency of such witness is to be determined by the rules of the common law. See also *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 155; *Sullivan v. Sullivan*, 106 Mass. 474.

In *Robinson v. Savage* (Ill. 1888), 15 N. E. Rep. 850, *Shope J.*, in delivering the opinion said: "Credible witnesses," as used in the statute relating to wills, has been construed both in *England* and this country to mean competent witnesses; that is, such persons are not legally disqualified from testifying in courts of justice, by reason of mental incapacity, interest, or the commission of crime, or other cause excluding them from testifying generally, or rendering them incompetent in respect of the particular subject-matter or in the particular suit."

In *Carlton v. Carlton*, 40 N. H.

(a) **Examples—Children as Attesting Witnesses.**—The age of the attesting witness is only important to be considered with reference to the requisite degree of intelligence necessary to competence in the witness. As regards children, no arbitrary and conclusive standard of years can be established, as the degree of understanding

17, Doe, J., respecting the qualifications of attesting witnesses to wills, said: "The Statute of Wills requires 'three or more credible witnesses,' and the well settled construction of this and other similar statutes is, that the witnesses should be competent, or not disqualified, at the time of the attestation of the will, to be sworn and to testify in a court of justice. The argument that attesting witnesses are regarded in law as persons placed around the testator to protect him from fraud, and to judge of his capacity, and are permitted to testify as to the opinions they formed of his capacity, and that it is contrary to the policy of the law to allow so important a trust to be exercised by children, tends to show that, on account of their peculiar rights and duties, they should possess some other qualifications than those which entitle persons to be sworn as witnesses in court; and it might lead to the conclusion that they should be experts in questions of insanity, a result that would often prevent the making of wills. Undoubtedly, the statute was intended to guard against fraud, and to provide means of proving the mental condition of the testator. And one of the objects of requiring the presence of witnesses being to give them an opportunity to ascertain and judge of his capacity, it would seem necessarily to follow that they should be allowed to testify the opinions which they were specially appointed to form. But whatever they are required or authorized to do, they are not required to have any other qualifications than those of ordinary testifying witnesses."

In *Windham v. Chetwynd*, 1 Burr. 421, a distinction is made by Lord Mansfield, between interest as a disqualification in the case of wills, and in other cases. He said: "Nice objections of a remote interest, which could not be paid or released, though they held in other cases, were not allowed to disqualify a witness in the case of a will; as parishioners might prove a devise to the use of the poor of the parish forever. *Townsend v. Row*, 2 Sid. 109."

Women as Attesting Witnesses—*Louisiana.*—In *Roth's Succession*, 31 La.

Ann. 315, it was held that women were absolutely incapable of acting as valid attesting witnesses to testaments, but that they might be competent witnesses to prove the handwriting of the testator upon the probate of a will when that fact has to be established. Manning, J., who delivered the opinion of the court in this case, said: "The laws touching the capacity of witnesses underwent a sweeping alteration in 1867 (Sess. Acts, p. 143) and again in 1868 (Sess. Acts, p. 269). The act of this last year was incorporated bodily in the Civil Code in 1870 and was substituted to article 2260 of that code, new number, 2281. It enacts that the competent witness of any covenant or fact, whatever it may be, in civil matters, is a person of proper understanding. The same code contains the prohibition of women being witnesses to a will, and the two articles must be construed together or if irreconcilable and naturally repugnant, when the last alone must stand. And they are not irreconcilable."

Witnesses Who Are Deaf, Dumb, or Blind.—In *Louisiana*, it seems that persons who are deaf, dumb, or blind have been held absolutely incompetent to act as valid attesting witnesses to wills. *Stimson's Am. Stat. Law* 356. However, the law does not exclude, as attesting witnesses to wills, those whose senses of sight or hearing are merely impaired; but such an infirmity might be taken into consideration respecting the credibility and effect of the testimony of such a witness. *Major v. Esneault*, 7 La. Ann. 51.

Person Convicted of Forgery.—The fact that one of the subscribing witnesses to a will has been convicted of forgery does not render him incompetent, as a witness, within the meaning of the Statute of Wills requiring the attestation of all wills by "two or more credible witnesses;" evidence of a conviction for crime being admissible merely to impeach the credibility of a witness, and not to disqualify him. *Robinson v. Savage* (Ill. 1888), 15 N. E. Rep. 850.

which is the test of competency is not developed in all at the same age. It has been held, however, that proof that an attesting witness was only fourteen years of age at the date of the attestation, would make a *prima facie* case against the due execution of the will, overcoming the presumption of competency which exists with respect to witnesses, until proof is adduced to the contrary.¹

(b) *Legatees and Devisees*.—Interest being a disqualification at common law, devisees and legatees under a will are regarded as incompetent attesting witnesses thereto, apart from statutory enactments to the contrary.² This interest, however, to operate as a disqual-

1. See *Carlton v. Carlton*, 40 N. H. 19. In *Jones v. Tebbetts*, 57 Me. 574, "A minor," said the court, "may be an attesting witness thereto, precisely to the extent that he is a witness generally." In this case one of the attesting witnesses was twenty years of age, who was held to be a competent witness to the execution of the will.

In *Louisiana*, women of what age soever have been held absolutely incompetent to witness testaments, and their male children who have not attained the age of sixteen years complete have been declared incapable. *Stimson's Am. Stat. Law* 356.

Prescribed Age by Statute.—Some statutes, however, prescribe the age below which a person may not be a valid attesting witness. Thus, article 4859, *Sayles Texas Civil Statutes*, provides: "Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator, or by some other person, by his direction and in his presence, and shall, if not wholly written by himself, be attested by two or more credible witnesses, above the age of fourteen years, subscribing their names thereto in the presence of the testator."

2. *Trotters v. Winchester*, 1 Mo. 413; 4 Min. Inst. (2d ed.) 92. See also *Haven v. Hilliard*, 23 Pick. (Mass.) 10; *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 157; *Fowler v. Stagner*, 55 Tex. 397; *Nixon v. Armstrong*, 38 Tex. 296; *Frink v. Pond*, 46 N. H. 125; *Lord v. Lord*, 58 N. H. 7; *Clark v. Hoskins*, 6 Conn. 106.

Louisiana.—In *Hall's Succession*, 28 La. Ann. 57, it was held that a legatee cannot be an attesting witness to a will, but he is not incompetent to be called as a witness in proceedings to establish a will, or to testify to any material fact which he may

know. *Morvant's Succession*, 45 La. Ann. 207.

In many of the states the common-law disqualification of witnesses generally, on the ground of interest, has been removed, but, by express exclusion of statute, the law as regards attesting witnesses is allowed to remain unchanged. *Sullivan v. Sullivan*, 106 Mass. 474; *Jones v. Larrabee*, 47 Me. 478. But by statute in *Maryland*, a person interested is not an incompetent witness to a will. *Estep v. Morris*, 38 Md. 417. And see *Kumpe v. Coons*, 63 Ala. 448, where it was held that this is the law in *Alabama*.

Legacy Avoided and Witness Rendered Competent by Statute.—But the law as stated in the text has been greatly modified both in *England* and in nearly all of the states, by statutes, to the effect that a legacy or devise to an attesting witness, without whose testimony the will may not be otherwise proved, shall be void, but the competency of the attesting witness shall be unaffected. Stat. 25 Geo. II., ch. 6; 1 Jarm. on Wills (5th ed.) 71, 72; *Tempest v. Tempest*, 2 K. & J. 635; *Denne v. Wood*, 4 L. J. Ch. 57; *Elliot v. Brent*, 6 Mackey (D. C.) 98; *Croft v. Croft*, 4 Gratt. (Va.) 105; *Miltenerberger v. Miltenerberger*, 78 Mo. 27; *Grimm v. Tittman*, 113 Mo. 56; *Clark v. Clark*, 54 Vt. 489; *Clark v. Hoskins*, 6 Conn. 106; *Fowler v. Stagner*, 55 Tex. 398; *Nixon v. Armstrong*, 38 Tex. 296. Compare *Boone v. Lewis*, 103 N. Car. 40.

In *Cornwell v. Wooley*, 1 Abb. App. Dec. (N. Y.) 441, it was held that a beneficial provision in a will in favor of the subscribing witnesses, is not rendered void by 2 *New York Rev. Stat.* 65, § 50, even where such witness was examined as such on the probate, if his examination was unnecessary—*e. g.*, where he was a non-resident, and

ification, must be an immediate, certain, and vested interest.¹ Thus, though an attesting witness to a will, by which the interest of a fund was given to a town for the maintenance of a public library, was a taxpayer and inhabitant of the town, such circumstances were held not to impair his competency on the ground of interest.² The policy of the rule excluding devisees and legatees

the will was sufficiently proved by the testimony of the other witnesses.

In *Texas*, the statute requiring the attestation of a will by two or more credible witnesses, and also one declaring a legacy or devise to an attesting witness, if the will cannot be otherwise proved void, and the witness not only allowed but compelled to testify, have been held to simply establish the competency of such witness to testify. Such witness is not, therefore, considered to have been a competent attesting witness, and unless the will is attested by a sufficient number of competent witnesses at the time of the attestation, the whole will is invalid. *Fowler v. Stagner*, 55 Tex. 398. Compare *Nixon v. Armstrong*, 38 Tex. 296.

In *Elliot v. Brent*, 6 Mackey (D. C.) 98, it was held that the statute of 25 Geo. II., ch. 6, § 11, declaring void any legacy or devise to an attesting witness to a will, is not changed, as to its effect upon the legacy or devise, by *District of Columbia* Rev. Stat., § 876, providing that parties to any suit, or those in whose behalf it is brought or defended, as well as all persons interested in it, shall, with certain exceptions, be competent to testify therein. See *Nixon v. Armstrong*, 38 Tex. 298; *Miltenerberger v. Miltenerberger*, 78 Mo. 27.

In some of the states a legatee is rendered competent by statute, if he renounces or refuses to accept his legacy. *Stimson's Am. Stat. Law*, § 2650; *Nixon v. Armstrong*, 38 Tex. 296; *Grimm v. Tittman*, 113 Mo. 56; *Miltenerberger v. Miltenerberger*, 78 Mo. 27.

1. *Warren v. Baxter*, 48 Me. 193; *Lord v. Lord*, 58 N. H. 7; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350.

In *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, *Wilde, J.*, said: "An interest to disqualify a witness, must be a present vested interest and not uncertain and contingent. And where the interest is of a doubtful nature the objection goes to the credit, and not to the competency, of the witness."

Heir of Devisee.—Though an attesting witness to a will would be the devisee's heir upon the latter's death

intestate after the death of the testatrix, he is not interested in the devise within the meaning of the Code of *Tennessee*, § 3003, which provides that wills shall be subscribed by at least two witnesses, neither of whom shall be interested in the devise. *Maxwell v. Hill*, 89 Tenn. 584.

Also, where an attesting witness to a will was not only a son of the principal devisee, but received a deed of law from the testator at the time of the execution of the will, he was held a competent witness. *Nash v. Reed*, 46 Me. 168.

Son of Legatee.—Under *Maine* Rev. Stat. (1857), ch. 74, § 1, providing that a person of sound mind, etc., may dispose of his real and personal estate by will, "to be witnessed by three credible attesting witnesses, not beneficially interested, etc."—the minor son of a legatee, being executor of the will, is a competent witness to the execution of the instrument. *Jones v. Tebbetts*, 57 Me. 572.

Creditors—Where the Debts Are Charged by Will.—In *England* and in most of the states there are statutes providing that creditors whose debts are charged by a will or codicil, shall nevertheless be good subscribing witnesses. *Stat. 25 Geo. II.*, ch. 6, § 2; *Act 1 Vict.*, ch. 26, § 16; *Stimson's Am. Stat. Law*, § 2648.

Devisees of land in remainder are under *Alabama* Code (1876), § 3058, competent witnesses to attest the will of their devisor. *Kumpe v. Coons*, 63 Ala. 448.

A devise of real estate for various special purposes, or a gift of personal estate in trust, is not forfeited, under 2 *New York* Rev. Stat. 65, by the devisee or legatee becoming a subscribing witness. *Pruyn v. Brinkerhoff*, 57 Barb. (N. Y.) 176.

2. *Hitchcock v. Shaw*, 160 Mass. 140. For similar decisions supporting the text see *Cornwell v. Isham*, 1 Day (Conn.) 35; *Jones v. Habersham*, 63 Ga. 146; *Loring v. Park*, 7 Gray (Mass.) 42; *Northampton v. Smith*, 11 Met. (Mass.) 390; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350; *Haven v. Hilliard*, 23 Pick. (Mass.) 10; *Marston, Petitioner*, 79 Me. 25;

as attesting witnesses to wills on the ground of interest, has been held to warrant the position that a devisee or legatee may not be allowed to subscribe the name of some other person at such person's request, on account of the illiteracy or physical disability of the latter, though the person who desires to attest by mark may be a valid attesting witness, whose name, written by some disinterested person, would be sufficient.¹ It has been held, however,

Grimm v. Tittman, 113 Mo. 56; *Eustis v. Parker*, 1 N. H. 273; *Warren v. Baxter*, 48 Me. 193; *Comb's Appeal*, 105 Pa. St. 155. Compare *Starr v. Starr*, 2 Root (Conn.) 303.

In *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, it appeared that a large estate was given by will to trustees for the use and benefit of the inhabitants of South Boston, one-half of the income to be applied to the support and maintenance of a certain religious association in South Boston, and the other half to be appropriated to the purpose of establishing a public school in the same place. The attesting witnesses were all inhabitants of South Boston, but it was held that they were competent witnesses. The grounds of the decision were that the payment of taxes for the support of public worship was voluntary and that, while public schools were supported by a general tax on the inhabitants, the court did not know, nor could it be ascertained, that the gift in question would have the effect of reducing the school tax. *Wilde, J.*, said: "No expected participation of the benefits of a public benefaction not affecting property, has ever been held a valid objection against the competency of a witness. It is clear, therefore, that, unless the witnesses are to be relieved from their taxes by this donation, they are competent. It is possible, though not probable, that they may be thus relieved, but neither possibilities nor even probabilities are sufficient to disqualify a witness. As to ministerial taxes, they are paid voluntarily, or rather the liability to pay them is voluntarily assumed, and it may at will be terminated. And as to school taxes, it does not appear, nor is it probable, that they have been or ever will be diminished by this donation. By improving the means of education, witnesses' children and their posterity may be benefited; but this confers no interest on the witnesses. If the whole estate had been given absolutely to their children, still the witnesses would be competent."

In *Northampton v. Smith*, 11 Met. (Mass.) 390, it was held that a bequest to trustees for the benefit of indigent persons in certain towns, did not make a judge of probate, who was an inhabitant in one of the towns, interested in the probate of the will which contained the bequest, so as to authorize him to transfer the case to a probate court of another county. In delivering the opinion of the court, *Shaw, C. J.*, said: "It is like the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent."

Where a will makes bequests for the benefit of the poor of a county, or to a church and other societies for charitable uses, the fact that the subscribing witnesses are taxpayers in said county, or members of said church and societies, does not render them incompetent. *Jones v. Habersham*, 63 Ga. 146.

In *Loring v. Park*, 7 Gray (Mass.) 42, property was given by a will to the trustees of Groton Ministerial Fund, a corporation in trust for the first parish in Groton. An attesting witness to the will was one of the trustees and a member of the parish. It was held that he was nevertheless a competent witness. See *Haven v. Hilliard*, 23 Pick. (Mass.) 10.

The fact that a person is a member of a particular church and society, worshipping in a certain meeting house, or that he owns a pew in that meeting house, does not of itself disqualify him as a witness to a will containing a legacy to that church and society. *Warren v. Baxter*, 48 Me. 193.

Likewise, one may be an employee in a charitable institution to which a will gives property, and yet be a "disinterested" witness to the will. *Comb's Appeal*, 105 Pa. St. 155.

1. See, in this connection, *Simmons v. Leonard*, 91 Tenn. 183.

that a devisee may, by his own attestation, authenticate the mark of an attesting witness who thus attested the instrument.¹

(c) **Husband and Wife.**—By the common law, the husband cannot be a competent attesting witness to the wife's will, nor the wife to the husband's will.² Nor, apart from the statutory enactments to that effect, is an attesting witness competent where the husband or wife of such witness takes a devise or legacy under the will.³

(d) **Executors.**—Under the English Statute of Victoria, it is expressly provided that an executor shall be a competent witness to a will.⁴ And this rule has been adopted in most of the states, an executor's right to commissions being held not to be such an interest as to disqualify him as an attesting witness.⁵

1. *Boone v. Lewis*, 103 N. Car. 40. In this case it did not appear that the attesting witness to the mark had signed the name of the illiterate attesting witness to the will, nor was this point raised or commented upon.

2. *Pease v. Allis*, 110 Mass. 157; *Dickinson v. Dickinson*, 61 Pa. St. 401.

In *Dickinson v. Dickinson*, 61 Pa. St. 401, it was held that the provision of the *Pennsylvania* Act of 1848, that the husband shall not be the subscribing witness to his wife's will, is a provision for the proof of the instrument, and not a prohibition against his presence at the execution thereof.

3. *Hatfield v. Thorp*, 5 B. & Ald. 589; *Sullivan v. Sullivan*, 106 Mass. 474; *Fisher v. Spence* (Ill. 1894), 37 N. E. Rep. 314; *Giddings v. Turgeon*, 58 Vt. 106. Compare *Hawkins v. Hawkins*, 54 Iowa 443; *Bates v. Officer*, 70 Iowa 343; *In re Holt's Will* (Minn. 1893), 57 N. W. Rep. 219.

Devises Annulled by Statute.—Under statute providing that "all beneficial devises, legacies, and gifts, made or given in any will to a subscribing witness, shall be wholly void unless there are three other attesting witnesses to the same," it has been held in some states that a devise to a husband where the wife is an attesting witness is void, the devise to the husband being considered a beneficial devise to the wife, and accordingly the wife is left a competent attesting witness to the will. The same construction is given where the wife is the devisee and the husband is the attesting witness. *Jackson v. Woods*, 1 Johns. Cas. (N. Y.) 163; *Jackson v. Durland*, 2 Johns. Cas. (N. Y.) 314; *Winslow v. Kimball*, 25 Me. 493. But see *In re Holt's Will* (Minn. 1893); 57 N. W. Rep. 219; *Fisher v. Spence* (Ill. 1894), 37 N. E. Rep. 314; *Fortune v. Buck*,

23 Conn. 1; *Giddings v. Turgeon*, 58 Vt. 106; *Sullivan v. Sullivan*, 106 Mass. 474.

In *England*, by Act of 1 Vict., ch. 26, § 15, gifts, legacies, and devises to the husband or wife of the attesting witness are expressly avoided. There is a similar provision in *Vermont*, by act of Nov. 25, 1894. *Giddings v. Turgeon*, 58 Vt. 106.

4. Act of 1 Vict., ch. 26, § 17. An executor who is entitled to a legacy in that character may be an admissible witness, if he releases his legacy. 2 Curt. 72. And see *Bettison v. Bromley*, 12 East 250. Compare *Allison v. Allison*, 4 Hawks (N. Car.) 141.

5. *Meyer v. Fogg*, 7 Fla. 292; *Wyman v. Symmes*, 10 Allen (Mass.) 153; *Murphy v. Murphy*, 24 Mo. 526; *Reeve v. Crosby*, 3 Redf. (N. Y.) 74; *Henderson v. Kenner*, 1 Rich. (S. Car.) 474; *Overton v. Overton*, 4 Dev. & B. (N. Car.) 107; *Noble v. Burnett*, 10 Rich. (S. Car.) 505; *Richardson v. Richardson*, 35 Vt. 238; *Stewart v. Harriman*, 56 N. H. 25; *Sears v. Dillingham*, 12 Mass. 358; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *In re Jordan's Estate*, 161 Pa. St. 393. Compare *Morton v. Ingram*, 11 Ired. (N. Car.) 368; *Tucker v. Tucker*, 5 Ired. (N. Car.) 161; *Taylor v. Taylor*, 1 Rich. (S. Car.) 531; *Jones v. Larrabee*, 47 Me. 474; *Snyder v. Bull*, 17 Pa. St. 54.

In *Jones v. Larrabee*, 47 Me. 474, it was held that an executor named in a will, who has declined the trust, is a competent attesting witness. See *Snyder v. Bull*, 17 Pa. St. 54.

In *Morton v. Ingram*, 11 Ired. (N. Car.) 368, it was held that an executor's right to commissions is such an interest as disqualifies a witness, and that an executor of a will of personality is not a competent witness of a will, although

(e) **Heir.**—An heir is a competent subscribing witness when testifying against his own interest. Thus, he may testify in support of a will by which he is disinherited.¹ And it has been also held that he is a competent witness to a will under which he takes a legacy less than his interest would have been without the will.²

(f) **Judge of Probate.**—The judge of probate may be a valid attesting witness to a will, notwithstanding the fact that the will is to be proved before him.³

he, after the attestation, releases all interest from the will.

In *Wilkins v. Taylor*, 8 Rich. Eq. (S. Car.) 291, it was held that while it was not denied that an executor might be a witness to a will devising real estate, he could not be an attesting witness to a will of personalty. See *Mathis v. Guffin*, 8 Rich. Eq. (S. Car.) 79.

In *Scotland*, where the executor was one of the attesting witnesses, it was held that the testament was null as to his appointment, though it would stand in other respects. Tait on Ev. 84.

Compensation in Addition to Commissions.—In *Pruyn v. Brinkerhoff*, 7 Abb. Pr. N. S. (N. Y. Supreme Ct.) 400, it was held that a gift to an executor of a sum of money as compensation for services in addition to commissions, or the appointment of an executor as legatee in trust for the purposes of the will, is not a beneficial provision which is forfeited by his acting as a witness.

Wife of Executor.—In *Piper v. Moulton*, 72 Me. 155, it was held that the wife of an executor, not beneficially interested under the will, is a credible attesting witness thereto. See *Stewart v. Harriman*, 56 N. H. 25.

1. *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 155; *Smalley v. Smalley*, 70 Me. 545; *Allen v. Allen*, 2 Overt. (Tenn.) 172. See also *Old v. Old*, 4 Dev. (N. Car.) 500.

In *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 157, the court, quoting 1 Greenl. on Ev. (14th ed.), § 410, said that a witness may always be adduced to testify against his interest. Hence, where the heir of the testatrix was an attesting witness to a will which made no provision for him, but on the other hand disposed of property which would have come to him had no will been made, it was held that he was a competent attesting witness.

2. In *Smalley v. Smalley*, 70 Me. 545, it was held that where an heir at law was given one dollar under a will, his interest as heir being of greater

value, he was a competent attesting witness to said will.

Under Statute.—In most of the states there are statutes providing that where a devise or bequest is given to a person who would inherit under the laws of distribution, the will is not invalidated nor the witness rendered incompetent, but such witness will be entitled to only such share of the testator's estate as he would have inherited. *Stimson's Am. Stat. Law*, § 2651; *Grimm v. Tittman*, 113 Mo. 56. Compare *Clark v. Clark*, 54 Vt. 489; *Maxwell v. Hill*, 89 Tenn. 594.

3. In *M'Lean v. Barnard*, 1 Root (Conn.) 462, it was objected that one of the three subscribing witnesses to a will was, at the time of subscribing his name to the will, and still remained, the judge of probate for the district in which the testator lived, and to whom belonged the probate of the will; but on appeal it was held that the objection was insufficient.

Where an attesting witness to a will was also judge of probate as well as executor, the contention was made that no one person could combine the characters of executor to carry into effect, witness to prove the execution, and judge to approve it. It was proved, however, that before probate the judge had divested himself of the character of executor by resignation, leaving merely the combination of witness and probate judge which was held to be no material impropriety. *Ford's Case*, 2 Root (Conn.) 232.

If one of the three attesting witnesses to a will be otherwise a competent witness, he is not rendered incompetent because he was at the time of its attestation, and at the time of its probate and allowance, judge of probate for that county. *Patten v. Tallman*, 27 Me. 17.

Alcalde—Mexican Law.—Where an *alcalde* was appointed executor in a will, and also signed as an attesting witness, it was held that he was competent to

(3) *Time When Competency Must Exist*.—At common law, there was some conflict of authority as to whether the requisite competency in the attesting witness must exist at the time of attestation, or when the will is offered for proof.¹ It seems to be well settled now, both in *England* and in this country, that the witness must be competent at the time of attestation.²

authenticate in his judicial capacity, as he derived no benefit from the testamentary disposition, nor did the law allow any compensation for his services. *Panaud v. Jones*, 1 Cal. 488.

1. In discussing the qualifications of attesting witnesses to wills, both in connection with the statutes of 29 Car. II., ch. 3, § 5, and also the *Virginia Statutes*, the author of *Minor's Inst.* (2d ed.), vol. 2, p. 1024 observed: "The witnesses must be competent. The word employed in the statute 29 Car. II., ch. 3, § 5, and in our statutes down to 1850, was credible. However, it was universally agreed that credible meant no more and no less than competent, so that no progress was made in substituting (as in the later statutes) the one word for the other. But there was a very serious diversity of opinion upon another point, namely, as to the period to which the statute designed to refer the witness as competent, whether to the period when he attested the will, as Lord Camden thought (*Hindson v. Hersey* (1765), 1 Bro. Adm. & Civ. Laws 284, n. 24; 4 Burn's Ecc. Law 88; Bacon's Abr. Wills (D.) III.), or to the period when he was called to prove it, as Lord Mansfield held (*Windham v. Chetwynd*, 1 Burr. 414; *Lowe v. Jolliffe*, 1 W. Bl. 366; *Goodtitle v. Welford*, Dougl. 141). This doubt the statute does not resolve. It is extremely probable that with us Lord Camden's opinion would prevail. It seems that it does in *England*. (*Holdfast v. Dowsing*, 2 Stra. 1254-55; *Hatfield v. Thorp*, 5 B. & Ald. 589; 1 Jarm. on Wills (5th ed.), 70.)"

In *Hindson v. Hersey*, 4 Burn's Ecc. Law 27, the testator, by a will made in 1734, devised his land to trustees for the distribution of the rents and profits to four orphans, and aged and infirm people within a particular township. The will was attested by two of the trustees who at the time of the testator's death were seised of tenements in the township for which they paid the poor rate. Before the day of trial, they released their interest to the other

trustee and conveyed their tenement within the township to other persons. The majority of the court were of opinion that the will was duly attested to pass the real estate. In this case Lord Camden held a different opinion and delivered an elaborate statement in support of his position, observing that a will is often executed suddenly in a last sickness, and sometimes in the very face of death itself, and the great question to be asked in such a case is, whether the testator was in his senses when he made the will, and, consequently the time of the execution is the critical moment which required guard and protection.

On the other hand, in *Windham v. Chetwynd*, 1 Burr. 414, it appeared that the testator left a will, by which he charged real estate with the payment of debts and legacies, attested by two attorneys and an apothecary, he being indebted to each of them at the time of the attestation for their professional services. Their several debts were paid before the day when the cause was tried and when their testimony was required to prove the will, and the court of Queen's Bench were of opinion that the will was duly attested. And in *Lowe v. Jolliffe*, 1 W. Bl. 365, and *Goodtitle v. Welford*, Dougl. 139, the legatee, after a release of his interest, was held a competent witness. Compare *Hindson v. Hersey*, 4 Burn's Ecc. Law 27.

2. *Holdfast v. Dowsing*, 2 Stra. 1254-55; *Hatfield v. Thorp*, 5 B. & Ald. 589; 1 Jarm. on Wills (5th ed.) 70; *Sullivan v. Sullivan*, 106 Mass. 474; *Amory v. Fellowes*, 5 Mass. 219; *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 157; *Morton v. Ingram*, 11 Ired. (N. Car.) 368; *In re Holt's Will* (Minn. 1893), 57 N. W. Rep. 219; *Fisher v. Spence* (Ill. 1894), 37 N. E. Rep. 314; *Patten v. Tallman*, 27 Me. 17. See also *Warren v. Baxter*, 48 Me. 193; *Allison v. Allison*, 4 Hawks (N. Car.) 141; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350; *Haven v. Hilliard*, 23 Pick. (Mass.) 10; *Taylor v. Taylor*, 1 Rich. (S. Car.) 531; *Workman v. Dominick*, 3 Strobb. (S. Car.) 589.

In *Holdfast v. Dowsing*, 2 Stra. 1253, a person who took under a will an annuity charged upon a real estate devise was held not to be a credible witness within the meaning of the statute; and Lord Lee, C. J., in delivering the opinion of the court, argued as if the objection of benefit from the will to the witness at the time of subscribing could not be removed or taken away by any subsequent act.

In *Carlton v. Carlton*, 40 N. H. 18, it was said that where an attesting witness to a will is competent at the time the will is offered for probate, he is to be sworn when the presiding judge ascertains, by interrogating the witness himself, and also by the testimony of others, whether or not the witness was competent at the time of attestation. In this connection it was observed that whether a witness is competent at the time of attestation is a question entirely distinct and separate from the question of his competency at the time of probate. There is no more reason to confine the judge of probate to the examination of a witness at the probate, to determine whether such witness was competent at the time of attestation, than to limit the judge to the testimony of one witness upon any other question. Whether at the probate an attesting witness is incompetent to be sworn, by reason of deficiency of understanding, arising from immaturity of intellect, insanity, or intoxication, is a question to be determined by the judge on proper evidence. More evidence from other witnesses may be required to determine whether such incompetency existed at the attestation, than to determine whether it exists at the probate, because the appearance of the witness whose competency is questioned may furnish little or no evidence of his condition at a former time. But the question of his competency is equally open in both cases, to be settled by such evidence as can be produced. This case involved an allegation of incompetency on account of the immature age of the attesting witness, and it may well be inferred from the language of the court that competency, certainly in respect to age, must exist at the time of attestation. Insanity and intoxication are also regarded in the same light.

And in *Patten v. Tallman*, 27 Me. 17, it is laid down that the competency of an attesting witness relates to the time of the attestation of the instru-

ment, which must be determined upon facts existing at that time.

In *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 157, the court said that where the competency of an attesting witness to a will, on the ground of interest, is before the court, the question to be determined is, whether the witness had, at the time of the attestation, such pecuniary interest in the will as would disqualify him to testify concerning the signing of the will by the testator, according to the established rule of evidence at common law.

This rule of law is expressly embodied in some of the American codes. Thus, it is provided in *Massachusetts* Pub. Stat., ch. 127, § 2, "If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall not prevent the probate and allowance of such will."

In *Illinois*, it has recently been held that the statute requiring a certain number of credible witnesses must be understood to mean competent at the time of attestation, and, therefore, no subsequent release of interest will remove the incompetency of the attesting witness, so as to comply with the requirements of the statute and render valid the attestation of the will. *Fisher v. Spence* (Ill. 1894), 37 N. E. Rep. 314. Compare *Nixon v. Armstrong*, 38 Tex. 296.

But where a statute provides that a release of interest renders a witness competent, it may be construed as determining that in this respect a witness need not have been competent at the time of attestation. This seems to have been done in *Missouri* (see *Miltenberger v. Miltenberger*, 78 Mo. 31), for section 40 of Wag. Mo. Stat. 1369, provides that "if any person has attested or shall attest the execution of any will, to whom any legacy or bequest is thereby given, and such person, before giving testimony concerning the execution of such will, shall have been paid, or have accepted or released, or shall refuse to accept such legacy or bequest upon tender thereof, such person shall be admitted as a witness to the execution of the will." See also *Grimm v. Tittman*, 113 Mo. 56.

Subsequent Incompetency.—It seems never to have been doubted, however, that subsequent incompetency will not impair the validity of the attestation, the diversity of opinion at common law relating to the question as to whether, where incompetency existed

6. What Is Writing Within the Statute of Frauds.—Typewriting or printing satisfies the requirement that the will shall be in writing, and it is not uncommon for a will to be written in a printed or engraved blank.¹ A will written in lead pencil is *prima facie* deliberative only, but is entitled to probate, if shown to be final;² and lead pencil alterations upon a will written in ink are

at the time of attestation, subsequent removal of such incompetency would suffice. Thus, in *Brograve v. Winder*, 2 Ves. Jr. 636, it was decided that a witness disinterested at the time of the execution of the will and the death of the testator was a good witness, notwithstanding he was interested at the time of his examination.

Where an executor attested the execution of the will, but by his acceptance of the trust was rendered incompetent to testify when the will was offered for probate, it was nevertheless held that the will was regularly executed under a statute requiring the attestation of three credible witnesses. *Parker, C. J.*, delivering the opinion of the court in this case, said that, otherwise, the commission of a crime, after the attestation of the will, which rendered the witness infamous, or the succession to an estate under a devise, would disable a witness who was free from any taint of crime or interest at the time of subscribing, which would greatly embarrass the practice of disposing of estates by will, and produce constant uncertainty in the minds of testators, whether their property would be appropriated according to their wishes. *Sears v. Dillingham*, 12 Mass. 359; *Holmes v. Holloman*, 12 Mo. 535; *In re Holt's Will* (Minn. 1893), 57 N. W. Rep. 219. See *In re Gill's Will*, 2 Dana (Ky.) 447.

1. Schouler on Wills (2d ed.), § 258; *In re Adams*, L. R., 2 P. & D. 367; *Dench v. Dench*, 2 Prob. Div. 60. See *Henshaw v. Foster*, 9 Pick. (Mass.) 312; *Temple v. Mead*, 4 Vt. 536.

In construing a provision of the *Vermont Constitution*, which required writing for certain purposes, the court, in *Temple v. Mead*, 4 Vt. 536, said: "The definition of the word writing includes printing; it means no more than conveying our ideas to others by letters or characters visible to the eye. It is so used by all writers, and generally comprehends printing, engraving, etc., in opposition to the mode of conveying them *viva voce*. In all legal writers, and in the statutes which have

been enacted in this state and elsewhere, the expression is made use of in the same general and comprehensive sense." For example, the court continues: "A deed is said to be a writing signed, etc.; yet it is always said that it may be printed. . . . Writs are defined to be precepts in writing, yet it is notorious that they are printed."

It may be said to be a rule of statutory construction of general application, that when a statute requires writing it is satisfied by printing. *Schneider v. Norris*, 2 M. & S. 286.

2. *In re Dyer*, 1 Hagg. 219; *Bateman v. Pennington*, 3 Moo. P. C. 223; *Mence v. Mence*, 18 Ves. Jr. 348; *Harris v. Pue*, 39 Md. 535.

In *Bateman v. Pennington*, 3 Moo. P. C. 223, probate was granted of a paper written in ink, but dated and signed in pencil, with the addition, "in case of accident I sign this my will"—although there was also an unsigned attestation clause, the facts pleaded in the allegation being sufficient to rebut the legal presumption against the paper. Lord Brougham said: "The pressure of the case arises from the words in pencil, 'in case of accident I sign this my will,' and the question is, are they deliberative or final? If the words had been, 'I sign this my will, in case of accidents,' though such signature was in pencil, could it be contended to be only deliberative? Or if he had said, 'I write this in pencil, in case of accidents,' and had then signed his name, could that be held not to be a good signing? But all the circumstances of the case must be looked at, and the question their lordships have to determine is not whether the circumstance of the date and signature being in pencil imports that the paper was deliberative, or the circumstance of the attestation clause being unwitnessed is so strong a presumption against the paper as a will, that the fact stated in the allegation, namely, the intention of the deceased to die testate, and the sudden death, ought not to be admitted to proof in order to rebut the presumption

subject to the same rule;¹ but a will written on a slate contravenes the policy of the statute and is not entitled to probate.²

VII. WHO MAY MAKE A WILL—PERSONAL DISABILITIES—1. Testamentary Capacity—In What It Consists—See TESTAMENTARY CAPACITY, vol. 25, p. 970; INSANITY, vol. 11, p. 105.

2. Aliens.—See CONFLICT OF LAWS, vol. 3, p. 630; ALIENS, vol. 1, p. 456.

3. Infants.—See INFANTS, vol. 10, p. 618.

4. Married Women.—See HUSBAND AND WIFE, vol. 9, p. 797; MARRIED WOMEN, vol. 14, pp. 594–603.

5. Idiots and Lunatics.—See INSANITY, vol. 11, p. 105; TESTAMENTARY CAPACITY, vol. 25, pp. 974, 977.

Idiots and lunatics are without the requisite intellectual capacity to make a will (see INSANITY, vol. 11, p. 151).

6. Persons of Unsound Mind.—See INSANITY, vol. 11, p. 105; TESTAMENTARY CAPACITY, vol. 25, p. 970.

7. Traitors and Felons.—Since the abolition of forfeiture by attainder and for crime,³ there is no reason why a traitor or felon should not make a valid will.⁴

afforded by the condition of the instrument itself. All the cases show that in either instance the fact of the signing being in pencil, though *prima facie* a presumption that the act is only deliberative, yet it may be shown to be otherwise; and so the presumption against a will having an attestation clause without witnesses may be repelled. And in either case, if the facts in this allegation are proved, the legal presumption would be negatived and the appellant entitled to probate."

Pennsylvania.—There is no distinction between pencil and ink. Tomlinson's Estate, 133 Pa. St. 245. See Knox's Estate, 131 Pa. St. 220.

In *Myers v. Vanderbilt*, 84 Pa. St. 510, it was held that a will written and signed with a lead pencil is "in writing" within the meaning of the act of April 8, 1833, and is valid.

1. Dickerson v. Dickerson, 2 Ph. 173; *In re Hall*, L. R., 2 P. & D. 256; *Goods of Adams*, L. R., 2 P. & D. 367.

The testator executed a will and codicil. At some time after the execution of the will, but before that of the codicil, he, with a pencil, struck through several paragraphs of his will, and made his initials on the margin; he also placed a query opposite other paragraphs. The codicil confirmed, in so far as it did not alter, the will. It was held that the alterations so made were only deliberative, and not final, and not included in the confirmation of the codi-

cil, and, therefore, to be omitted from the probate. *In re Hall*, L. R., 2 P. & D. 256. Lord Penzance said: "If, under all the circumstances, the court considered that such words, although found in a testamentary paper, had not been written as a fixed testamentary disposition, but merely deliberatively, in order that the testator, on further consideration, should determine whether or not they should be ultimately carried out, it rejected the words as part of the will. In this case the alterations are in pencil, lines are scored through certain paragraphs, and opposite others the word 'query' is placed. This very fact of using the word 'query' shows that the testator had no definite intention in doing what he did. The court must exercise some discretion in the matter. It will see with what object alterations are made, and if in any way it can determine that they represent a definite intention of a testator it will adopt them, if satisfied that they were on the paper at the time of the execution of a codicil. These alterations are not of such a character. I am satisfied that the testator contemplated some further act to give them effect, and what he has done, therefore, is not sufficient to make them part of the will."

2. Reed v. Woodward, 11 Phila. (Pa.) 541.

3. FORFEITURE, vol. 8, pp. 444, 445, note 5.

4. 1 Redf. Wills (4th ed.) *119.

8. **Persons Deaf, Dumb, and Blind**—(See also **TESTAMENTARY CAPACITY**, vol. 25, p. 975).—At common law, persons born deaf and dumb,¹ or deaf, dumb, and blind, were *prima facie* presumed to be idiots and incapable of making a will;² the presumption, however, could be rebutted by showing that they had understanding, or had once been able to write or speak;³ and such is the modern rule also, with the qualification that the presumption of incapacity is much more easily repelled than formerly.⁴ Where the defect is not congenital, testamentary capacity is presumed as in other cases.⁵ Aside, however, from the general question of mental capacity, the fact that the testator is deaf, dumb, or blind, whether the defect be congenital or not, renders him peculiarly liable to error and imposition, has an important bearing upon the question of fraud or undue influence, and imposes upon the proponents the burden of showing that the formalities of execution were performed understandingly.⁶ Thus, educated deaf

1. Swinb., pt. 2, § 4, pl. 2; Godolph., pt. 1, ch. 11; 1 Redf. on Wills (4th ed.) 52; Co. Litt. 42 b. See *In re Geale*, 3 S. & T. 431; *In re Owston*, 2 S. & T. 461; *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441.

2. Taylor Med. Jur. 690, 691; 2 Bl. Com. 497; Co. Litt. 42 b.

3. 1 Redf. on Wills (4th ed.) 52, 57; *Reynolds v. Reynolds*, 1 Spears (S. Car.) 256; *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42; *Moore v. Moore*, 2 Bradf. (N. Y.) 265; *Potts v. House*, 6 Ga. 325. See also *Martin v. Mitchell*, 28 Ga. 382; *Clifton v. Murray*, 7 Ga. 564.

4. Schouler on Wills (2d ed.), § 95; 1 Redf. on Wills (4th ed.) 53, 55.

"Since this class of persons" (deaf mutes) "have, through the ingenuity of philanthropic men, been educated, and, like other persons, been rendered capable of communicating their thoughts and wishes, not only by signs, but by writing also, there seems no more reason for denying them the privilege of making a last will and testament, than in denying it to any other class of persons whatever. And we regard this class of persons as standing precisely like all others in that respect, with this difference perhaps, that where it appears that the testator was a deaf mute, it will impose upon those who claim to establish the will the burden of showing, in the first instance, that the testator made the instrument understandingly." 1 Redf. on Wills (4th ed.) 52.

5. Schouler on Wills (2d ed.), § 96; *Gombault v. Public Administrator*, 4

Bradf. (N. Y.) 244; *Wilson v. Mitchell*, 101 Pa. St. 495.

Presumption in Favor of Capacity.—In such cases there is a general presumption in favor of capacity "which must be satisfactorily disproved, when no grounds exist for imputing fraud or circumvention, and the contents of the instrument in question are natural and rational." *Bradford Sur. in Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 244.

6. Schouler on Wills (2d ed.), §§ 96, 97; *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42; *Matter of Bull's Will*, 111 N. Y. 624.

Impaired Faculties.—Where the testator was of advanced age, his hearing slightly affected and his sight very seriously impaired, the circumstances attending the execution of his will should be carefully scrutinized for any traces of imposition or artifice. Kind offices and faithful services tend to influence the mind in favor of the party performing them, and care should be taken not to confound the natural action of the human feelings in this respect, with positive dictation and control exercised over the mind of the testator. Besides mere formal proof of execution something more is necessary to establish the validity of a will when, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the formal execution. Additional evidence is required that his mind accompanied the will and that he was cognizant of its provisions.

muters should write their own wills; uneducated may communicate by signs, in which case the court will require to be satisfied that the will embodies the testator's real intent, and that its provisions were understood by him.¹ Where the testator is blind, it should be proved to the satisfaction of the court that he knew and approved of the contents of the will which he executed;² but it is

This may be established by the subscribing witnesses or by evidence *alibunde*. *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42.

Deaf and Dumb Testator.—"In proving the will of a deaf and dumb person it should, of course, be shown that the obstacles created by his physical infirmity had been overcome and his mind had been reached and communicated with, so that he was cognizant of the act, knew and approved of the contents of the will, and comprehended the force and purpose of the business he was engaged in when he was doing it." *Wms. on Exrs.* 18, note (d) by Perkins. Thus, where a testator, who was deaf and dumb, made his will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterward duly executed by the testator, the court required an affidavit from the draftsman, stating the nature of the signs and motions by which the instructions were communicated to him, and ultimately required to grant probate on motion. *In re Owston*, 2 S. & T. 461. See *In re Geale*, 3 S. & T. 431.

1. *In re Owston*, 2 S. & T. 461; *In re Geale*, 3 S. & T. 431.

"This will be especially requisite in those cases where the testator was incapable of writing, and was therefore compelled to communicate with his scrivener, and with the witnesses also, by signs. In such cases, it would seem, upon principle, that to a full compliance with the requisites of the statute, requiring a will to be declared, as such, by the testator, in the presence of his witnesses, they giving their attestation to the act, in his presence, and, in some states, in the presence of each other, it would be important that all the witnesses made necessary should be able to communicate with the testator, and to comprehend his declarations thus made. But we know no case where the subject has been so viewed. But in the case of educated muters, who are capable of communicating by writing, there would be no such diffi-

culty. And the fact that the testator wrote the will might fairly be regarded as sufficient evidence, *prima facie* at least, that he made it understandingly. It might still be necessary, in practice, that he should, before the witnesses, make some recognition of the writing as his last will and testament, and intimate his desire to execute it as such, in their presence, by something more unequivocal than mere signs. It would certainly be prudent and proper for the witnesses to be assured of these matters, by some written intimation from the testator." 1 Redf. on Wills (4th ed.) 53.

"One who is not deaf and dumb by nature, but being once able to hear and speak, if by some accident he loses both his hearing and the use of his tongue, then in case he shall be able to write, he may with his own hand write his last will and testament. But if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, *i. e.*, if he have understanding he may make his testament by signs, otherwise not at all. Such as can speak and cannot hear, they may make their testaments as if they could both speak and hear, whether that defect came by nature or otherwise. Such as be speechless only, and not void of hearing, if they can write, may very well make their testament themselves by writing; if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as then be present." *Wms. on Exrs.* (9th Eng. ed.) 18; *Swinb.*, pt. 2, § 10, pl. 2, 4; *Godolph.*, pt. 1, ch. 11. As to the presumption in favor of intelligent execution in ordinary cases, see *Mason v. Williams* (Supreme Ct.), 6 N. Y. Supp. 479; 53 Hun (N. Y.) 398; *Worthington v. Klemm*, 144 Mass. 167; *Walter's Will*, 64 Wis. 487.

2. *Wms. on Exrs.* (9th Eng. ed.) 19; *Moore v. Paine*, 2 Cas. Temp. Lee 595; *In re Axford*, 1 S. & T. 540. See *Wampler v. Wampler*, 9 Md. 540; *Martin v. Mitchell*, 28 Ga. 382.

The testator's declarations after the

not necessary to prove that the identical paper which he executed as his will was ever read to him.¹

9. Persons Who Cannot Read.—A testator, who either from sickness or illiteracy cannot read the will, must be shown affirmatively to have understood its contents.²

execution of the will are competent to show that he knew its provisions. *Harleston v. Corbett*, 12 Rich. (S. Car.) 604; *Davis v. Rogers*, 1 Houst. (Del.) 44.

1. Wms. on Exrs. (9th Eng. ed.) 19; Schouler on Wills (2d ed.), § 98; 1 Redf. Wills (4th ed.) *57; *Edwards v. Fincham*, 3 Curt. 63. See *Longchamp v. Fish*, 2 N. R. 415; *Washington, J.*, in *Harrison v. Rowan*, 3 Wash. (U. S.) 585; *Lewis v. Lewis*, 6 S. & R. (Pa.) 496; *Hess' Appeal*, 43 Pa. St. 73; *Clifton v. Murray*, 7 Ga. 564; *Boyd v. Cook*, 3 Leigh (Va.) 32.

"It is laid down in the old text-books of the ecclesiastical law, that although he that is blind may make a nuncupative testament, by declaring his will before a sufficient number of witnesses, yet that he cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will; and that, therefore, if a writing be delivered to the testator, and he, not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same he would not own it. And the civil law expressly required that the will should be read over to the testator, and approved by him, in the presence of all the subscribing witnesses." Wms. on Exrs. (9th Eng. ed.) 18; *Godolph.*, pt. 1, ch. 11; *Swinb.*, pt. 2, § 11. See *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42.

2. Wms. on Exrs. (9th Eng. ed.) 18; *Barton v. Robins*, 3 Ph. 455, note (b); *Day v. Day*, 3 N. J. Eq. 549; *Harrison v. Rowan*, 3 Wash. (U. S.) 580. *Van Pelt v. Van Pelt*, 30 Barb. (N. Y.) 134. See *Harding v. Harding*, 18 Pa. St. 340. Compare *Gerrish v. Nason*, 22 Me. 438; *Pettes v. Bingham*, 10 N. H. 514; *Hoshauer v. Hoshauer*, 26 Pa. St. 404; *Vernon v. Kirk*, 30 Pa. St. 218; *Chandler v. Ferris*, 1 Harr. (Del.) 454; *Smith v. Dolby*, 4 Harr. (Del.) 350; *Munnikhuisen v. Magraw*, 35 Md. 280; *McNinch v. Charles*, 2 Rich. (S. Car.) 229; *Carr v. M'Camm*, 1 Dev. & B. (N. Car.) 276.

In ordinary cases, where a testator is in health and of ability, it is not

necessary to show that the will was read over to him, or that he knew the contents of it. The legal presumption in such cases is always in favor of the will; and he who seeks to impeach it must show conclusively that the testator was imposed on, or that there was some mistake whereby he was deceived. But where it appears affirmatively that the testator did not read the will himself, and that it was not read to him, it must then be shown to the satisfaction of the court that he was in some other way made acquainted with the contents of the instrument and approved them. So if the testator be incapable of reading the will, whether the incapacity arise from blindness, sickness, or any other cause, the rule is the same, and the burden of proof is thrown on the person offering the will. If it be established, either by direct evidence, or by circumstances so conclusive as to admit of no reasonable doubt, that the will in question was truly copied from a previous will, with the contents of which the testator was acquainted, the instrument will be admitted to probate, although it was neither read by him nor in his hearing. Or if it can be shown that the will in question is substantially in accordance with the instructions of the testator, it may be considered as sufficient evidence that he was acquainted with its contents. *Day v. Day*, 3 N. J. Eq. 549.

But in *Guthrie v. Price*, 23 Ark. 396, it was held that, on proof that the will was executed in accordance with the formalities prescribed by the statute, the burden of showing that fraud or imposition was practiced upon the testatrix was upon the parties contesting the validity of the will; and though in determining such question the fact that she could not read, and that the will was not read to her at the time she signed it, were circumstances to be considered, it was erroneous for the court to tell the jury, as a matter of law, that, it being shown she could not read, it was necessary to prove that the will was read to her—they having the right to infer from all the circumstances that she knew its contents. See *Downey v.*

VIII. RESTRAINTS ON TESTAMENTARY POWER—WHO MAY BE DEVISEE OR LEGATEE.

1. **Gifts to Aliens.**—See *ALIENS*, vol. 1, p. 630.
2. **Gifts to Charitable Uses.**—See *CHARITIES*, vol. 3, p. 137.
3. **Gifts to Corporations.**—See *CORPORATIONS*, vol. 4, p. 235.
4. **Gifts for Accumulation.**—See *PERPETUITIES AND TRUSTS FOR ACCUMULATION*, vol. 18, p. 335.
5. **Whether Devisee or Legatee Who Has Murdered Testator May Take.**—The better opinion is that a beneficiary under the will who has murdered the testator to prevent the provision in his favor from being revoked, is thereby disqualified to take.¹

Murphey, 1 Dev. & B. (N. Car.) 82; *Crispell v. Dubois*, 4 Barb. (N. Y.) 393.

1. *Riggs v. Palmer*, 115 N. Y. 506. But see *Owens v. Owens*, 100 N. Car. 240.

"No One Shall Profit by His Own Wrong."—In *Riggs v. Palmer*, 115 N. Y. 511, the court, by Earl, J., said: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of the New York Mut. L. Ins. Co. v. Armstrong, 117 U.S. 591. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. Mr. Justice Field, writing the opinion, said: 'Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired.'

"These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other instrument, may be decreed void and set aside, and so a particular portion of a

will may be excluded from probate or held inoperative if induced by the fraud or undue influence of the person in whose favor it is. (*Allen v. M'Pherson*, 1 H. L. Cas. 191; *Harrison's Appeal*, 48 Conn. 202.) So a will may contain provisions which are immoral, irreligious, or against public policy, and they will be held void. Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course.

"He therefore murdered the testator expressly to vest himself with an estate. Under such circumstances what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator and taken his property by force, he would have no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative, it seems to me, would be a reproach to the jurisprudence of our state, and an offense against public policy. Under the civil law, evolved from the general principles of natural law and justice by many generations of juriconsults, philosophers and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. (*Domat*, pt. 2, bk. 1, tit.

6. Gifts Contrary to Public Policy or Good Morals.—(See RE-MAINDERS AND EXECUTORY INTERESTS, vol. 20, p. 875).—Gifts subversive of good morals, or contrary to sound public policy, are void, and the executor is justified in refusing to make payment.¹

1, § 3; Code Napoleon, § 727; Mac-Keldy's Roman Law, 530, 550.) In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and lawmakers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case and that a specific enactment for that purpose was not needed.

"For the same reasons, the defendant Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather, or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime.

"My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission. Our attention is called to *Owens v. Owens*, 100 N. Car. 240, as a case quite like this. There a wife had been convicted of being an accessory before the fact to the murder of her husband, and it was held that she was, nevertheless, entitled to dower. I am unwilling to assent to the doctrine of that case. The statutes provide dower for a wife who has the misfortune to survive her husband and thus lose his support and protection. It is clearly beyond their purpose to make provision for a wife who by her own crime makes herself a widow and wilfully and intentionally deprives herself of the support and protection of her husband. As she might have

died before him, and thus never have been his widow, she cannot by her crime vest herself with an estate. The principle which lies at the bottom of the maxim *volenti non fit injuria*, should be applied to such a case, and a widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created."

1. *St. Amour v. Rivard*, 2 Mich. 294; *Moore v. Moore*, 50 N. J. Eq. 554; *Philleo v. Holliday*, 24 Tex. 38; *Mallet v. Smith*, 6 Rich. Eq. (S. Car.) 12; *Whitehead v. Watson*, 19 La. Ann. 68; *Johnson v. Clarkson*, 3 Rich. Eq. (S. Car.) 305; *Schouler on Wills* (2d ed.), § 22; *Schouler on Exrs. and Admsrs.*, § 463; *Rex v. Postington*, 1 Salk. 162; *Atty. Gen'l v. Fishmongers' Co.*, 2 Beav. 157; *Habershorn v. Vardon*, 7 Eng. L. & Eq. 228. Compare *Emmons v. Cairns*, 3 Barb. (N. Y.) 243.

Bequest of Freedom to Slaves.—In *Luckey v. Dykes*, 10 Miss. 60, it was held that a bequest in a will, directing the executors to emancipate the slaves of the testator, is void because in opposition to state policy. See also *Carter v. Carter*, 39 Ala. 579; *Johnson v. Clarkson*, 3 Rich. Eq. (S. Car.) 305; *Mallet v. Smith*, 6 Rich. Eq. (S. Car.) 12.

In *Philleo v. Holliday*, 24 Tex. 38, it was held that a bequest, by will, of freedom to slaves, where no provision was made for their removal from the state, was void. See also *Johnson v. Clarkson*, 3 Rich. Eq. (S. Car.) 305; *Mallet v. Smith*, 6 Rich. Eq. (S. Car.) 12.

Substitution Prohibited by Law.—A will contained the following devise, viz.: "I give and bequeath to my beloved wife the plantation upon which I reside, and the following slaves, etc. I further will, upon the demise of my said wife, that the property bequeathed her return to my brothers and sisters, and be equally divided between them." It was held that such a disposition was a prohibited substitution, null even as to the legatee, and that the prohibition contained in article 1507 of the Civil Code, being in the interest of public order, the bequest clashing with it, was an absolute nullity, incurable by the

To this principle may be referred many miscellaneous restraints upon testamentary disposition, varying greatly in different epochs and different jurisdictions. Thus, gifts deemed superstitious in one jurisdiction would probably not be so in another.¹

7. Gifts to Bastards.—Gifts to future illegitimate children are void as *contra bonos mores*; but an illegitimate child *in esse* or *en ventre sa mere* may, if properly described, take the benefit of a devise or bequest, and the court will not inquire as to his origin.²

prescription of five years. *Provost v. Provost*, 13 La. Ann. 574.

Where the right of action of an heir to compel a partition of the immovables and slaves was sought to be conveyed by a will made in *Missouri*, in the following words: "I do hereby give and bequeath, absolutely and unconditionally, to M. and to A., to have and to hold the same, unto them jointly and severally, that is to say, as joint tenants, so that all and singular the property hereby devised and bequeathed shall, upon the death of either of them, the said M. and A., descend, pass, and belong to the survivor of them, and to the heirs of such survivor forever," it was held, that such a disposition was a conditional substitution prohibited by law. *Weber v. Ory*, 14 La. Ann. 543.

The will of A. made in *Mississippi*, where he died, and where his estate was situated, contained these words: "I give and bequeath to my grandson, W., and his heirs lawfully begotten, all the balance of my estate, real, personal, and mixed, together with the rest and residue of which I may die possessed, to inure to and vest in the said W., on the day on which he shall have attained the age of twenty-one years and not before, and in the event of the said W. dying before he shall have arrived at lawful age, as aforesaid, and leaving no heir of his own body, or in the event of his death at any time thereafter, without lawful issue, then, and in such contingency or contingencies, I give, devise, and bequeath all the real and personal and mixed estate aforesaid to R., daughter and only surviving child of my brother L. C., and wife of B., and to her heirs forever." It was held that such a clause in a will was a substitution prohibited by the laws of *Louisiana*. *Wailes v. Daniell*, 14 La. Ann. 585.

1. *Smith v. Du Bose*, 78 Ga. 435. See also *Pool v. Harrison*, 18 Ala. 514; *Pinckard v. McCoy*, 22 Ga. 28; *Cobb*

v. Battle, 34 Ga. 458; *Whitehead v. Watson*, 19 La. Ann. 68; *Joliffe v. Fanning*, 10 Rich. (S. Car.) 186. Compare *Carrie v. Cumming*, 26 Ga. 690.

2. *Medwith v. Pope*, 27 Beav. 73, per *Romilly*, M. R. See *Lamb v. Eames*, L. R., 6 Ch. 597; *Holt v. Sindrey*, L. R., 7 Eq. 170; *Savage v. Robertson*, L. R., 7 Eq. 176; *Bagley v. Mollard*, 1 R. & M. 581; *Durrant v. Friend*, 11 Eng. L. & Eq. 2; *Owen v. Bryant*, 13 Eng. L. & Eq. 217; *Hill v. Crook*, L. R., 6 H. L. Cas. 265; *In re Bolton*, 31 Ch. Div. 542; *Dunlap v. Robinson*, 28 Ala. 100; *Hughes v. Knowlton*, 37 Conn. 429; *Kingsley v. Broward*, 19 Fla. 722; *Smith v. Du Bose*, 78 Ga. 413. See also *Shelton v. Wright*, 25 Ga. 636; *Taylor v. McRa*, 3 Rich. Eq. (S. Car.) 96. Compare *Gaines v. Hennen*, 24 How. (U. S.) 553; *Bennett v. Cane*, 18 La. Ann. 590.

In *England*, it has been held that a testator may provide for his own illegitimate children born, or to be born, of an illicit connection of long standing, at the date of the will, by describing them by their maternity and reputation in such way as to make it unnecessary to prove their actual paternity. Thus, in *Occleston v. Fullalove*, L. R., 9 Ch. 147, a testator, who had gone through the ceremony of marriage with M. L., his deceased wife's sister, who had two daughters, C. and E., by him, and who was *eniente* with a third at the date of the will, gave a moiety of his property to trustees in trust for M. L. for life, and after her death for his reputed children C. and E., and all other children which he might have or be reputed to have by M. L., then born or thereafter to be born. The third child was born before the testator's death, and was acknowledged by him as his child. It was held (*dissentiente* Lord Selborne, L. C.), that the after born child was entitled to share with her sisters under the will. *Mellish*, L. J., said: "The question to be determined is whether Margaret Occleston is entitled

to take with Catherine Occleston and Edith Occleston, the one-half of the residue of the testator's real and personal estate. I think it is clear that she cannot take as an actual child of the testator by Margaret Lewis, because, although there is evidence from which any jury would find, if the question could be left to them, that the appellant was a child of the testator by Margaret Lewis, yet it seems clear on the authorities that the law does not allow such evidence to be given, and this was not seriously disputed. I also think that she cannot take as a child of Margaret Lewis, who was reputed to be a child of the testator at the date of making the will, assuming that an illegitimate child can acquire the reputation of being the child of a particular man whilst in *ventre sa mere*. I think there is no sufficient evidence that the appellant had at that time acquired the reputation of being the child of the testator. There is no evidence that the testator or anyone else knew at that time that Margaret Lewis was with child, and it seems to me impossible to infer that a child whose existence was unknown was the reputed child of anybody. If, therefore, the appellant takes at all, she must take as a child which the testator was, subsequent to the making of his will, reputed to have by Margaret Lewis. Now, two objections are in substance taken to the right of the appellant so to take: First, that there is not, and indeed could not be, a sufficient legal description to enable a class of subsequent born illegitimate children to take; and secondly, that it is contrary to the policy of the law to allow such a class to take, even if they could be sufficiently described.

"Now, with reference to the first question, it appears to me that every child of Margaret Lewis who was born during the testator's lifetime and who, at the time of his death, was his reputed child, must be included in the class. Whether, if there had been a child in *ventre sa mere* at the time of the testator's death, who afterwards was born and acquired the reputation of being the testator's child, such a child would have been included, may be doubtful, but, giving the narrowest construction to the words of the will, every child born in the testator's lifetime, and who was his reputed child at the time of his death, must, I think, be included. Then is such a bequest void upon the ground of the insufficient description of the

persons who are to take? I am of opinion that it is not. It is clear that a bastard may take as the reputed son of a particular person after he has acquired such reputation. Now, no one can take under a will until the testator is dead, and if at that time a child has acquired the reputation of being a child of the testator, why may he not take under the description of a reputed child of the testator? As a general rule, it is obviously wholly immaterial that a person who is to take a bequest under a will cannot be ascertained at the time the will is made, if he is so described that he can be ascertained after the death of the testator. It makes no difference whether a testator, making his will on his deathbed, gives a legacy of twenty pounds to every servant who is then in his service, or whether, making his will years beforehand, he gives a legacy of twenty pounds to every servant who shall be in his service at the time of his death.

"Neither can I see how a bequest to the illegitimate children of a particular woman, who shall be the reputed children of the testator at the time of his death, is more uncertain than a bequest to the illegitimate children of a particular woman, who are the reputed children of the testator at the time he makes his will. In the one case there must be an inquiry whether the children were the reputed children of the testator at the time of his death, and in the other, whether the children were the reputed children of the testator at the time he made his will.

"Then, with respect to the authorities, I cannot find that there is any direct authority on the subject. The cases appear to establish that a bequest to the future illegitimate children of a man is void for uncertainty, because the law will not allow evidence to be given that they are the actual children of a man. On the other hand, it seems clear that a bequest to the future illegitimate children of a woman is not void for uncertainty, whether it be or be not void for encouraging immorality, and as being contrary to the policy of the law; and, in my opinion, a bequest to the illegitimate children of a particular woman, who shall be the reputed children of the testator, is not more uncertain than a bequest to the future illegitimate children of a woman simply. It occurred to me during the argument that there might be some difficulty in determining at what time

8. Gifts to Mistress or Paramour.—Unless expressly prohibited by statute, as is the case in *Louisiana*,¹ a bequest to a mistress or paramour, free from suspicion of fraud or undue influence, will be sustained.² It should be observed, however, that conduct which

it was necessary that a child who was to take should have required the reputation of being a child of the testator; but, on consideration, I am satisfied that the material time is the death of the testator. If at that time a child of Margaret Lewis had acquired the reputation of being a child of the testator, such child seems to me clearly within the description of the persons who are to take.

"I have next to consider whether a bequest to the future illegitimate children of a woman, who shall be the reputed children of the testator, is void on the ground of public policy. I agree that the earlier authorities, and, in particular, *Blodwell v. Edwards*, as reported, Cro. Eliz. 509, do go a long way to establish that a settlement of property by deed on future reputed children or bastards is void, as being contrary to public policy. Fenner, J., is there reported to have said 'that they had conferred with divers of the Justices in *Serjeants' Inn*, and that the greater opinion of them was that a remainder to his first reputed son or bastard is not good, because the law does not favor such a generation, nor expect that such should be, nor will suffer such a limitation for the inconvenience which might arise thereupon.' I am not disposed to throw any doubt on the correctness of this opinion. If a man, at the commencement of an illicit intercourse with a particular woman, could make a valid settlement on his expected illegitimate children, this would, I think, manifestly encourage the immoral connection and discourage marriage, which the law favors. The present case, however, is the case of a will, and it is necessary to consider how far the same doctrine applies to wills. Now if a will was so worded as to give a bequest to illegitimate children to be begotten after the death of the testator, I think it would be subject to the same objection as a settlement by deed; and it may be observed that both in *Metham v. Devon*, 1 P. Wms. 529, and in *Hill v. Crook*, L. R., 6 H. L. Cas. 265, the will was the will of a third person, and not of either the father or the mother of the children; and if in those cases the word

'children' had been held to include future illegitimate children, it would have included children begotten after the death of the testator, when the will had come into operation. In the present case, the will being the will of the putative father himself, it is impossible that it can encourage an immoral intercourse after his death. If the bequest is to be held to be contrary to public policy, it must be because it tended to promote an immoral intercourse in his lifetime. There was no evidence that Margaret Lewis knew that the will was made, and if she did know it she must also have known that it could be revoked at any moment. Then can it be said that the testator himself would be encouraged in immorality by having the power to make a will in favor of his future reputed children? I cannot see that he would, or, at any rate, I think that this is too uncertain to be made a ground of decision. I am of opinion that a will no more comes into operation for the purpose of promoting immorality, or for effecting something contrary to public policy, during a testator's lifetime, than it does for any other purpose."

So where H. by his will gave a trust fund "in trust for my four natural children by M. E. N., viz., J. C. E. and J. H., and all and every other children and child which may be born of the said M. E. N. previous to, and of which she may be pregnant at, the time of my death, share and share alike," it was held that three children born after the date of the will and before the death of the testator could take. But a gift to a future illegitimate child described solely by its paternity is void. *In re Bolton*, 31 Ch. Div. 542.

South Carolina.—Gifts to bastards of more than one-fourth the clear value of the testator's property are void as against legitimate children. Gen. Stat. 1882, §§ 1165, 1866.

Indiana.—In this state, peculiar provisions exist restricting the testator's right to dispose of his property in favor of his bastard children. Civ. Code, §§ 1483-1488.

1. *Gibson v. Dooley*, 32 La. Ann. 959.

2. *In re Donnelly's Will*, 68 Iowa 126;

would not avoid the will for undue influence in the case of a wife, may have that effect in the case of a mistress.¹

9. Gifts to Subscribing Witnesses.—In *England* and most of the *United States*, statutes annul a devise or bequest to a subscribing witness with a view to securing his competency, unless there are the requisite number of subscribing witnesses without him.²

10. Disinheritance of Children.—In many states pretermitted children, or pretermitted issue of deceased children living at the date of the will, take, under the local statute, the same interest in the testator's estate which they would have taken had he died intestate.³

11. Wills Between Husband and Wife.—See HUSBAND AND WIFE, vol. 9, p. 797.

12. Gifts to Scrivener.—While the fact that the person who drew the will is the chief beneficiary imposes upon the court the duty of careful scrutiny, it does not invalidate the gift.⁴

IX. WHAT MAY BE DEVISED OR BEQUEATHED—1. **General Principles.**—All interests, legal or equitable, in real and personal property, transmissible on the decease of the testator, unless otherwise

McMahon v. Ryan, 20 Pa. St. 329; Porschet v. Porschet, 82 Ky. 93. See McClure v. McClure, 86 Tenn. 174.

In Porschet v. Porschet, 82 Ky. 93, it was held that the mere fact that the testator devised all his estate to a woman with whom he lived as his wife, when she was, in fact, the lawful wife of another, would not authorize the court to instruct the jury that the law presumed undue influence on the part of the devisee, and that, in the absence of any proof to the contrary, they must find against the will.

1. Schouler on Wills (2d ed.), § 236. See McClure v. McClure, 86 Tenn. 174; Sunderland v. Hood, 84 Mo. 293; Dean v. Negley, 41 Pa. St. 312; Kessinger v. Kessinger, 37 Ind. 341; Monroe v. Barclay, 17 Ohio St. 302; Delafield v. Parish, 25 N. Y. 9.

2. Goods of Clark, 2 Cart. 329. See the various state statutes.

In *Rhode Island, New Jersey, North Carolina, South Carolina, and Georgia*, it seems that the gift is void, even though there are enough subscribing witnesses without the devisee or legatee. Stimson's Am. Stat. Law, § 2650.

Slight variations exist in the statutes of the several states; thus in some states the gift is not void, if corroborating disinterested testimony can be produced; in others the principle is so extended as to cover even a gift to

the husband or wife of a subscribing witness. Stimson's Am. Stat. Law, § 2650. See, as to incompetency of subscribing witnesses upon ground of interest, Piper v. Moulton, 72 Me. 155; Marston, Petitioner, 79 Me. 26; Comb's Appeal, 105 Pa. St. 155; Quinn v. Shields, 62 Iowa 129; Bates v. Officer, 70 Iowa 343; Kumpe v. Coons, 63 Ala. 448; Vester v. Collins, 101 N. Car. 114; Moore v. McWilliams, 3 Rich. Eq. (S. Car.) 10; Croft v. Croft, 4 Gratt. (Va.) 103. Compare Cornwell v. Woolley, 47 Barb. (N. Y.) 327.

3. Such is the case, with slight variation, in *Arkansas, California, Dakota, Maine, New Hampshire, Vermont, Massachusetts, Michigan, Minnesota, Missouri, Montana, Idaho, Nebraska, Nevada, Oregon, and Washington*. Stimson's Am. Stat. Law, § 2842, and Sup., § 2842.

For slight variations in the several states, the local statute should be consulted.

Upon this subject see the following authorities: Matter of Witter's Estate (Surrogate Ct.), 15 N. Y. Supp. 133; Boman v. Boman, 47 Fed. Rep. 849; Arnold v. Arnold, 62 Ga. 627.

Under what circumstances the subsequent birth of a child left unprovided for works a revocation, see *infra*, this title, *Revocation*.

4. Cheatham v. Hatcher, 30 Gratt.

disposed of, to his general, real, or personal representatives, may be devised or bequeathed by him in his lifetime.¹

2. Transmissible Interests in Personality.—See EXECUTORS AND ADMINISTRATORS, vol. 7, p. 238 *et seq.*; REMAINDERS AND EXECUTORY INTERESTS, vol. 20, p. 875.

3. Transmissible Interests in Real Estate.—See ESTATES, vol. 6, p. 875; REMAINDERS AND EXECUTORY INTERESTS, vol. 20, p. 875.

4. Lands Out of Testator's Possession—Rights of Entry and Action.—At common law, a mere right of action as a reversion in fee expectant on an estate tail, which had been discontinued by the tenant in tail, could not be devised;² and the same doctrine applied to a mere right of entry created by actual disseisin, as distinguished from a right to recover land held by adverse possession or by a tenant at sufferance.³ In *England*, the Statute 3 & 4 William IV., ch. 27, § 36, abolishing real actions, has rendered

(Va.) 69; *Riddell v. Johnson*, 26 Gratt. (Va.) 152.

1. 1 Jarm. on Wills (5th ed.), § 46; 1 Redf. on Wills (4th ed.) 388; 1 Schouler on Pers. Prop. (2d ed.), § 71; 4 Kent's Com. (13th ed.) 511. See *Ingilby v. Amcotts*, 21 Beav. 585; *Bailey v. Hoppin*, 12 R. I. 569.

Under a statute which confers the right of devising real estate only on persons who are "seised," a contingent remainder has been held devisable, the word seised being construed "having," which is the word used in 32 Hen. VIII., ch. 1. *Bailey v. Hoppin*, 12 R. I. 569.

Devise by Testator of a Devise to Himself.—Under *Mississippi* Rev. Code 433, § 37, a devisee who is a descendant of a testator, and who dies before the testator, leaving children surviving him, cannot by his will dispose of a devise left him by the testator. *Pate v. Pate*, 40 Miss. 750. See *Land v. Otley*, 4 Rand. (Va.) 213; *Glenn v. Belt*, 7 Gill & J. (Md.) 362; *Hall's Appeal*, 26 Md. 107; *Newbold v. Prichett*, 2 Whart. (Pa.) 46; *Perry v. Hunter*, 2 R. I. 80.

Devise of Equitable Claim.—A claim of an heir at law in the final division of an intestate estate, for the value of land, to which the intestate had no title, but which was assigned to such heir through mistake and ignorance in a previous partial division of the estate, is not such a purely equitable claim as to cease with the death of the heir; but it may be disposed of by him by devise. *Smith v. Sweringen*, 26 Mo. 551.

2. 1 Jarm. on Wills (5th ed.), § 50;

Baker v. Hacking, Cro. Car. 387; *Doe v. Finch*, 1 N. & M. 130.

3. 1 Jarm. on Wills (5th ed.), § 50; *Goodright v. Forester*, 8 East 564; *Eyre, C. J.*, in *Cave v. Holford*, 3 Ves. Jr. 669; *Lord Eldon* in *Atty. Gen'l v. Vigor*, 8 Ves. Jr. 282; *Doe v. Hull*, 2 D. & R. 38; *Culley v. Doe*, 11 Ad. & El. 1020; 39 E. C. L. 303.

Rights of entry and action were not devisable at common law, because a devise was regarded as a species of conveyance, and such rights could not be conveyed by deed without champerty (see *CHAMPERTY*, vol. 3, p. 80), as appears from the language of Lord Ellenborough, in *Goodright v. Forester*, 8 East 566: "We are of opinion that it (*i. e.*, a right of entry) is not devisable. For such right is certainly not assignable by the common law; nor does it fall within the words of the Stat. 32 Hen. VIII., ch. 1, which are, 'having manors, lands, tenements, or hereditaments;' nor of the Stat. 34 and 35 Hen. VIII., ch. 5, § 4, which are, 'Having a sole estate or interest in fee simple of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder.' If the devise of *Thomas Burton* were stated upon record in any pleadings at common law, what description of interest, falling within these words, could he be stated to have had at the time of the devise? The opinion of Lord Eldon, in *The Atty. Gen'l v. Vigor*, 8 Ves. Jr. 282, was certainly against it; and the case of *Roe v. Griffiths*, 1 W. Bl. Rep. 606; *Goodtitle v. Wood*, Willes 211, and *Jones v.*

the question of devisability of rights of action obsolete; and the Statute 1 Vict., ch. 26, expressly extends the testamentary power to "all rights of entry for conditions broken and other rights of entry."¹ In most of the *United States* the local statute provides that all property, real or personal, or at least all property descendable to the heirs or transmissible to the personal representatives, may be devised or bequeathed;² and where such is the case, in the absence of an express statutory provision forbidding the devise of land held adversely to the testator, there would seem to be no reason why one may not devise lands of which he is disseised or to which he has only a right of entry.³

Roe, 3 T. R. 94, do not show that such right of entry is devisable, as in those cases the devisors devised all the interest they had ever had. And Lord Thurlow, *Perry v. Phelps*, 1 Ves. Jr. 255, supposed, in order to bring executory interests within the Statutes of Wills, that they must have been considered as executed by the Statute of Uses, which is a very different interest from a right of entry for the purpose of revesting a divested estate. In *Corbet's Case*, 1 Co. 85, b., 'For the construction of wills, this rule was taken by the justices in their arguments; that such an estate, which cannot by the rules of the common law be conveyed by act executed in his life, by advice of counsel learned in the law, such estate cannot be devised by the will of a man who is intended by law to be *inops consilii*;' from whence it may be inferred that out of that interest, in which by act executed in a man's life it is not possible to create any estate, no estate can be created by his will. And in *Butler's Baker's Case*, 3 Co. 32, a., it is said: 'Without question that which a man cannot dispose of by any act in his life shall not be taken for any of his manors, etc., whereof he may devise two parts by authority given him by the statute.' And in *Lord Mountjoy's Case*, *Godbolt* 17, it is laid down, 'that the Statute of Wills, 32 Hen. VIII., that it shall be lawful, etc., to devise two parts, etc., respects only such things as are devisable;' but a right of entry is not devisable; and therefore, according to the terms of the statute and the authority of that case, is not devisable. For these reasons we are of opinion that there must be judgment for the defendant. And whatever mischief or hardship may attend the decision of this case, or may be expected to arise from the application of the same rule to

other cases, it is an inconvenience which can, if our judgment be well founded, only be remedied by positive law. And the propriety of applying such a remedy, whereby the same rights of entry and action which belong to the heir may be extended to the devisee, is a question particularly fit for the consideration of the legislature."

In *Poor v. Robinson*, 10 Mass. 131, it was held that a disseisee, dying disseised, could not devise such estate to any but the disseisor, and that in such case the devise would, strictly speaking, operate as a release and not as a devise.

1. 1 Jarm. on Wills (5th ed.) 50.

2. See the various local statutes. See also *Gist v. Robinet*, 3 Bibb (Ky.) 2.

Under a statute authorizing the devise of estates in possession, reversion, or remainder, the intrusion of a stranger into the testator's land does not affect his power to devise. *May v. Slaughter*, 3 A. K. Marsh. (Ky.) 505. *Mills, J.*, delivering the opinion of the court in this case, said: "Here it is urged that no title passed by the will, because the land now in question is shown to have been in the adverse possession of another, at the death of the testator, as well as at the making of the will, and that the *Virginia* statute under which the will was made, like the statute of this state now in force, only authorized the testator to devise estates held by him at his death, 'in possession, reversion, or remainder.'" "The words 'possession,' 'reversion' or 'remainder,'" continues the judge, "are used as descriptive of the nature of the estate to be devised, or of its tenure, and not as describing the peculiar situation in which the land itself might be, with regard to intrusions upon it by strangers." See also *Thompson v. Hoop*, 6 Ohio St. 480.

3. 4 Kent's Com. (13th ed.) 512; *Stim-*

5. Devise of Lands Occupied by Testator Without Title.—A devise of land which the testator held merely by possession, without title, confers upon the devisee a good title against all but the true owner.¹

son's Am. Stat. Law, § 2630; *Waring v. Jackson*, 1 Pet. (U. S.) 570; *Varick v. Jackson*, 2 Wend. (N. Y.) 166; 7 Cow. (N. Y.) 238; *Hyer v. Shobe*, 2 Munf. (Va.) 200; *Watts v. Cole*, 2 Leigh (Va.) 664; *Smith v. Jones*, 4 Ohio 115; *Whittemore v. Beane*, 6 N. H. 47. Compare *Atwood v. Weems*, 99 U. S. 183; *Carter v. Thomas*, 4 Mc. 341.

In *Pennsylvania*, it is well settled that one may convey or devise lands out of possession. *Stoever v. Whitman*, 6 Binn. (Pa.) 421; *Humes v. McFarlane*, 4 S. & R. (Pa.) 435.

In *Maine*, *New Hampshire*, *Massachusetts*, and *Kentucky*, a devise of lands held adversely to the testator is authorized by statute. *Maine* Rev. Stat. (1883), ch. 74, § 4; *Massachusetts* Pub. Stat. (1882), ch. 127, § 26; *New Hampshire* Gen. Laws (1878), ch. 193, § 3; *Kentucky* Gen. Stat. (1873), ch. 11, § 2.

1. *Asher v. Whitlock*, L. R., 1 Q. B. 1. See *Doe v. Bryan*, 12 Ired. (N. Car.) 11; *Atwood v. Weems*, 99 U. S. 183.

In *Asher v. Whitlock*, L. R., 1 Q. B. 1, W., in 1842, inclosed some waste land; in 1850 he inclosed more land adjoining, and built a cottage; he occupied the whole till 1860, when he died, having devised it to his wife, so long as she remained unmarried, with remainder to his daughter in fee. On his death, the widow and daughter continued to reside on the property, and in 1861 the defendant married the widow, and came to reside with them. Early in 1863, the daughter died, aged eighteen years, and the mother died soon after. The defendant continued to occupy the property, and in 1865 the daughter's heir-at-law brought ejectment against him. It was held that the plaintiff was entitled to recover the whole property. *Cockburn, C. J.*, said: "Assuming the defendant's possession to have been adverse, we have then to consider how far it operated to destroy the right of the devisee and her heir-at-law. Mr. Merewether was obliged to contend that possession acquired, as this was, against a rightful owner, would not be sufficient to keep out every other person but the rightful

owner. But I take it as clearly established, that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine. In *Doe v. Dyeball*, Mood. & M. 346, one year's possession by the plaintiff was held good against a person who came and turned him out; and there are other authorities to the same effect. Suppose the person who originally inclosed the land had been expelled by the defendant, or the defendant had obtained possession without force, by simply walking in at the open door in the absence of the then possessor, and were to say to him, 'you have no more title than I have, my possession is as good as yours,' surely ejectment could have been maintained by the original possessor against the defendant. All the old law on the doctrine of disseisin was founded on the principle that the disseisor's title was good against all but the disseisee. It is too clear to admit of doubt, that if the devisor had been turned out of possession he could have maintained ejectment. What is the position of the devisee? There can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner. Here the widow was a prior devisee, but *durante viduitate* only, and as soon as the testator died, the estate became vested in the widow; and immediately on the widow's marriage the daughter had a right to possession; the defendant, however, anticipates her, and with the widow takes possession. But just as he had no right to interfere with the testator, so he had no right against the daughter, and had she lived she could have brought ejectment; although she died without asserting her right, the same right belongs to her heir. Therefore, I think the action can be maintained, inasmuch as the defendant had not acquired any title by length of possession. The devisor might have brought ejectment, his right of possession being passed by will to his daughter, she could have maintained ejectment, and so, therefore, can her heir, the female plaintiff. We know to what

6. Equitable Rights to Reconveyance.—One who has executed a conveyance under circumstances which would entitle him in equity to have it set aside and reconveyance decreed, has an interest distinct from a right of entry, which may be devised without regard to the devisability of rights of entry under the local law.¹

extent encroachments on waste lands have taken place; and if the lord has acquiesced and does not interfere, can it be at the mere will of any stranger to disturb the person in possession? I do not know what equity may say to the rights of different claimants who have come in at different times without title; but at law, I think the right of the original possessor is clear. On the simple ground that possession is good title against all but the true owner, I think the plaintiffs entitled to succeed, and that the rule should be discharged."

1. *Gresley v. Mousley*, 4 De G. & J. 92; *Uppington v. Bullen*, 2 D. & W. 184; *Stump v. Gaby*, 2 De G. M. & G. 623.

Rescinded Contract of Sale.—But where, at the date of the execution of a will, the testator had sold a large portion of his estate, real and personal, and taken a mortgage thereon for the purchase-money, and then the contract of sale was rescinded, followed by the death of the testator, without a republication of the will, it was held that the property included in the contract of sale did not pass under a residuary clause in the will; the then existing law being that no real nor personal property acquired after the making of a will shall pass thereby, without republication of the will. *Cogdell v. Widow*, etc., 3 Desaus. (S. Car.) 346.

In *Gresley v. Mousley*, 4 De G. & J. 92, the devisee of lands sold by the testator to his solicitor was allowed to recover. Turner, L. J., said: "The will under which the plaintiff claims title was executed after the conveyance had been made to the solicitor, the purchaser, upon the occasion of the purchase in question, and it is, therefore, insisted, on the part of the appellants, the devisees of the purchaser, that the testator had not, at the time of the execution of his will or at any time afterwards, any estate or interest in the property, that he had merely a right of suit to recover it, which right, it was said, was analogous to a right of entry, and could not pass by devise. This

argument, on the part of the appellants, was not supported by any authority; on the contrary, it was admitted that the cases of *Uppington v. Bullen*, 2 D. & W. 184, and *Stump v. Gaby*, 2 De G. M. & G. 623, which were referred to in the argument, were opposed to it. Those cases, however, were called in question, and it was insisted that the decision of the case ought to be governed by the analogy contended for between the right of suit which the testator in this case had and a mere right of entry. It is hardly necessary to say, that I should hesitate long before I should venture to dissent from authorities of at least equal weight with our own, even if I had strong doubts upon the subject; but on considering the decisions referred to, I am by no means disposed to dissent from them. I think the analogy contended for does not exist. A right of entry is the foundation of proceedings to recover an estate. The exercise of it is of course prescribed by law for restoring the seisin which has been displaced, and without which the estate cannot be recovered. A devise of a right of entry, therefore, is no more than a devise of the right to institute proceedings for recovering an estate; but where a purchase is voidable in equity there is no question of restoring the seisin before instituting proceedings to avoid it. The interest in the estate which gives the right to avoid it exists independently of any act to be done by the party seeking the avoidance. The decree of the court avoiding the purchase does not, as was suggested in argument, create a wholly new right; it proceeds upon a pre-existing right. The mere circumstance of an estate not being recoverable otherwise than by action or suit, clearly does not prevent it from being devisable. That point is well settled by *Doe v. Hall*, 2 Dow. & R. 38, and *Culley v. Doe*, 11 Ad. & El. 1021; 39 E. C. L. 303; and it would be most dangerous to unsettle the point, for if it was ruled otherwise, no valid devise could be made by a testator who was out of

7. Devise of Land Contracted for by Testator.—Where the contract is such as could have been enforced against the purchaser at the time of his decease, the estate which is the subject-matter of the contract, or, failing that, the purchase-money, belongs to his heir or devisee; but if, from a defect of title or any other cause, the contract was not obligatory on the purchaser at his death, his heir or devisee is not entitled to say that he will take the estate with its defects or have the purchase-money laid out in the purchase of another.¹

possession and whose title was disputed. Whether we look, therefore, to the distinction between a mere right of entry and a suit of this description, or to the law as settled upon the power to devise, notwithstanding the title is disputed, I see no ground for holding that the plaintiff is not entitled to sue for the purpose of setting aside this purchase. It was attempted, however, to strengthen the appellant's argument on this part of the case by reference to the authorities as to the revocation of will by conveyances which are void in equity only; but those cases do not seem to me to apply to the present. They proceed upon the ground that the conveyance, although void in equity, evidences an intention to make a different disposition and, therefore, to revoke the devise; but here there is certainly no intention not to devise."

1. 1 Jarm. on Wills (5th ed.) 53; *Broome v. Monck*, 10 Ves. Jr. 597. See *Hudson v. Cook*, L. R., 13 Eq. 417; *Haynes v. Haynes*, 1 Dr. & Sm. 451; *Lysaght v. Edwards*, 2 Ch. Div. 516; *Curre v. Bowyer*, 5 Beav. 6, n; *Ingle v. Richards*, 28 Beav. 366; *O'Shea v. Howler*, 1 J. & L. 398; *Sergeant v. Simpson*, 8 Me. 149; *In re Champion*, 1 Busb. Eq. (N. Car.) 246; *Smith v. Jones*, 4 Ohio 115.

In 3 Wms. on Exrs. (9th Eng. ed.) 265, it is said: "If the purchaser of real estate dies, without having paid the purchase-money, his heir-at-law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor or administrator. (*Milner v. Mills*, Mosely 123; *Broome v. Monck*, 10 Ves. Jr. 597.) And if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket, he may afterwards call upon the personal representative to reimburse him. (*Broome v. Monck*, 10 Ves. Jr. 615; 1 Sugd. V. & P. 180 (9th ed.). See *Lord v. Lord*, 1 Sim. 505.)

So, if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty so far as it goes. And it has been decided that if, by reason of the complication of the testator's affairs, the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet, on the coming in of the assets, the devisee of the estate contracted for may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit. (*Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Broome v. Monck*, 10 Ves. Jr. 597; 1 Sugd. V. & P. (9th ed.) 180.)

"But if a title cannot be made, or there was not a perfect contract, or the court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal, in consideration of the court, upon which the right of the executor on the one hand, and of the heir or devisee on the other, depends. And therefore, if the vendor dies, the estate will go to the heir at law of the vendor, in the same manner as if no contract had been entered into (*Lacon v. Mertins*, 3 Atk. 1; *Atty. Gen'l v. Day*, 1 Ves. 218; *Buckmaster v. Harrop*, 7 Ves. 341. See also *Johnson v. Legard*, T. & R. 281), and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him. (*Green v. Smith*, 1 Atk. 573; *Broome v. Monck*, 10 Ves. Jr. 597.) The court cannot speculate upon what the deceased party would or would not have done; but in these cases the inquiry must be whether at his death a contract existed by which he was bound, and which he would be compelled to perform. (See *Curre v. Bowyer*, 5 Beav. 6, n.) That alone can give the heir of the purchaser a right to call for the personal estate to be

8. **After Acquired Personality.**—At common law, personal property acquired by the testator after the date of the making would pass by the will;¹ and the principle has been extended to cover personal property limited by settlement to one's executors and administrators.²

applied, or to the personal representative of the vendor a right to call upon his heir." See *EXECUTORS AND ADMINISTRATORS*, vol. 7, p. 281.

Where a testator, at the time of executing his will, was in the possession of lands under a verbal agreement for their purchase, his legal title to which he subsequently perfected by the acceptance of a deed, it was held that the lands passed by a devise in the will to the devisee; and that the subsequent acceptance of a deed was not a revocation of such devise. *Smith v. Jones*, 4 Ohio 115.

A testator, by the first item of his will made in August, 1847, gave to his wife "all my real estate, consisting of several town lots in Shelby, viz., No. 11, etc.;" by the second item he gave her "all my personal estate of whatever nature," and "my interest in a tract of land lying, etc., whereon B. now lives;" he then added: "I do give all the aforesaid bequests to my wife, her heirs and assigns forever," and afterward appointed her executrix. In February, 1848, he annexed a codicil giving a negro woman with her child, lately purchased, to his wife. In 1851, he contracted to purchase land of the clerk and master for one thousand eight hundred and seventy-five dollars, but died before paying the money, and before he had taken a title. It was held that, under the Act of 1844, ch. 83, the wife was entitled to his testator's rights in this land. *In re Champion*, 1 Busb. Eq. (N. Car.) 246.

1. Schouler on Wills (2d ed.), § 28; Lawson Rights, Remedies, and Practice, vol. 19, p. 1; Stimson's Am. Stat. Law, § 2630. See *Smith v. Edrington*, 8 Cranch (U. S.) 66; *Haven v. Foster*, 14 Pick. (Mass.) 539; *Winchester v. Forster*, 3 Cush. (Mass.) 369; *Wait v. Belding*, 24 Pick. (Mass.) 1; *Loveren v. Lamprey*, 22 N. H. 434; *Allen v. Harrison*, 3 Call. (Va.) 289; *Henderson v. Ryan*, 27 Tex. 674; *Warner v. Swearingen*, 6 Dana (Ky.) 199; *Walton v. Walton*, 7 J. J. Marsh. (Ky.) 58; *Marshall v. Porter*, 10 B. Mon. (Ky.) 1; *Nichols v. Allen*, 87 Tenn.

131; *McNaughton v. McNaughton*, 34 N. Y. 201.

2. *Morris v. Howes*, 4 Hare 599; *Mackenzie v. Mackenzie*, 3 Mac. & G. 559.

In *Mackenzie v. Mackenzie*, 3 Mac. & G. 559, by a postnuptial settlement certain moneys, to become payable on three policies of insurance on the life of R. M., were vested in trust for B. M. for life, and after her death, upon trust for the appointees of R. M. In 1821 R. M. appointed the moneys so to become payable to his executors and administrators. By an order in a suit instituted for the purpose of carrying into effect the trusts of the settlement, it was ordered that the trustees should relinquish the policies for such a sum as might be obtainable for the same from the insurance company, and that the moneys so realized should be invested, and the dividends accumulated during the joint lives of R. M. and B. M. B. M. died in 1847. On a question being then raised between the children of the marriage and the assignees in insolvency and in bankruptcy of R. M., it was held that the effect of the appointment was to make the property part of the personal estate of R. M. Lord Truro said: "The fact is that the effect of the appointment is to add the money to the husband's personal estate in the first instance in the hands of his executors or administrators, and when in the hands of his executors or administrators, it then becomes subject to the operation of any testamentary disposition of it, or in default of that, to the operation of the Statute of Distributions. The persons who take it beneficially do not take as purchasers under the instrument by which the property becomes added to his personal estate. They are not like the objects of a limitation particularly designated by that instrument; they have only the hope or chance, whatever it may amount to, of becoming entitled to the property, or some part of it, not under that instrument, but under the will or intestacy, as the case may be. The children then having no interest, properly

9. **After Acquired Lands.**—At common law, a devise of lands was regarded as a species of conveyance, and hence after acquired real estate, in which the testator had no interest when he made the will, would not pass.¹ The right, however, to call for a conveyance, pursuant to a binding contract entered into before the will was made, was held a sufficient interest to sustain a devise of the land contracted for.² At the present time, statutes exist in

speaking, under the settlement or the appointment, the husband, after the death of the wife, could have sold the policies to the insurance office, or the assignees might have sold them, and would have been entitled to the proceeds. But, in fact, they have been sold, and consequently those who are now entitled to the settlor's interest are entitled to the fund which has arisen from the sale."

1. 1 Jarm. on Wills (5th ed.), § 51; Harwood v. Goodright, Cowp. 90; Bunter v. Coke, 1 Salk. 237, *nom*; Buckingham v. Cook, 3 Bro. P. C. 19; Langford v. Pitt, 2 P. Wms. 629; Milnes v. Slater, 8 Ves. Jr. 295; Perry v. Phelps, 1 Ves. Jr. 251.

Express Reference to After Acquired Lands.—Even though after acquired lands might be expressly and in terms disposed of, the same rule applied; thus, under a devise of "all the lands I shall have at my decease," it was held that lands purchased after the devise did not pass; "for a man cannot give that which he has not, and the statute only empowers men having lands to devise them, so that if the deviser has not the lands, he is out of the statute." Bunter v. Coke, 1 Salk. 237. The rule applied equally to devises of copyholds by custom, and under the wills of Henry VIII. 1 Jarm. on Wills (5th ed.) 57.

The old regard for wills as a conveyance is assigned in *George v. Green*, 13 N. H. 521, and *Watson v. Child*, 9 Rich. Eq. (S. Car.) 129, as the reason for restricting its power of disposal to property owned at the date of its execution.

See further, as to the common-law rule, *Hays v. Jackson*, 6 Mass. 149; *Ballard v. Carter*, 5 Pick. (Mass.) 112; *Brewster v. McCall*, 15 Conn. 274; *George v. Green*, 13 N. H. 521; *Carter v. Thomas*, 4 Me. 341; *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *McKinnon v. Thompson*, 3 Johns. Ch. (N. Y.) 307; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312; *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441; *Girard v. Philadelphia*, 4 Rawle (Pa.) 323;

Kemp v. M'Pherson, 7 Har. & J. (Md.) 320; *Raines v. Barker*, 13 Gratt. (Va.) 128; *Ross v. Ross*, 12 B. Mon. (Ky.) 437; *Johnston v. Hunley*, 1 Tayl. (N. Car.) 305; *Foster v. Craig*, 2 Ired. Eq. (N. Car.) 536; *Meador v. Sorsby*, 2 Ala. 712; *Watson v. Child*, 9 Rich. Eq. (S. Car.) 129; *Luce v. Dimock*, 1 Root (Conn.) 82; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394; *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Parker v. Cole*, 2 J. J. Marsh. (Ky.) 503; *Girard v. Philadelphia*, 4 Rawle (Pa.) 323; *Grimke v. Grimke*, 1 Desaus. (S. Car.) 366. And see *Jones v. Shoemaker*, 35 Ga. 151; *Skeene v. Fishback*, 1 A. K. Marsh. (Ky.) 356; *Roberts v. Elliott*, 3 T. B. Mon. (Ky.) 395; *Bowman v. Violet*, 4 T. B. Mon. (Ky.) 350; *Den v. Speight*, 9 Ired. (N. Car.) 288; *Turpin v. Turpin*, 1 Wash. (Va.) 75.

2. *Marston v. Roe*, 8 Ad. & El. 63; 35 E. C. L. 303; *Langford v. Pitt*, 2 P. Wms. 631; *Greenhill v. Greenhill*, Pre. Ch. 320; *Morgan v. Holford*, 1 Sm. & Gif. 101.

Of course if the will was made before the articles of purchase were entered into, the testator had not a devisable interest. *Langford v. Pitt*, 2 P. Wms. 631.

In *Cathrow v. Eade*, 4 De G. & S. 527, it was held that there was no presumption that the contract antedated the will.

"Where a testator had an equitable interest in the devised lands when he made his will, and afterwards acquired the legal ownership, the equitable interest passed by the will, and the subsequently acquired legal estate descended to the heir, who, of course, became a trustee for the devisee. If, on the other hand, the testator were seised only of the legal estate, at the time of the execution of his will, and afterwards acquired the equitable interest (being the converse case), as where, being a mortgagee in fee at the date of the will, he subsequently purchased the equity of redemption, the devisee was a trustee of the legal estate, which he derived

England,¹ and nearly all the *United States*, which enable a testator to devise land to which he may be entitled at the time of his death; although he became entitled to the same after the execution of the will.² In the absence of such provision, it is conceived that the common-law rule is still in force.

10. Joint Interests.—Estates in real or personal property, held

through the will, for the heir at law to whom the equitable inheritance descended. Cases of the former description frequently occurred where a man contracted to purchase a freehold estate, then devised it, and, subsequently to the execution of his will, took a conveyance of the property, and then died without republishing his will. The testator being equitable owner under the contract, his interest passed by the will to the devisee, whose equitable right the heir was bound to clothe with the legal title. In these and many other cases, great inconvenience occurred from the incompetency of a testator to dispose by will of his after acquired real estate; and questions often arose as to the actual state of the rights and obligations of the parties under the contract, on which the validity of the devise depended, and also as to the effect of certain modes of conveyance in producing a revocation of the devise of the equitable interest. The removal of this incapacity, therefore, is not the least of the advantages conferred by the Statute 1 Vict., ch. 26, which has expressly extended the testamentary power to such real and personal estate as the testator may be entitled to at the time of his death, notwithstanding he may become entitled to the same subsequently to the execution of his will. But it may, of course, be necessary, even under the new law, to go into the inquiry, whether the circumstances attending a contract for promise or sale by a deceased person, are such as to render the contract obligatory; for upon this fact would depend the question (which has lost none of its importance), whether, as between the representatives of the deceased testator or intestate, it is to be regarded as real or personal estate; and this may, and often does, depend on extrinsic circumstances, ascertainable by parol testimony. In *Lacon v. Mertins*, 3 Atk. 1, Lord Hardwicke decreed a parol contract to be carried into execution as between the real and personal representatives of the deceased vendor, the

purchaser submitting to perform it, and acts of part performance, sufficient to take it out of the Statute of Frauds, being proved. In *Buckmaster v. Harrop*, 7 Ves. Jr. 341, a bill by the purchaser's heir-at-law for a similar purpose was dismissed by Sir Wm. Grant, M. R., on the ground that a binding contract had not been proved." 1 Jarm. on Wills (5th ed.) *51, *52.

1. 1 Vict., ch. 26, which applies to all wills made since January 1, 1838. 1 Jarm. on Wills (5th ed.), §§ 51, 52; Schouler on Wills (2d ed.) 695.

2. Such is the case in *Alabama, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin*, and others. 1 Jarm. on Wills (5th ed. by Randolph and Talcott), § 51, n. 8; Stimson's Am. Stat. Law, §§ 2630, 2634.

In some states the statute has been held to apply only to wills made after its passage; in others, to all cases in which the testator died after the passage of the act. Upon this point the local statute should be consulted. See also the following authorities, *Loveren v. Lamprey*, 22 N. H. 434; *Brewster v. McCall*, 15 Conn. 289; *Meserve v. Meserve*, 63 Me. 518; *Winchester v. Foster*, 3 Cush. (Mass.) 366; *Cushing v. Aylwin*, 12 Met. (Mass.) 169; *Pray v. Waterston*, 12 Met. (Mass.) 262; *De Peyster v. Clendinning*, 8 Paige (N. Y.) 295; *Parker v. Bogardus*, 5 N. Y. 399; *Ellison v. Miller*, 11 Barb. (N. Y.) 332; *Green v. Dikeman*, 18 Barb. (N. Y.) 535; *Condict v. King*, 13 N. J. Eq. 375; *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432; *VanTilburgh v. Hollinshead*, 14 N. J. Eq. 36, n.; *Wilson v. Wilson*, 6 Md. 487; *Gable v. Daub*, 40 Pa. St. 217; *Mullock v. Souder*, 5 W. & S. (Pa.) 198; *Roney v. Stiltz*, 5 Whart. (Pa.) 381; *Gibbon v. Gibbon*, 40 Ga. 562; *Peters v.*

strictly in joint tenancy, cannot be devised or bequeathed by one joint tenant, free from his co-tenant's title by survivorship, which takes precedence of the claim of the devisee or legatee, as it would of that of his heir or administrator had he died intestate.¹ Instances of joint tenancy are rare in practice, as the modern presumption favored by legislation is that a devise or conveyance to two or more creates a tenancy in common, rather than a joint tenancy.²

11. Remainders and Executory Interests.—See REMAINDERS AND EXECUTORY INTERESTS, vol. 20, pp. 838, 968.

12. Community Property.—See COMMUNITY PROPERTY, vol. 3, p. 350.

X. PROBATE AND ITS EFFECTS.—See PROBATE AND LETTERS OF ADMINISTRATION, vol. 19, p. 161.

XI. ALTERATIONS, ERASURES, AND INTERLINEATIONS—1. **Whether Presumed to Have Been Made Before or After Execution.**—Alterations and additions made in a will complete without them, are presumed, in the absence of evidence, to have been made after the execution of the will or any subsequent codicil.³ Alterations

Spillman, 18 Ill. 370; Willis v. Watson, 5 Ill. 64; Den v. Speight, 9 Ired. (N. Car.) 288; *In re* Champion, Busb. Eq. (N. Car.) 246; Means v. Evans, 4 Desaus. (S. Car.) 242; Alexander v. Waller, 6 Bush (Ky.) 341; Roberts v. Elliott, 3 T. B. Mon. (Ky.) 395; Warner v. Swearingen, 6 Dana (Ky.) 195; Hamilton v. Flinn, 21 Tex. 713; Henderson v. Ryan, 27 Tex. 670; Smith v. Jones, 4 Ohio 115; Turpin v. Turpin, 1 Wash. (Va.) 75; Hardenbergh v. Ray, 151 U. S. 112; McAleer v. Schneider, 22 Wash. L. Rep. 193; Applegate v. Smith, 31 Mo. 166. Compare Havens v. Havens, 1 Sandf. Ch. (N. Y.) 329; Beall v. Schley, 2 Gill (Md.) 181.

By a will executed in *Kentucky*, a testator devised to his wife his entire estate, real, personal, and mixed, "wherever situate." After the date of the will the testator acquired land in *Missouri*. It was held that the title to said land passed to the widow under the will. Applegate v. Smith, 31 Mo. 166.

During the operation of a statute providing that personal property acquired after the making of a will should not pass thereby, a certain testator executed his last will and testament. Then the existing act was repealed, and the law changed so as to make a will speak in its disposition of personalty as if executed at the death of the testator. Later the testator, who had made his will disposing of his personal estate when such affairs were

regulated by the pre-existing statute, died, leaving the repealing statute in force. It was held that this latter statute should be regarded, and consequently personal property acquired after the making of the will was held to pass thereby. Means v. Evans, 4 Desaus. (S. Car.) 242.

1. 1 Jarm. on Wills (5th ed.), § 46; Co. Lit. 185a.

2. Schouler on Wills (2d ed.), § 28.

3. Theobald on Wills (2d ed.) 33, citing Cooper v. Bodlett, 4 No. Cas. 685; 4 Moo. P. C. 419; Simmons v. Rudall, 1 Sim. N. S. 115; Greville v. Tylee, 7 Moo. P. C. 320; Gann v. Gregory, 3 De G. M. & G. 780; Doe v. Palmer, 16 Q. B. 747; Williams v. Ashton, 1 J. & H. 115; Christmas v. Whinyates, 3 S. & T. 81; Goods of Sykes, L. R., 3 P. & D. 26. See also Burgoyne v. Showler, 1 Rob. 5; *In re* James, 1 S. & T. 238; *In re* Adamson, L. R., 3 P. & D. 253; 1 Redf. on Wills (4th ed.) 316; Dyer v. Erving, 2 Dem. (N. Y.) 160; Wetmore v. Carry, 5 Redf. (N. Y.) 544. But compare Matter of Homes' Will (Surrogate Ct.), 11 N. Y. Supp. 898; Matter of Potter's Will (Surrogate Ct.), 12 N. Y. Supp. 105; Crossman v. Crossman, 95 N. Y. 145; Martin v. King, 72 Ala. 354. But see, *contra*, Wiloff's Appeal, 15 Pa. St. 290.

Where a testatrix told the witnesses to her will, at the time of attestation, that she had made alterations in her will, but did not allow them to see

and additions made in a will which would be incomplete without them, are presumed to have been made before execution.¹

2. Admissibility of Extrinsic Evidence as to Date of Alterations.—Extrinsic evidence is admissible to show whether obliterations, additions, or other alterations, were made before or after execution,² and for this purpose the declarations of a testator made be-

what the alterations were, it was held that, in the absence of any means to determine what alterations were made before execution, the court could not give effect to any of them. *Williams v. Ashton*, 1 J. & H. 115. *Wood, V. C.*, said: "I find numerous alterations in this will, as to which the only information afforded by the testatrix is, that she said she had made alterations, without specifying what the alterations were which she had so made. I do not think that it is quite a correct mode of stating the rule of law, to say that alterations in a will are presumed to have been made at one time or at another. The correct view, as enunciated in the case of *Doe v. Palmer*, 16 Q. B. 747, is that the *onus* is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury may infer that the alteration was made before the will was executed. I do not consider that the court is bound to say that it will presume such alterations to have been made either before or after execution. With regard to a will, I do not see any necessary presumption of the kind. As to a deed, a presumption is considered to exist that alterations have been made before execution, because, if you presume them to have been subsequently introduced, you presume a crime; but even that view has only recently been adopted. With respect to a will, this reasoning has no application. There is no crime in a testator choosing to make alterations in his own will, and all that can be said, with respect to such alterations as these, is that we do not know when they were made. Now, a testator cannot reserve to himself a power of making future testamentary gifts by unattested instruments. If a general statement by a testatrix that she had made some alterations in her will were to give validity to any alterations found in the instrument after her death, that would enable her, at any time after such statement, to make as many unattested alterations as she pleased. I apprehend the rule is that those who pro-

pound a doubtful instrument must make the doubt clear. I cannot tell what alterations the testatrix made before attestation, or what interests might be affected by alterations subsequently made. Not being able to say which alterations are valid, I cannot give effect to any of them."

1. *Theobald on Wills* (2d ed.) 33; *In re Cadge*, L. R., 1 P. & D. 543; *Birch v. Birch*, 1 Rob. 675; *In re Swindin*, 2 Rob. 192; *Greville v. Tylee*, 7 Moo. P. C. 320; *In re Birt*, L. R., 2 P. & D. 214; *In re Adams*, L. R., 2 P. & D. 367; *Goods of King*, 23 W. R. 552. See *Matter of Voorhees*, 6 Dem. (N. Y.) 162.

"Where obliterations and interlineations appear on the face of a will, and there is no evidence to show when they were made, the presumption is that they were made after the execution of the will; and if there be a codicil to the will, which codicil takes no notice of them, the presumption is, that they were made after the date of the codicil. And the same presumptions hold regarding mutilation. But where a will has been drawn with blanks left, *e. g.*, for the names of the legatees and the amount of the legacies, which blanks are afterwards filled up, but there is no evidence to show when, the presumption is that the blanks were filled in before execution. And although there may have been no blanks, but the names of the legatees are found interlined, yet if the interlineation only supplies a blank in the sense, and appears to have been written with the same ink and at the same time as the rest of the will, the court will conclude that it was written before execution. In *Birch v. Birch*, 6 No. Cas. 581, where some blanks were filled in with black ink and others with red, it was presumed that the additions in black ink were made before execution, but that those in red ink were made after execution, the envelope in which the will was found appearing to have been sealed, opened, and resealed." 1 *Jarm. on Wills* (5th ed.) *143.

2. *Theobald on Wills* (2d ed.) 32;

fore the execution of the will, or before the execution of a codicil which republishes the will, showing an intention to benefit an individual, which will not be carried out, unless the alterations are admitted, may be given in evidence.¹ Declarations by a testator after execution of a will, that an alteration was made before execution, are not admissible.²

3. Alterations Dated Prior to Execution.—The fact that an alteration in the testator's handwriting bears an earlier date than the will, is not alone sufficient, where the statute specifies that alterations shall be made in a particular way, to show that it was made before execution.³

Moore v. Moore, 1 R., 6 Eq. 156; *In re Duffy*, 1 R., 5 Eq. 506; *In re Hindmarch*, L. R., 1 P. & D. 307. See *In re Adamson*, L. R., 3 P. & D. 253.

1. *Doe v. Palmer*, 16 Q. B. 747; 20 L. J. Q. B. 367; *Dench v. Dench*, 2 Prob. Div. 60; *In re Sykes*, L. R., 2 P. & D. 26.

The testator having obtained the lithographed form of a will by which the property was left to all the children absolutely on the death of the wife, filled up the blanks in his own handwriting, and in the place of the bequest to the children interlined the words, "To my only son, A. B." The bequest to all the children was canceled by a line drawn through it. No reference was made to the alterations in the attestation clause, nor were any initials placed in the margin to identify them. The surviving attesting witness had no knowledge whether the alterations were made at the time of execution. The testator had one child, a son, by the second wife, who took a life interest under the will, and five children by a previous marriage. The court held that the presumption arising from the ignorance of the witness was rebutted by a declaration of the testator, made previous to the execution of the will, that he intended to provide for the child of the second marriage and by the other circumstances of the case. *Dench v. Dench*, 2 Prob. Div. 60.

In *Re Sykes*, L. R., 3 P. & D. 26, the deceased executed a will and codicil, the latter referring to the former by its date. The name of the executor appointed by the will was written on an erasure. The court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the will and codicil to such executor. Sir J. Hannen said: "As

the declarations of a testator, made before the execution of a will, are admissible to show that alterations were made before such execution, so declarations made before the execution of a codicil, which republishes the will, may be admitted to show that the alterations in the will were made before the execution of the codicil."

2. *In re Adamson*, L. R., 3 P. & D. 256; *Doe v. Palmer*, 16 Q. B. 747. Otherwise, however, if made before the execution of a codicil which republishes the will. *In re Sykes*, L. R., 3 P. & D. 26. But in *Ravenscroft v. Hunter*, 2 Hagg. 69, declarations of an intent to benefit certain legatees, made after the will was executed, seem to have been admitted.

3. *In re Adamson*, L. R., 3 P. & D. 253. In this case, Sir J. Hannen said: "The general presumption, is that unattested alterations were made after the execution of the will, but this presumption may be rebutted by proof or internal evidence to the contrary. In the present case there is a total absence of evidence when the alterations and additions were made, unless the fact that dates prior to that of the will have been affixed to some of them by the testator is to be deemed such evidence. I have been unable to find any case in which it has been held that a date to an alteration was in itself sufficient to establish that it was made at that time. It is no doubt a general presumption that documents were made on the day they bear date. *Taylor on Evidence*, § 137; but it may well be that the presumption does not exist with reference to alterations in a will, though made by the testator himself, because the legislature, in prescribing the conditions necessary for the due execution of testamentary papers, intended to guard against certain innocent acts of testators as well as

4. **Distinctions Between Ink and Pencil Alterations.**—Alterations in ink are presumed to be final, while those in pencil, the will being written in ink, are *prima facie* deliberative only, and the original writing will have effect.¹ Where the alterations are of both kinds in the same instrument, the presumption as to each is

the fraudulent acts of others. The object of the Statute 1 Vict., ch. 26, is to obtain the security of the attestation of two witnesses to the fact that the testator has executed the whole instrument sought to be proved. If, in the absence of any proof that the alterations in a will were made before execution, beyond the fact that they bear an earlier date in the testator's handwriting, they were admitted to probate, the security of two witnesses would be wanting and the mere statement of the testator would be acted upon. It has been held that declarations by a testator, after execution of a will, that an attestation was made before, are not admissible in evidence, *Doe v. Palmer*, 16 Q. B. 747; but if the date written by the testator be taken as sufficient, his declaration would be accepted without proof, whether it was made before or after the execution. It may be said that there is little probability of a testator affixing a false date to an alteration in his will, but my experience in this court leads me to a different conclusion. That I am not alone in deeming it necessary to guard against such practices by testators is proved by the following passage in the judgment of the privy council in *Croker v. Hertford*, 4 Moo. P. C. 367: 'The want of specific identification would of necessity repeal, to a certain extent, the statute; for if a general reference would do, why should not a testator write as many codicils as he pleases after the incorporating codicil, and by omitting to date them or by antedating them, defeat the provisions of the statute?'

1. 1 Jarm. on Wills (5th ed.) *133; Theobald on Wills (2d ed.) 32; *Hawkes v. Hawkes*, 1 Hagg. 321; *Edward v. Astley*, 1 Hagg. 490; *Ravenscroft v. Hunter*, 2 Hagg. 68; *Parkin v. Bainbridge*, 3 Ph. 321; *Lavender v. Adams*, 1 Add. 403; *Bateman v. Pennington*, 3 Moo. P. C. 223; *Francis v. Grover*, 5 Hare 39; *Garm v. Gregory*, 3 De G. M. & G. 780; *In re Hall*, L. R., 2 P. & D. 256; *In re Adams*, L. R., 2 P. & D. 367. See further *Mence v. Mence*, 18 Ves. Jr. 348; *Goods of Bellamy*, 14 W. R. 501.

Thus, where a will was written in ink, and formally executed, and the testator afterward drew a line in pencil through a clause in the will, it was held that the erasure in pencil raised no presumption of revocation, and that, without other explanation, it was properly regarded not as a revocation of the clause, but as merely deliberative, or indicative of some future and incomplete purpose. *Francis v. Grover*, 5 Hare 39. *Wigram, V. C.*, said: "The alleged omission was in not directing the jury that, *prima facie*, the pencil erasure was a revocation, and that they were therefore bound to find the bequest revoked, unless evidence was given to counter-vail that act. The judge certainly did not tell the jury that the pencil erasure was a revocation, but only that the act was equivocal, and that they were to decide, from the collateral facts and the nature of the alteration, which was in pencil instead of the more durable material, ink, what effect was to be given to it; and the judge observed very properly that the testator had taken pains to have the will formally drawn up, and had afterward made pencil alterations. Omitting the case of *Mence v. Mence*, 18 Ves. Jr. 348, it appears to me that, in the cases of *Parkin v. Bainbridge*, 3 Ph. 321; *Ravenscroft v. Hunter*, 2 Hagg. 68; *Lavender v. Adams*, 1 Add. 403; *Edwards v. Astley*, 1 Hagg. 490, and *Hawkes v. Hawkes*, 1 Hagg. 321, the learned judges have all considered that a pencil alteration may be final, or that it may be deliberative; and that, from the nature of the act, they consider it, *prima facie*, as deliberative and not final. That view has always been taken in the ecclesiastical courts, admitting that any circumstance appearing upon the face of the will, or facts appearing by extrinsic evidence, must be taken into account in deciding the question. It is impossible not to feel the force of what the learned judges have said. Every man who makes an alteration in ink supposes that alteration to remain, for the material cannot, without much labor, be got rid of; but with respect to alterations in pencil, the probability

stronger than if either stood alone.¹ Any circumstances appearing upon the face of the will, facts appearing by extrinsic evidence, or even the declarations of the testator, may be taken into account in deciding the question.²

is that they have been made as notes for the purpose of altering the instrument, to be changed as the testator thinks fit. The act is deliberative, and I cannot say that the learned judge did not do right when he so stated the law of the case, and left it to the jury to consider the effect of the alteration. He clearly defined the question intended to be referred to them, and left it to the jury as distinctly as it could be left. In that view, therefore, of the case, I do not see any ground to alter their conclusion. I do not understand Sir William Grant, in *Mence v. Mence*, 18 Ves. Jr., 348, as meaning to lay down any abstract rule. In that case there was a residuary clause, and a pencil line drawn through the residuary clause, so far as it related to the disposition of the property; but the words 'and as to all my ready money, securities for money,' etc., which were descriptive of the property, were left standing. Against the residuary clause in the margin the testator had written, 'This is to be particularly noted;' giving as a reason for the erasure that he meant to make a different disposition of some portraits and other specific articles. Then, in the residuary clause, there were some directions given as to advances for his natural sons and a nephew, and opposite to that the testator had written in the margin, 'This should be modified.' Sir William Grant, having the erasure and the notes in the margin before him, came to the conclusion that the testator did intend to revoke the residuary bequest; that he intended to revoke it so far as the disposing part went; and that he had intended also not to leave the other part standing against which he had written that it was 'to be modified.' I cannot understand Sir William Grant as intending by this intention to lay down any abstract rule of law different from that which has been recognized by other judges. In this case I am of opinion that the learned judge did not miscarry in point of law, in not directing the jury that they were bound to assume a revocation unless the contrary was proved. The jury were directed to consider the nature of the act

done, the course the testator had taken in executing a formal instrument, and all the surrounding facts which were brought to their attention; and the judge was satisfied with the verdict. I see no ground for directing a new trial."

Pennsylvania.—Alterations in a will made by the testator with a lead pencil, signify the same intent and have the same effect as if they were in ink; and from the fact that the alterations are in pencil upon a will written in ink, no presumption arises that they are deliberative only and do not express the final intent of the testator. *Tomlinson's Estate*, 133 Pa. St. 245. See *Knox's Estate*, 131 Pa. St. 220.

1. *Hawkes v. Hawkes*, 1 Hagg. 321.

In *Hawkes v. Hawkes*, 1 Hagg. 322, Sir J. Nichol said: "There are various erasures, and crossings, and interlineations—some in pencil, some in ink; the general presumption and probability are, that, where alterations in pencil only are made, they are deliberative; where in ink, they are final and absolute; but when they are of both sorts, the presumption as to each is stronger; if the writer had made up his mind, and intended the variation to be final, he would, instead of pencil, have used the other material, ink; if he were deliberating only, and undecided, he would not use ink, but pencil."

2. *Ravenscroft v. Hunter*, 2 Hagg.

69; *Francis v. Grover*, 5 Hare 47.

Declarations of the testator, before the execution of the will, showing an intent to benefit a particular individual, which cannot be carried out unless the alterations are admitted, may be given in evidence. *Doe v. Palmer*, 16 Q. B. 747; *Dench v. Dench*, L. R., 2 P. & D. 60; *In re Sykes*, L. R., 3 P. & D. 26. In *Ravenscroft v. Hunter*, 2 Hagg. 69, such declarations were admitted, though made after the will was executed. But the testator's declarations, subsequent to the execution, that a particular alteration was made before, are inadmissible. *In re Adamson*, L. R., 3 P. & D. 256; *Doe v. Palmer*, 16 Q. B. 747. Otherwise, if the will has been republished since the declaration by a subsequent codicil. *In re Sykes*, L. R., 3 P. & D. 28.

5. Mode of Making Alterations.—Unless the local statute points out a different method, alterations which merely revoke existing provisions of the will may be made as prescribed by the Statute of Frauds, by burning, tearing, canceling, or obliterating the particular provision;¹ but if the alteration in effect creates a new devise or bequest, or enlarges an existing interest, the whole instrument should be re-executed or the alterations made by a duly executed codicil.² If a will is republished by codicil, it is enough

1. *Swinton v. Bailey*, 48 L. J. 57; *Larkins v. Larkins*, 3 Bos. & P. 16; *In re Kirkpatrick's Will*, 22 N. J. Eq. 463; *Bigelow v. Gillott*, 123 Mass. 102; *Tudor v. Tudor*, 17 B. Mon. (Ky.) 389; *McPherson v. Clark*, 3 Bradf. (N. Y.) 92.

In *Swinton v. Bailey*, 48 L. J. 57, it was held that a greater estate might be reduced to a less without cutting out the whole clause. But see *Eschbach v. Collins*, 61 Md. 499.

Interlineations require a new attestation. *Doane v. Hadlock*, 42 Me. 74.

New York.—Under the *New York Revised Statutes* a codicil or other writing duly executed is required. Matter of *Prescott*, 4 Redf. (N. Y.) 178.

Victorian Statute.—The Wills Act, 1 Vict., ch. 26, § 21, enacts that no obliteration, interlineation, or other alteration, made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot, or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will.

An alteration opposite which the testator and two witnesses have set their initials in the margin, is sufficiently executed under this section. *In re Blewitt*, 49 L. J. P. 31; 5 P. D. 116; see also *In re Treeby*, L. R., 3 P. & D. 242; *In re Shearn*, 50 L. J. P. 15.

Where the original is completely obliterated and not ascertainable, the will must be considered blank, so far as the obliteration, interlineation, or other alteration is concerned. *In re*

Ibbetson, 2 Curt. 337; *Townley v. Watson*, 3 Curt. 761; *In re James*, 1 S. & T. 238.

The court will only endeavor to discover the original by the use of glasses or similar means, and not by the use of chemicals, or removal of any substance from the will. *In re Beavan*, 2 Curt. 369; *In re Horsford*, L. R., 3 P. & D. 211; *In re Nelson*, I. R., 6 Eq. 569. See *Lushington v. Onslow*, 6 No. Cas. 183.

It appears to be clear that no external evidence would be admitted to show what the original words were, except in a case of dependent relative revocation. *In re Horsford*, L. R., 3 P. & D. 211; *In re Nelson*, I. R., 6 Eq. 569. See *Townley v. Watson*, 3 Curt. 761; *Theobald on Wills* (2d ed.) 33.

2. *In re Wilson's Will*, 8 Wis. 171; *Jackson v. Holloway*, 7 Johns. (N. Y.) 395; *McPherson v. Clark*, 3 Bradf. (N. Y.) 99; *Wolf v. Bollinger*, 62 Ill. 372; *Doane v. Hadlock*, 42 Me. 72; *In re Penniman's Will*, 20 Minn. 253; *Pringle v. M'Pherson*, 2 Brev. (S. Car.) 289. See *Eschbach v. Collins*, 61 Md. 478; *Wheeler v. Bent*, 7 Pick. (Mass.) 61.

A, having made his will, duly executed, devising all the lands of which he was then in possession to his four sons, and having afterward become seised of other lands, altered his will by erasures and interlineations, so as to make the devise extend to all lands of which he should die seised; and indorsed a memorandum to that effect on the will, stating the alterations which he had made; but the memorandum was attested by two witnesses only. It was held that the erasures and interlineations did not destroy the original devise; but that the alteration, not being attested by three witnesses, could not operate; and the lands acquired subsequent to the date of the devise, descended to the heirs-at-law. *Jackson v. Holloway*, 7 Johns. (N. Y.) 394.

Attestation of Interlineations—Knowledge of Their Import.—Where the

to show that the alterations were made before the execution of the codicil.¹

6. Alterations by a Stranger.—Interlineations and alterations made by a stranger have no legal effect.²

witnesses attested the interlineations without knowing what or where they were, it was held that the attestation was invalid. *In re Penniman's Will*, 20 Minn. 246, the court, by Berry, J., said: "Our statute has prescribed the manner in which wills must be executed, and this in language so peremptory and explicit as to leave no doubt upon the point that the general rule, which renders it indispensable that a will should be executed in strict compliance with the forms of law, is in force here. Section 5, ch. 47, Gen. Stat., enacts that 'no will . . . shall be effectual to pass any estate, real or personal, or to charge or in any way affect the same, unless it is in writing and signed at the end thereof by the testator, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses.' Now, if the erasures, interlineations, and additions in this instance are to be held valid, the result is that the original will, as such, is superseded by the (so to speak) new will, which has been made out of it by the alterations, and a re-execution or a new execution is required, just as a republication would be necessary in a like case, if publication of wills was required here, as in some countries. *Pringle v. M'Pherson*, 2 Brev. (S. Car.) 289; 1 Redfield on Wills (4th ed.) 315, 316, §§ 22, 23, 25.

"The attestation of the original will is, of course, not an attestation of the will as altered; and if there is no other sufficient attestation of the will as altered, it cannot be sustained, since it is not attested as imperatively required by the statute. *Doane v. Hadlock*, 42 Me. 72; *Jackson v. Holloway*, 7 Johns. (N. Y.) 399. The only other attestation is that of the Sidles, and we think it affirmatively and clearly appears that this cannot be regarded as an attestation of the will. The testimony of the Sidles upon the hearing for probate, as well as the language of the attestation clause signed by them (*Mundy v. Mundy*, 15 N. J. Eq. 293), and which is in the handwriting of the testator, shows conclusively that, both in the understanding of the testator and the witnesses, their attestation was at most an attestation

of the erasures and interlineations only: their attestation of such erasures and interlineations consisting of no more than the signing, at the testator's request, of a memorandum which had not been signed by the testator himself, and without any knowledge on their part of the number or location or nature of the erasures, interlineations, and additions. What was said by the witness J. K. Sidle, in answer to the inquiry of the court, as it appears in his testimony is, we think, entitled to no weight as against the other testimony of himself and H. G. Sidle, and the statements of the memorandum. It is to be observed, too, that the integrity of wills would be greatly jeopardized, if attestations like that in this instance were to be upheld, either as a sufficient attestation of erasures and interlineations, or of the will as altered thereby, since, the erasures and interlineations not being pointed out or identified, any number of them could be made, at any time, under cover of this attestation."

Alteration by Attesting Witness.—A testator made his last will and testament, disposing of his real and personal estate, which was signed, sealed, published, and attested by two witnesses. Subsequently, one of the witnesses, by order of the testator, and in his presence, made some alterations in its provisions both as to the real and personal estate, but there was no attesting witness to the alterations. The testator merely put his finger to the signature and said "it was as he wanted it," and the witness making the alterations made an indorsement on the back of the will to refresh his memory. It was held by the court that the alteration was no revocation of the whole will, and that the will as it stood before the alteration was a good will to pass real estate, and that, as altered, it was a good will to pass the personal estate according to the alterations. *Greer v. McCrackin*, Peck (Tenn.) 301.

1. *Tyler v. Merchant Taylors' Co.*, 15 Prob. Div. 216; *Burge v. Hamilton*, 72 Ga. 568. Compare *Lushington v. Onslow*, 12 Jur. 465; *In re Wyatt*, 2 S. & T. 404.

2. *Morrell v. Morrell*, 7 Prob. Div.

7. **Alterations by a Legatee.**—Whatever the effect of alterations made by a legatee as to avoiding the legacy so altered, such alterations cannot affect other bequests in the will, to himself or others.¹

XII. REVOCATION—1. **Testator's Right to Alter or Revoke.**—Owing to the ambulatory nature of wills, a testator may revoke or alter his will at any time before death, provided only he observes the formalities prescribed by the governing statute.²

2. **Revocation Defined.**—By revocation is meant the destruction of the operative force of the will, either in part or entirely, by some extrinsic act in regard to it, or by making and publishing a later instrument in the nature of a will *animo revocandi*, or by operation of law from the testator's marriage and birth of issue, or the alteration of his estate.³

3. **Presumption of Revocation.**—See LOST PAPERS, vol. 13, p. 1091.

4. **Parol Revocation.**—Under the Statute of Frauds,⁴ the Statute of Victoria,⁵ and corresponding statutes in the *United States*, no duly executed written will or any provision therein can be revoked by parol.⁶ Exceptions exist in regard to wills of personal property in *New Jersey* and *Florida*, and in regard to wills of both real and personal property in *Pennsylvania*, *Maryland*, and *Tennessee*, provided the words of revocation are reduced to writing, read over, and approved by the testator in his lifetime.⁷

70. Story, J., in *Smith v. Fenner*, 1 Gall. (U. S.) 170; *Doane v. Hadlock*, 42 Me. 72; *Grubbs v. McDonald*, 91 Pa. St. 236. See *Jackson v. Malin*, 15 Johns. (N. Y.) 293.

1. Story, J., in *Smith v. Fenner*, 1 Gall. (U. S.) 174; *Doane v. Hadlock*, 42 Me. 72. See *Jackson v. Malin*, 15 Johns. (N. Y.) 293.

2. Schouler on Wills (2d ed.), §§ 380, 429-431.

Mutual wills prove an exception. See *supra*, this title, *Classification—Joint and Mutual Wills*.

3. 1 Jarm. on Wills (Rand. & Talcott's ed.), p. 268, note 1; Schouler on Wills (2d ed.), § 380; 2 Greenl. Ev. (14th ed.), § 680; *In re Woodward*, L. R., 2 P. & D. 206; *Christmas v. Whinyates*, 3 S. & T. 81; *White v. Casten*, 1 Jones (N. Car.) 197. See, as to *animus revocandi*, *Mills v. Millward*, 15 Prob. Div. 20; *Rich v. Gilkey*, 73 Me. 595; *Wilbourn v. Shell*, 59 Miss. 205; *Forbing v. Weber*, 99 Ind. 588.

4. 29 Car. II., ch. 3, §§ 6, 22.

5. 1 Vict., ch. 26, §§ 18, 20, 21.

6. Stimson's Am. Stat. Law, § 2672.

See *Goodsell's Appeal*, 55 Conn. 171; *Kent v. Mahaffey*, 10 Ohio St. 204; *Perjue v. Perjue*, 4 Iowa 520; *Hylton v. Hylton*, 1, Gratt. (Va.) 161; *Wittman v. Goodhand*, 26 Md. 95; *Kennedy v. Upshaw*, 64 Tex. 412; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31; *Slaughter v. Stephens*, 81 Ala. 418; *Brown v. Thorndike*, 15 Pick. (Mass.) 393; *Jones v. Moseley*, 40 Miss. 261; *Taylor v. Pegram*, 151 Ill. 106; *Hargroves v. Redd*, 43 Ga. 143; *Herbert v. Long*, 15 Ky. L. Rep. 427; *Lewis v. Lewis*, 2 W. & S. (Pa.) 455; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Ladd's Will*, 60 Wis. 187.

7. Stimson's Am. Stat. Law, § 2675; Pars. Dig., tit. "Wills," par. 17; *New Jersey Stat.*, tit. "Wills," par. 14; *Tennessee Code*, § 3008; *Florida Stat.*, ch. 200, § 3; *Maryland Rev. Stat.*, art. 49, § 6; *Rodgers v. Rodgers*, 6 Heisk. (Tenn.) 489; *Boudinot v. Bradford*, 2 Yeates (Pa.) 170.

Prior to the revision of the *Connecticut* statutes in 1821, wills might be revoked in the state by parol. *Card v. Grinman*, 5 Conn. 164.

5. Revocation by Burning, Tearing, Canceling, Obliterating, or Destroying.—Under the Statute of Frauds,¹ the Statute of Victoria,² and corresponding statutes in the *United States*, a will or codicil, or any part thereof, may be revoked by the burning, tearing, canceling, obliterating, or destroying of the same by the testator himself or some one in his presence, and by his direction, with intent to revoke it.³ The act of destruction must be accompanied with the *animus revocandi* or intent to revoke, and both must concur to constitute a legal revocation.⁴ The *animus* or intent also governs the extent and measure of operation to be attributed to the

1. "By the 6th section of the Statute of Frauds, it is enacted 'that no devise in writing of any lands, tenements, or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, canceled, torn, or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will,' etc., executed as therein mentioned." 1 Jarm. on Wills (5th ed.) *129.

2. By the Statute 1 Vict., ch. 26, §§ 20, 21, it is provided that "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed as a will or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same," and that "no obliteration, interlineation, or other alteration made in any will, after the execution thereof, shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will."

Under this statute, revocation by burning or tearing remains the same as under the Statute of Frauds, but cancellation or obliteration is ineffectual unless it amounts to effacement, or the alterations are executed in the manner prescribed for the execution of wills. 1 Jarm. on Wills (5th ed.), § 140.

3. Stimson's Am. Stat. Law, § 2672. Goods of Dodd, Dea. 290. See Brown v. Thorndike, 15 Pick. (Mass.) 388; Smith v. Dolby, 4 Harr. (Del.) 350; Clingan v. Mitcheltree, 31 Pa. St. 25; Burns v. Burns, 4 S. & R. (Pa.) 295; Dan v. Brown, 4 Cow. (N. Y.) 483; Clark v. Smith, 34 Barb. (N. Y.) 140; Timon v. Claffy, 45 Barb. (N. Y.) 438; Semms v. Semms, 7 Har. & J. (Md.) 388; Spoonmore v. Cables, 66 Mo. 579; Barker v. Bell, 46 Ala. 216; White v. Casten, 1 Jones (N. Car.) 197; Johnson v. Brailsford, 2 Nott. & M. (S. Car.) 272; Means v. Moore, 3 McCord (S. Car.) 282; Boylan v. Meeker, 28 N. J. L. 274; Smock v. Smock, 11 N. J. Eq. 156; Marr v. Marr, 2 Head (Tenn.) 303; Dower v. Seeds, 28 W. Va. 113; Wolf v. Bollinger, 62 Ill. 368; Slaughter v. Stephens, 81 Ala. 418; Gains v. Gains, 2 A. K. Marsh. (Ky.) 190; Steele v. Price, 5 B. Mon. (Ky.) 58; Patterson v. Hickey, 32 Ga. 156; Lawyer v. Smith, 8 Mich. 411.

The local statutes in the several states differ somewhat, and should be consulted. In *Georgia, Delaware, Iowa, Kansas, Nevada, and Ohio* it seems that the act of destruction may be performed by a third person acting by the testator's express direction in his absence. In *New York, Arkansas, California, Oregon, Dakota, Alabama, Montana, and Utah* the fact of destruction and the testator's consent thereto must be proved by two witnesses. Stimson's Am. Stat. Law, § 2672.

Revocation of Holographic Will.—To revoke a holographic will, made under the *Tennessee Act of 1784*, there must be some act done plainly showing such intention, such as cancellation, destruction, reclamation from the hands of the person with whom it may have been lodged for safe keeping, or removal from the place of deposit. Marr v. Marr, 2 Head (Tenn.) 303.

4. Clarke v. Scripps, 2 Rob. 567;

act, and determines whether it shall effect a revocation of the whole instrument or only a portion, and what portion, of it.¹ Thus, if a testator attempts to destroy his will, in a fit of insanity,²

Mills v. Millward, 15 Prob. Div. 20; *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Delafield v. Parish*, 25 N. Y. 9; *Smock v. Smock*, 11 N. J. Eq. 156; *Wolf v. Bollinger*, 62 Ill. 368; *Dickey v. Malechi*, 6 Mo. 177; *Wright v. Wright*, 5 Ind. 389; *Runkle v. Gates*, 11 Ind. 95; *Overall v. Overall*, Litt. Sel. Cas. (Ky.) 501; *Heise v. Heise*, 31 Pa. St. 246; *Evans' Appeal*, 58 Pa. St. 238; *Lewis v. Lewis*, 2 W. & S. (Pa.) 455; *Burns v. Burns*, 4 S. & R. (Pa.) 295; *Gains v. Gains*, 2 A. K. Marsh. (Ky.) 190; *Jackson v. Betts*, 9 Cow. (N. Y.) 208; *In re Johnson's Will*, 40 Conn. 587; *Sweet v. Sweet*, 1 Redf. (N. Y.) 451; *Rich v. Gilkey*, 73 Me. 595; *Forbing v. Weber*, 99 Ind. 588; *In re Lang's Estate*, 65 Cal. 19; *Graham v. Burch*, 47 Minn. 171. See also *Woodfill v. Patton*, 76 Ind. 575; *Marsh v. Marsh*, 3 Jones (N. Car.) 77; *Taylor v. Taylor*, 2 Nott. & M. (S. Car.) 482; *Means v. Moore*, 3 McCord (S. Car.) 282; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394.

1. *Clarke v. Scripps*, 2 Rob. 567. See *Brown's Will*, 1 B. Mon. (Ky.) 57; *Law v. Law*, 83 Ala. 432; *Muh's Succession*, 35 La. Ann. 394.

In *Clarke v. Scripps*, 2 Rob. 567, Sir J. Dodson said, in regard to 1 Vict., ch. 26, § 20, which provides that a will may be revoked by "burning, tearing, or otherwise destroying the same:" "It is obvious, first, that a part only of a will may be revoked in the manner described; in other words, that the whole will is not necessarily revoked by the destruction of a part; nevertheless, I do not by any means intend to say that the destruction of a part may not, under certain circumstances, operate as a revocation of the entire will. Secondly, it is to be observed that 'the burning, tearing, or otherwise destroying' the instrument must be done with the intention to revoke. It is not the mere manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means, which will satisfy the requisites of the law; the act must be accompanied with the intention of revoking; there must be the *animus* as well as the act; both must concur in order to constitute a legal revocation. It is the *animus*, also, which must govern the

extent and measure of operation to be attributed to the act, and determine whether the act shall effect the revocation of the whole instrument, or only of some, and what, portion thereof." See also *In re Cook's Will*, 5 Pa. L. J. 1.

In *Frear v. Williams*, 7 Baxt. (Tenn.) 550, the testator signed his surname to his will immediately after his given name, which had been written by the draftsman in writing the attesting clause, in the presence of two witnesses, who subscribed the attesting clause at his request. Two days thereafter, being doubtful as to the validity of such a signature, he sent for two other witnesses, one of whom erased the surname at the testator's request, when he signed his full name. These two witnesses, at his request, and in his presence, signed their names under those of the former witnesses. It was held that the erasure did not amount to a revocation of the will, as it did not appear to be his intention to cancel his will, and all the facts and circumstances may be looked to in arriving at the testator's intentions.

2. *Scrubby v. Fordham*, 1 Add. 74; *Brunt v. Brunt*, L. R., 3 P. & D. 37; *Goods of Shaw*, 1 Curt. 905. See *Forbing v. Weber*, 99 Ind. 588; *Matter of Forman's Will*, 54 Barb. (N. Y.) 274; *Smith v. Wait*, 4 Barb. (N. Y.) 28; *Rhodes v. Vinson*, 9 Gill (Md.) 169; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *In re Johnson's Will*, 40 Conn. 587; *Rick v. Gilkey*, 73 Mo. 595; *Allison v. Allison*, 7 Dana (Ky.) 94; *In re Lang's Estate*, 65 Cal. 19.

The testator, having duly executed his will, subsequently, when suffering under an attack of delirium tremens, tore it in pieces. The pieces were preserved, and on his recovery he was informed of what he had done, and he answered he must have been mad when he did the act, and that he would make a fresh will, which intention he did not carry out. It was held that the will was not revoked. *Brunt v. Brunt*, L. R., 3 P. & D. 37.

It requires the same mental capacity to revoke as it does to make a will. *Allison v. Allison*, 7 Dana (Ky.) 94; *Loughton v. Atkins*, 1 Pick. (Mass.)

or under the mistaken impression that it is invalid,¹ or has become useless because revoked by a subsequent will,² or throws ink on the paper instead of sand,³ or is induced to destroy it through fraud or undue influence, the will remains in full force.⁴ So the destruction of a codicil which has revived a revoked will, does not revoke the will, if it appears that the codicil was destroyed on the supposition that the will would still stand.⁵ The destruction, by a third person,

547; *McIntire v. Worthington*, 68 Md. 203.

1. *Giles v. Warren*, L. R., 2 P. & D. 401.

In *Giles v. Warren*, L. R., 2 P. & D. 401, a testator, under the false impression that his will was invalid, tore it up. Immediately afterward, on reconsideration, he collected the pieces and placed them together among his papers of importance, and preserved them until his death. It was held that as the act done was not accompanied by an intention to revoke a valid will, it was ineffectual, and the will was admitted to probate. Lord Penzance said: "The fact that a testator tears or destroys his will is not itself sufficient to revoke one properly executed. That is to say, the bare fact. If, for instance, he tears it imagining it to be some other document, there would be no revocation, for there would be no *animus revocandi*. He must intend by the act to revoke something that he had previously done. There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will. Revocation is a term applicable to the case of a person canceling or destroying a document which he had before legally made. He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it. According to the evidence the testator, in consequence of some conversation he had with Hillstead, was under the impression that he had made no valid will, and, as being useless, he tore the document up and threw it on the fire. That is no revocation."

Parol evidence of intention is admissible to show that the destruction was effected under a mistake. *Powell v. Powell*, L. R., 1 P. & D. 209.

Contents of Destroyed Will.—The contents of a will destroyed by mistake may be proved by parol. *Brown v. Brown*, 8 El. & Bl. 876; 92 E. C. L. 875; *Wood v. Wood*, L. R., 1 P. & D. 309.

2. *Scott v. Scott*, 1 S. & T. 258; *Clarkson v. Clarkson*, 2 S. & T. 497; *Goods of Middleton*, 3 S. & T. 583. See *Semmes v. Semmes*, 7 Har. & J. (Md.) 390; *Bohanon v. Walcot*, 1 How. (Miss.) 336.

In *Clarkson v. Clarkson*, 2 S. & T. 497, B. duly executed a will in August, 1857; in July, 1859, he executed another will, purporting to revoke the will of 1857; in a suit respecting the validity of the will of 1859, the court of probate pronounced against the validity of such will. The draft of the will of 1857 was then propounded, and it was proved that, after the execution of the will of 1859, B. had called for the will of 1857, and after appearing to read it had torn it up, saying, "It is of no use now, I have another." Most of the above facts were admitted on the record, and the court held that there was no proof of the destruction of the will of 1857, with intention to revoke, so as to satisfy 1 Vict., ch. 26, § 20, and decreed probate of the draft thereof. Sir C. Creswell said: "The act done without the intention is ineffectual. Here the intention was wanting, for, according to the evidence, he imagined that the revocation had been already accomplished; and because it had been accomplished, and not for the purpose of accomplishing it, the act of destruction was done."

3. Lord Mansfield, in *Burtenshaw v. Gilbert*, Cowp. 52.

An act of destruction for the purpose merely of making a fair copy of the will, or of improving the handwriting, has no revocatory effect. *Theobald on Wills* (2d ed.) 37; *In re Kennett*, 2 N. R. 461; *Goods of Applebee*, 1 Hagg. 144; *In re Tozer*, 2 No. Cas. 11. Compare *Wilbourn v. Shell*, 59 Miss. 205.

4. *Batton v. Watson*, 13 Ga. 63; *Voorhees v. Voorhees*, 39 N. Y. 463; *Rich v. Gilkey*, 73 Me. 595; *Laughton v. Atkins*, 1 Pick. (Mass.) 546; *McIntire v. Worthington*, 68 Md. 203.

5. *Theobald on Wills* (2d ed.) 37; *James v. Shrimpton*, 1 Prob. Div. 431.

of a will or codicil, in the testator's lifetime, without his knowledge or permission, does not affect its validity; *a fortiori*, if the destruction took place after his decease.¹ The slightest act of tearing or burning, with intent to revoke the whole will, is sufficient for the purpose,² but an unexecuted intent to revoke,

In *James v. Shrimpton*, 1 Prob. Div. 431, the testator, having duly executed a will, subsequently married. On the day of and after the marriage ceremony he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will. His wife predeceased him, and on his death the codicil, which had been in his possession, could not be found. Declarations of the testator of a desire to adhere to his will were proved extending up to the latest period of his life. It was held that the testator could not have intended by the destruction of the codicil to render his will inoperative, and that the court would therefore grant probate of the will and of the codicil as contained in a draft from which the original was prepared for execution. Sir J. Hannen said: "The question for my consideration is, whether the destruction of the codicil upon which the revival of the will depended has left the will inoperative. I am of opinion that it was not the intention of the testator to leave the will inoperative, but his idea was that the will, having been brought into existence again, remained valid, notwithstanding the destruction of the codicil. I was asked to grant probate of the will and codicil on the presumption that what the testator had done had not been done *animo revocandi*. Where there has been a physical destruction of a testamentary paper, the court has often been called upon to form an opinion as to the intention of a deceased at the time he did the act. In this case I have come to the conclusion that the testator destroyed the codicil with no intention of revoking the will, and that the court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he was destroying. It was done under a misconception of the effect of the act; it was not done *animo revocandi*, and I therefore decree probate of the will and codicil."

1. 1 Jarm. on Wills (5th ed.), § 130; *Haines v. Haines*, 2 Vern. 441; *Mills v. Millward*, 15 Prob. Div. 20. See

Idley v. Bowen, 11 Wend. (N. Y.) 227; *Kidder's Estate*, 66 Cal. 488; *Tucker v. Whitehead*, 59 Miss. 594; *Allison v. Allison*, 7 Dana (Ky.) 94; *Bennett v. Sherrod*, 3 Ired. (N. Car.) 303.

Subsequent Ratification.—To make cancellation, burning, or obliteration of a will, efficacious as to revocation, it must be done by the express direction of the testator, and his subsequent ratification is not equivalent to a previous command. *Clingan v. Mitcheltree*, 31 Pa. St. 25. See *Steele v. Price*, 5 B. Mon. (Ky.) 61. But see *Mills v. Millward*, 15 Prob. Div. 20.

Destruction After Death.—A testator cannot revoke his will by authorizing any person to destroy it after his death. *Stockwell v. Ritherden*, 12 Jur. 779. See *Goodsell's Appeal*, 55 Conn. 171. And if so destroyed, its contents may be proved *aliunde*. *Goods of North*, 6 Jur. 564.

2. *Bibb v. Thomas*, 2 W. Bl. 1043; *Clarke v. Scripps*, 2 Rob. 567; *Avery v. Pixley*, 4 Mass. 460; *Sweet v. Sweet*, 1 Redf. (N. Y.) 451; *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Johnson v. Brailsford*, 2 Nott. & M. (S. Car.) 272; *Means v. Moore*, 3 McCord (S. Car.) 282; *White v. Casten*, 1 Jones (N. Car.) 197; *Bohanon v. Walcot*, 1 How. (Miss.) 336; *Jackson v. Betts*, 6 Cow. (N. Y.) 377; *Brown's Will*, 1 B. Mon. (Ky.) 56; *Evans' Appeal*, 58 Pa. St. 238; *Chinmark's Estate*, Myr. Prob. (Cal.) 128.

In *Bibb v. Thomas*, 2 W. Bl. 1043, as stated in 1 Jarm. on Wills (5th ed.) *130, "the testator (who had frequently declared himself dissatisfied with his will), being one day in bed near the fire, ordered W., a person who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat creased; he opened and looked at it, then gave it a rip with his hands, so as almost to tear a bit off, then crumpled it together, and threw it on the fire; but it fell off. However it must soon have been burnt, had not W. taken it up, and put into her pocket. The testator did not see her do so, but seemed to have some suspicion of it, as he asked her what she was at, to which she made

no matter how clearly expressed, is insufficient, unless accompanied by one of the acts of destruction prescribed by the local statute, even though the attempt was frustrated by the improper conduct of a third person, for, the legislature having pointed out certain modes by which a will may be revoked, it is not within the power of the judiciary to dispense with any of the prescribed requirements and accept the intention to perform the prescribed act as equivalent to the act itself.¹ Where the testator abandons

little or no answer; the testator several times afterwards said that was not, and should not be his will, and bid her destroy it; she said at first, 'So I will when you have made another;' but, afterwards, upon his repeated inquiries, she falsely told him that she had destroyed it. She asked him to whom the estate would go when the will was burnt. He answered, to his sister and her children. The testator afterwards told a person that he had destroyed his will, and should make no other until he had seen his brother J. M., and desired the person would tell his brother so, and that he wanted to see him; he afterwards wrote to his brother, saying, 'I have destroyed my will which I made; for, upon serious consideration, I was not easy in my mind about that will;' and desired him to come down, saying, 'If I die intestate, it will cause uneasiness.' The testator, however, died without making another will. The jury thought this a sufficient revocation, and the court of common pleas was of the same opinion, on a motion for a new trial; *De Grey, C. J.*, observing that this case fell within two of the specific acts described by the Statute of Frauds; it was both a burning and a tearing; and that throwing it on the fire, with an intent to burn, though it was only very slightly singed and fell off, was sufficient within the statute." But compare *Doe v. Harris*, 6 Ad. & El. 209; 33 E. C. L. 57.

New York and Alabama.—See *Lovell v. Quitman*, 88 N. Y. 377; *Slaughter v. Stephens*, 81 Ala. 418.

1. 1 Jarm. Wills (5th ed.) *131; *Doe v. Harris*, 8 Ad. & El. 1; 35 E. C. L. 299; *Cheese v. Lovejoy*, 2 Prob. Div. 251; *Blanchard v. Blanchard*, 32 Vt. 62; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Clingan v. Mitcheltree*, 31 Pa. St. 25; *Gains v. Gains*, 2 A. K. Marsh. (Ky.) 190; *Boyd v. Cook*, 3 Leigh (Va.) 32; *Malone v. Hobbs*, 1 Rob. (Va.) 366; *Delafield v. Parish*, 25 N. Y. 9; *Jackson v. Betts*, 9 Cow. (N. Y.) 208; *Hise*

v. Fincher, 10 Ired. (N. Car.) 139; *Giles v. Giles*, Cam. & N. (N. Car.) 174; *Pryor v. Coggin*, 17 Ga. 445; *Kent v. Mahaffey*, 10 Ohio St. 204; *Clark v. Smith*, 34 Barb. (N. Y.) 140; *Gratham v. Burch*, 47 Minn. 171. See *Goodsell's Appeal*, 55 Conn. 171; *Runkle v. Gates*, 11 Ind. 95; *McBride v. McBride*, 26 Gratt. (Va.) 476; *contra Smiley v. Gambill*, 2 Head (Tenn.) 164.

In *Blanchard v. Blanchard*, 32 Vt. 62, the defendants offered to prove that about ten days before the death of the testator he procured the will in question for the purpose of revoking it, and sent for a magistrate and witnesses to be present at its revocation, but before they all arrived the will was taken from him without his consent, and withheld from him, and for that reason the revocation was not consummated; that afterward he applied to the person who had the will, to get it so that he might revoke it, but his request was not complied with; and that he supposed it to be necessary to have a magistrate and witnesses present to enable him to make a valid revocation of the will. The plaintiffs objected to this testimony, and it was excluded by the court, to which the defendants excepted. It was held not to be error. The court, by *Bennett, J.*, said: "It is clear that the facts offered to be proved would not have constituted a revocation of the will. Though the testator might have procured the will for the purpose of revocation, and sent for a magistrate and witnesses to be present at its revocation, yet this does not create a revocation; and the fact that the will was taken from the testator without his consent, and kept from him, and the revocation by this means prevented, cannot alter the case. Though at common law the mode of proof might, perhaps, be immaterial, if the intention to revoke a will was fully established, and an attempt to cancel a will might have the same effect as an actual cancellation, yet the statute prescribing how a will shall

be revoked has changed the rule, and now that intention must be wholly or partially consummated."

In *Doe v. Harris*, 6 Ad. & El. 209; 33 E. C. L. 57; 8 Ad. & El. 1; 35 E. C. L. 299, a testator, intending to destroy his will, threw it on the fire; but a devisee under the will snatched it off, and took it away, a corner of the envelope only being burnt. The testator was displeased at her having taken it, and she, being urged by him to give it back, promised to burn it, and pretended to do so in his presence, but did not. The testator afterward told another person that the devisee had thrown the will on the fire; but, on that person expressing a doubt, the testator said that he did not care, and that, if he was alive and well, he would make another. He took no further step either to destroy the old will, or to make a new one. It was held in regard to devises of freehold lands which were governed by the Statute of Frauds, that the will was not revoked. Lord Denman, C. J., said: "The Statute of Frauds requires that a will shall be executed with certain solemnities; and, after describing these, directs how it shall be revoked; and that is by certain acts, which are specified. In the present case, there is no evidence that any one of those acts has been done. It is impossible to say that singeing a cover is burning a will within the meaning of the statute. The terms used in the sixth section show that to assert this would be going a length not contemplated in the statute. The acts required are palpable and visible ones. Cases may, indeed, be put where very little has been done, as a slight tearing and burning, and yet a revocation has taken place; but the main current of the statute is against the argument from such cases. The intention seems to have been to prevent inferences being drawn from such slight circumstances. In *Bibb v. Thomas*, 2 W. Bl. 1043, the will was slightly torn and slightly burnt; and the court said that the case fell within two of the specific acts described by the statute; there was both a burning and a tearing. Doubt might be entertained now whether the proof there given would be sufficient as to these; but, as the court considered what was done to have been a burning and a tearing, the case shows at least that they did not think the acts required by the statute could be dispensed with by reason of the conduct of a third party. In *Doe v. Perkes*, 3 B. &

Ald. 489; 5 E. C. L. 353, the testator's hand was arrested while he was in the act of tearing the will; he submitted to the interference; and the intention of revoking was itself revoked before the act was complete. There it was properly left to the jury to say whether the testator had done all he intended or not. Neither of these cases at all approaches the present. It would be a violence to language if we said here that there was any evidence to go to the jury of the will having been burnt. Great inconvenience would be introduced by holding that there may be a virtual compliance with the statute, but there is none in saying that, if a testator perseveres in the intention of revoking his will, he shall fulfill it by some of the means pointed out in the statute; that he shall revoke the will, if not in his possession, by writing properly attested, or cancel it, if in his power, by some of the other acts which the statute prescribes." Patterson, J., said: "As the act says that there must be a tearing or burning of the instrument itself, a mere singeing of the corner of an envelope is not sufficient. To hold that it was so would be saying that a strong intention to burn was a burning. There must be, at all events, a partial burning of the instrument itself. I do not say that a quantity of words must be burnt, but there must be a burning of the paper on which the will is."

In *Cheese v. Lovejoy*, 2 Prob. Div. 251, a testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured. It was held that the will was not revoked, the words "or otherwise destroying," in 7 Wm. IV. and 1 Vict., ch. 26, § 20, not being satisfied, as, whatever the testator may have intended, the will had not been actually injured. James, L. J., said: "It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the court below, 'All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two.'"

his intention of revoking the will before the act of destruction is complete, the will remains unrevoked.¹ In the absence of evidence *aliunde*, however, an intent to revoke the whole will cannot be inferred from a partial mutilation which does not affect the instrument as an entirety, or destroy that part which gives effect to the whole.² Thus, by merely cutting off or tearing the begin-

Concerning evidence of intention in the absence of special statutory requirements as to revocation, see *Card v. Grinman*, 5 Conn. 164; *Smiley v. Gambill*, 2 Head (Tenn.) 164. Compare *Pryor v. Coggin*, 17 Ga. 444.

The fact that the testator was deceived into believing that the will was destroyed, as required by the statute to work a revocation, will not revoke it if such was not the case. *Clingan v. Mitcheltree*, 31 Pa. St. 25; *Boyd v. Cook*, 3 Leigh (Va.) 32; *Malone v. Hobbs*, 1 Rob. (Va.) 366; *Hise v. Fincher*, 10 Ired. (N. Car.) 139. But in *Smiley v. Gambill*, 2 Head (Tenn.) 164, it was held that the will was revoked where the testator burnt another paper by mistake, supposing it to have been his will.

In *Gains v. Gains*, 2 A. K. Marsh. (Ky.) 191, it was said that a devisee, who by fraud or force prevents the will from being revoked, may, in a court of equity, be considered a trustee for those who would be entitled to the estate in case it were revoked, but such a question cannot be determined upon an application to admit the will to record. See *Blanchard v. Blanchard*, 32 Vt. 65. But this seems doubtful, since such a doctrine would in effect work a revocation without regard to the requirement of the local statute.

1. 1 Jarm. on Wills (5th ed.) *131; *Doe v. Perkes*, 3 B. & Ald. 489; *Elms v. Elms*, S. & T. 155; *Burns v. Burns*, 4 S. & R. (Pa.) 568. Compare *Goods of Colberg*, 2 Curt. 832. *In re Cockayne*, Deane Ecc. Rep. 177; *Winsor v. Pratt*, 2 B. & B. 655; *Giles v. Giles*, Cam. & N. (N. Car.) 174.

In *Doe v. Perkes*, 3 B. & Ald. 489; 5 E. C. L. 353, a testator, being angry with one of the devisees named in his will, began to tear it, with the intention of destroying it; and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a bystander, who seized his arms, and partly by the entreaties of the devisee. Upon this he became calm; and having put by the several pieces, he ex-

pressed his satisfaction that no material part of the writing had been injured, and that it was no worse. It was held that it was, on these facts, properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the court refused to disturb the verdict, and supported the will. *Bayley, J.*, said: "If the testator had done all that he originally intended, it would have amounted to a cancellation of the will; and nothing that afterwards took place could set it up again. But if the jury were satisfied that he was stopped *in medio*, then the act not having been completed will not be sufficient to destroy the validity of the will. Suppose a person, having an intention to cancel his will by burning it, were to throw it on the fire, and upon a sudden change of purpose, were to take it off again, it could not be contended that it was a cancellation. So here, there was evidence from which a change of purpose, before the completion of the act, might properly be inferred. The jury have drawn that inference, and I see no reason to disturb the verdict."

2. *Hobbs v. Knight*, 1 Curt. 768; *Clarke v. Scripps*, 2 Rob. 563; *Goods of Woodward*, L. R., 2 P. & D. 206; *Bell v. Fothergill*, L. R., 2 P. & D. 148; *Goods of Geellan*, 1 S. & T. 23; *Williams v. Jones*, 7 No. Cas. 106. See *In re Lewis*, 1 S. & T. 31; *Goods of Simpson*, 5 Jur. N. S. 1366; *Abraham v. Joseph*, 5 Jur. N. S. 179; *Evans v. Dallo*, 31 L. J. Prob. 128; *Price v. Powell*, 3 H. & N. 341; *Williams v. Tyley*, Johns. 530; *Giles v. Warren*, L. R., 2 P. & D. 401; *Coleridge, J.*, in *Doe v. Harris*, 6 Ad. & El. 209; 33 E. C. L. 57; *Avery v. Pixley*, 4 Mass. 460; *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272; *Brown's Will*, 1 B. Mon. (Ky.) 56; *Lovell v. Quitman*, 88 N. Y. 377. As to erasing name of beneficiary, see *Noyes' Will*, 61 Vt. 14. Compare *Dammann v. Dammann* (Md. 1894), 28 Atl. Rep. 408.

ning of the will,¹ or the clause appointing executors,² or tearing the will in such a way as to indicate that the signature and attestation clause were designedly left untouched, the will is revoked only as to the parts so torn.³ On the other hand, tearing or cutting out (for tearing includes cutting)⁴ the signature of the testator,⁵ or the subscription of the witnesses, works a revocation of the

In *Brown's Will*, 1 B. Mon. (Ky.) 56, it was held that the cancellation or cutting off a portion of the devises in a will, leaving the testator's signature at the conclusion, or in the body, when no other signing had been intended, with a declaration that the intention was to annul only what was so canceled, the residue is not affected, but remains a valid will. And in *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272, it is declared that the degree of "burning, canceling, tearing, or obliterating," necessary to the revocation of a will, according to the Statute of Frauds, must depend on the circumstances of each case.

1. *In re Woodward*, L. R., 2 P. & D. 207. In this case Lord Penzance said: "The mere cutting off eight lines at the beginning of the document does not show an intention to revoke the whole will. It may be said that the object of tearing off the first part was to destroy the statement that it was the last will and testament of the deceased, which is a material averment, but the force of that observation depends very much, if not entirely, upon the consideration whether there was anything else of moment or importance in that part of the will destroyed, which the testator might have wished to revoke. It is probable in this case that there was. It seems probable that the part torn off did contain something besides the mere statement that the document was the last will and testament of the deceased, and it might very well have been that the deceased tore it off in order to get rid of that. I consider, under these circumstances, that the will is not revoked, and must be admitted to probate."

2. *In re Maley*, L. R., 12 Prob. Div. 134; *Wells v. Wells*, 4 T. B. Mon. (Ky.) 152.

3. *Clarke v. Scripps*, 2 Rob. 575.

4. *Hobbs v. Knight*, 1 Curt. 768; *Clarke v. Scripps*, 2 Rob. 563; *In re Cooke*, 5 No. Cas. 390.

In *Hobbs v. Knight*, 1 Curt. 779, Sir H. Jenner said: "Cutting is a mode of

destroying as effectual as tearing, and it appears to me that if tearing a will to this extent be a sufficient destruction of it, the same effect must be attributed to the act of cutting it; what would be the consequences of a different construction? Suppose a will were torn into two or more pieces, the will, no doubt, would be revoked; but if it were cut into twenty pieces with a knife that would be no revocation; and if the pieces could be collected and pasted together, the will must be pronounced for by the court. I cannot conceive it possible that it was the intention of the legislature to leave the law in that state."

Scratching Out.—Scratching out a signature revokes the will. *In re Morton*, 12 Prob. Div. 141.

5. *Hobbs v. Knight*, 1 Curt. 768; *Goods of Geellan*, 1 S. & T. 23; *In re Simpson*, 5 Jur. N. S. 1366; *In re Lewis*, 1 S. & T. 31. See *Gay v. Gay*, 60 Iowa 418.

The signature of the testator being "an essential part of a will, it is difficult to comprehend, when that which is essential to the existence of a thing is destroyed, how the thing itself can exist. There can be no doubt that if the name of the testator had been burnt or torn out, the revocation would have been as complete as if the will had been torn into twenty pieces. If this were not the case, it would lead to many absurd consequences. But it has been argued, that as the present act of Parliament has pointed out certain modes with regard to the revocation of wills, the court cannot go beyond the express terms of the act; that the words being confined to 'burning, tearing, or otherwise destroying,' omitting the terms 'obliterating' and 'canceling' used in the Statute of Frauds, there must be an actual burning or tearing, or as to 'otherwise destroying,' that the whole instrument must be destroyed; that the cutting, in the present case, is not tearing (burning is out of the question) and, the instrument not being destroyed, that there is no revocation; and upon this part of the argument, the case of *Doe v.*

whole will.¹ Where a will is written on several sheets, each of which is signed by the testator and subscribed by witnesses, tearing off the signature and subscription on the last sheet revokes the whole will, although the prior signatures and subscriptions remained.² Although sealing is not essential to the validity of a will, tearing off seals works a total revocation, if the will professed to be executed and attested as a sealed instrument, or the *animus revocandi* be shown by evidence *aliunde*.³

Harris, 6 Ad. & El. 209; 1 Nev. & P. 405; 33 E. C. L. 57, in the Queen's Bench, was referred to, in which the testator had thrown his will on the fire, with the intention of destroying it, and a part of the cover was burnt, but there being no burning on the instrument itself, the judges of that court held that the will was not revoked; that the words of the Statute of Frauds had not been complied with. But that case is not applicable to the present point, for here a part of the will, the most essential part, is removed, and if in that case the name of the testator had been burnt or torn off, I think the court of Queen's Bench would have held that to be an effectual revocation by burning or tearing, for, according to the judgment in that case, it was not required that the whole will should be burnt or torn. The learned judges do not say how much it is necessary should be burnt, but Mr. Justice Coleridge says it is sufficient if the entirety of the will is destroyed; his expressions are these: 'We were pressed with the argument, must the whole of the document be destroyed? I say no; but there must be a destruction of so much as to impair the entirety of the will, so that it may be said that the will does not exist in the manner framed by the testator.' So I say here, is not the entirety of the will destroyed by the removal of the signature of the testator? It is true this is not an act of tearing, in the strict sense of that term; but, if the circumstances of this case required it, I think it would not be difficult to show that a will might be revoked by cutting with an instrument as well as by tearing, if a corresponding effect be produced by the one act as by the other. . . . The question then comes to this: Whether this be or be not a destruction of the will. I consider the name of the testator to be essential to the existence of a will, and that if that name be removed, the essential part of the will is removed and the will is

destroyed." Sir H. Jenner, in *Hobbs v. Knight*, 1 Curt. 779.

Pasting Signature on Again.—Pasting the signature into its former place will not revive the will. *Bell v. Fothergill*, L. R., 2 P. & D. 148.

1. *Abraham v. Joseph*, 5 Jur. N. S. 179; *Evans v. Dallow*, 31 L. J. Prob. 128; *Hobbs v. Knight*, 1 Curt. 781. See *Birkhead v. Bowdoin*, 2 No. Cas. 66; *In re White's Will*, 25 N. J. Eq. 501.

2. This is undoubtedly so in jurisdictions in which the will is required to be signed "at the end thereof," for in such case, the last signature alone gives it efficacy. *Goods of Gullan*, 1 S. & T. 23. See *supra*, this title, *Construction of English and American Statutes*. See *Gullan v. Grove*, 26 Beav. 64; *Christmas v. Whinyates*, 32 L. J. P. 73.

3. *Lambell v. Lambell*, 3 Hagg. 568; *Davies v. Davies*, 1 Cas. temp. Lee 444; *Price v. Powell*, 3 H. & N. 341; *Avery v. Pixley*, 4 Mass. 462; *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 277. See *In re White's Will*, 25 N. J. Eq. 501.

"There can be no doubt that prior to the new statute a will found in the testator's possession with the seal torn off was deemed to have been canceled. *Davies v. Davies*, 1 Cas. temp. Lee 444; *Lambell v. Lambell*, 3 Hagg. 568. At that time any tearing done with the intention of revoking had been held sufficient. The expression upon which we have now to put a construction is 'by tearing or otherwise destroying;' and as it was admitted (and we think could not be denied) that actual destruction was not necessary, it becomes a question of degree whether what was done in this case was sufficient; and in such cases, and indeed in all similar cases, we think it would be discreet not to lay down any general rule applicable to cases and circumstances which have not been the subject of argument before us, but to confine our judgment to the case at bar.

The whole will, or any provision therein, may be revoked by cancellation or obliteration, as well as by tearing or burning. Thus, if the testator strikes out or obliterates a particular provision, a revocation is effected *pro tanto*, and the rest of the will remains in full force;¹ but if he should strike out or obliterate his signature or

And in our opinion, as this will professed to be executed under seal, and was published and attested as a sealed instrument, when the seal was torn off it ceased to be the instrument which the testator professed to execute and to publish to the attesting, and through them to the world. It was, to make use of the expression of Mr. Justice Coleridge in *Doe v. Harris*, 6 Ad. & El. 209; 33 E. C. L. 57, 'destroyed in its entirety,' and ceased to be (by means of tearing) the instrument as and for which it had been published." Pollock, C. B., in *Price v. Powell*, 3 H. & N. 350.

Upon the principle of this case it was held, by Wood, V. C., in *Williams v. Tyley*, Johns. 530, that by the usual statement in the witnessing clause at the end of his will, that he has set his hand to the preceding pages, a testator makes the signatures on those pages a part of his will; and if, having so recited, he afterwards, *animo revocandi*, tears off the signatures from the preceding pages, it is a good revocation of the whole will under the 20th section of the act, 7 Will. 4 and 1 Vict., ch. 26. See *In re Harris*, 3 S. & T. 485.

1. *Sutton v. Sutton*, Cowp. 812. See *Bigelow v. Gillott*, 123 Mass. 102; *Wheeler v. Bent*, 7 Pick. (Mass.) 61; *In re Kirkpatrick's Will*, 22 N. J. Eq. 463; *McPherson v. Clark*, 3 Bradf. (N. Y.) 92; *Clark v. Smith*, 34 Barb. (N. Y.) 140; *Jackson v. Holloway*, 7 Johns. (N. Y.) 395; *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383; *Cogbill v. Cogbill*, 2 Hen. & M. (Va.) 467; *Dixon's Appeal*, 55 Pa. St. 424; *Tomlinson's Estate*, 133 Pa. St. 245; *Doane v. Hadlock*, 42 Me. 72; *Means v. Moore*, 3 McCord (S. Car.) 282; *Brown's Will*, 1 B. Mon. (Ky.) 57; *Wells v. Wells*, 4 T. B. Mon. (Ky.) 152.

In *McPherson v. Clark*, 3 Bradf. (N. Y.) 92, the court, in delivering the opinion, said: "It never seems to have been doubted that a portion of a will might be revoked by obliteration. In *Roberts v. Round*, 3 Hagg. 548, the testatrix having partially mutilated a duplicate will, Sir John Nicoll said: 'Suppose that the mutilated instrument alone had been found, and that no duplicate had

ever existed. This mutilation of the first sheet, leaving the signature untouched, would not be a total revocation—it would be a revocation of those particular devises only.' In support of this position, he refers to *Larkins v. Larkins*, 3 Bos. & P. 16. In that case, the testator having made a devise to three persons, as joint tenants, afterwards struck out the name of one of the devisees, without republication, and it was held that the erasure operated only as a revocation of the will *pro tanto*. Lord Alvanley remarked, 'I have no doubt upon this case. A revocation by obliteration will have the same effect which a revocation by any other means will have, and no more.' In *Burkitt v. Burkitt*, 2 Vern. 498, certain devises were obliterated and alterations made, and it was decreed that the obliterations did not revoke such clauses as remained unaltered. (See *Limbery v. Mason*, Comyns 451.) In *Sutton v. Sutton*, Cowp. 812, various and extensive alterations were made, and parts obliterated *animo revocandi*, but it was decided that the whole will was not revoked, but a devise of certain real estate was sustained as valid and unaffected. The same doctrine has been held in this country. In the case of *Brown's Will*, 1 B. Mon. (Ky.) 57, it was declared that a cancellation of a portion of the devises, the testator's signature being left untouched, did not affect the residue of the dispositions, which remained unaltered, the testator's intention not to revoke them being clearly established." But see *Quinn v. Quinn*, 1 Thomp. & C. (N. Y.) 437.

In *Pennsylvania*, where several legacies were canceled by drawing a pencil through them, the will was held to be revoked as to such legacies, but not entirely. *Tomlinson's Appeal*, 133 Pa. St. 245.

In *Bigelow v. Gillott*, 123 Mass. 102, it was held that where a testator struck out certain bequests by drawing lines through them, the property passed under the residuary clause. The court, by Merton, J., said: "The statute provides that 'no will shall be revoked, unless by burning, tearing, cancelling,

or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction; or by some other will, codicil, or writing, signed, attested, and subscribed in the manner provided for making a will.' Gen. Stat., ch. 92, § 11. This provision is a re-enactment of the Rev. Stat., ch. 62, § 9, with merely unimportant changes. The Revised Statutes made material changes in the law as to wills, doing away with the distinctions between wills affecting real and wills affecting personal property, and putting all upon the same footing. The Stat. of 1783, ch. 24, § 2, permitted the revocation of a devise of land, 'or any clause thereof,' in the manner pointed out in the statute, which was the same manner now provided for the revocation of a will. "We see nothing to indicate that the legislature, in the revision of 1836, intended to change the law in this respect and to limit the power of revocation to a revocation of the whole will. The power to revoke a will includes the power to revoke any part of it. If we were to hold that under this provision a testator could not revoke a part of a will by canceling or obliterating it, we should be obliged by the same rule of construction to hold that he could not revoke a part by a codicil, which would be against the uniform practice in this commonwealth, sanctioned by numerous decisions. We are therefore of opinion that, in this case, the cancellation by the testator of the sixth and thirteenth clauses of his will, by drawing lines through them, with the intention of revoking them, was a legal revocation of those clauses."

New York.—Under 2 Rev. Stat. 64, § 42, it seems that a will cannot be revoked *pro tanto*, except by a writing executed with the same formalities with which the will itself was required to be executed. *Lovell v. Quitman*, 88 N. Y. 377. In this case, testatrix struck out certain clauses with intent to revoke, leaving them still legible, and it was held that the whole will, including these clauses, should be admitted to probate. The court, by Danforth, J., said: "The appeal depends upon the true construction of the statute (2 Rev. Stat., pt. 2, ch. 6, tit. 1, art. 3, p. 64, § 42), which enacts that 'no will in writing, . . . nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or

some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required, by law, to be executed; or unless such will be burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by any other person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.'

"*First.* A literal and plain reading of these words defeats the appellant. There is language of prohibition, but it is so qualified as to amount to permission to revoke or alter a will, or any part thereof, by some other will in writing, or some other writing of the testator declaring such revocation or alteration; or by burning, tearing, canceling, obliterating, or destroying the will, 'for the purpose of revoking the same.' Now, by the first phrase, the repentant testator is required to write out the proposed alteration, select his witnesses and make to them an acknowledgment or declaration that the act is his; and, so far, the language permits but one inference or construction; that that act becomes effectual whether it relates to the whole will, or some portion only of the will.

"The second clause requires no such construction. The words 'or any part thereof,' are omitted. The 'will' itself is to be burnt, torn, canceled, obliterated, or destroyed, not with an intent or purpose of 'altering,' but, as the statute says, 'with the intent and for the purpose of revoking the same.' And while these things may be done, either by the testator or by another person in his presence, under his direction, yet the statute provides that 'when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.' The injury relates to the effect of burning, tearing, canceling, and obliterating.

"We see, therefore, that, under the first clause, an act of alteration or revocation, if in writing, and under the last clause an act of destruction or of injury, unless by the testator himself, is required to be proved by witnesses. Can it be supposed that the statute intended a partial revocation or alteration, if done by the testator himself,

the subscription of the witnesses, the whole will is revoked.¹ Under the Statute of Frauds, and similar statutes framed thereon in

should be effective, although no formality was observed? According to the appellant's construction, a dash of the testator's pen supplies the place of the formality required by the first clause, renders unnecessary the presence of two witnesses, and becomes effectual to the same extent as if the above provisions of the statute had been observed.

"Such a conclusion is inadmissible. The dissimilarity of the two events, one requiring and the other dispensing with formalities, the most solemn known to the law relating to the execution of papers, seems to permit but one answer to the appellant. The two acts cannot be deemed equivalents. To the same end is the general policy of the law, which aims to close the door against opportunities of fraud, and it would be unreasonable to suppose that the legislature intended a method by which the purpose of the testator could be defeated, and the restrictions thrown around him at the time of executing the will designed to carry that purpose into effect, evaded. The provisions of the statute applicable to wills (2 Rev. Stat., pt. 2, ch. 6, art. 3, tit. 1, p. 63), which include the one before us, have in view not merely the convenience of the individual and his protection, but also the prevention of fraud and perjury in reference to an act which becomes effective only after the death of the testator, and then concerns his devisees, his heirs, and indirectly the whole public. *Second.* The appellant resorts to implication, and imports into the second clause of the statute words which are found only in the first, thus violating not only the method of the legislature, but the grammatical reading of the sentence. This last consideration would be of little importance if there was anything in the statute from which it appeared that the apparent grammatical construction could not be the true one, but should control unless there is some strong and obvious reason to the contrary; as if we could see that the legislature had a different intention. But when we find in the first clause that the will, or any part thereof, can be altered by a writing only when duly attested, and in the second clause the words 'or any part thereof' omitted, we are bound to give effect to the specific words actually used, and say that no

obliteration can be effective as to part, unless it altogether destroys the whole will. We have no power to interpolate other words."

In *Gugel v. Vollmer*, 1 Dem. (N. Y.) 484, the testator's will consisted of six pages, four of which were marked across, as having been stricken out at some time after its execution, with a marginal note on each of the four pages, in the handwriting of the testator, as follows: "I pronounce this void, July 24, 1878." All the writing was perfectly distinguishable; it only appearing on the face of the paper, that the pen had been drawn across several pages of it. It was held that there was no revocation and that the entire will, as executed, must be admitted to probate.

Alabama.—Under a statute providing that "a will in writing can only be revoked by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence, and by his direction; or by some other will in writing, or some other writing subscribed by the testator, and attested as prescribed in the first section of this article; and when this will is burned, torn, canceled, or obliterated by any other person than the testator, his direction and consent thereto, and the fact that such burning, canceling, tearing, or obliteration must be proved by at least two witnesses." (Code (1886), § 1968.) It was held that all alterations or revocations of any part or any clause of a will, properly executed, must be made, not by burning, tearing, canceling or obliterating, but only by a new will, or a codicil, properly subscribed by the testator, and attested by at least two subscribing witnesses, in the mode prescribed by the statute. *Law v. Law*, 83 Ala. 432.

In *England*, it has been repeatedly held that the canceling of a legacy by lines drawn by the testator revokes the legacy so canceled, but does not affect the residue of the will. *Mence v. Mence*, 18 Ves. Jr. 350; *Martins v. Gardner*, 8 Sim. 73; *Francis v. Grover*, 5 Hare 39; *Larkins v. Larkins*, 3 Bos. & P. 16; *Short v. Smith*, 4 East 418; *In re Woodward*, L. R., 2 P. & D. 206; *Rogers Ecc. Law* 1018.

1. *In re James*, 7 Jur. N. S. 52; *Bap-*

the *United States*, the revocation is complete, if enough of the material part of a provision is stricken out, canceled, or obliterated to show an intent to revoke, as where the testator draws his pen through a devisee's name.¹ Under the Statute of Victoria, revocation by cancellation is abolished, and obliteration to be effective

tist *Church v. Robbarts*, 2 Pa. St. 110; *Evan's Appeal*, 58 Pa. St. 238.

Pencil Marks Over Signature.—Drawing pencil marks over the signature has been held sufficient. *Woodfill v. Patton*, 76 Ind. 575. See *Tomlinson's Estate*, 133 Pa. St. 245.

Scratching out the signature revokes the will. *Goods of Morton*, 12 Prob. Div. 141.

Tearing out the seal, and part of the signature, and obliterating the rest of signature and the names of witnesses, works a revocation of the will. *In re White's Will*, 25 N. J. Eq. 501.

1. *Mence v. Mence*, 18 Ves. Jr. 350; *In re Kirkpatrick's Will*, 22 N. J. Eq. 463; *Matter of Clark's Will*, 1 Tuck. (N. Y.) 445; *Woodfill v. Patton*, 76 Ind. 575; *Evan's Appeal*, 58 Pa. St. 238.

In *Müh's Succession*, 35 La. Ann. 394, the will containing some twenty legacies was found, with all the legacies except four erased by pen marks, but still legible. The clause appointing executors was erased in like manner, the names being read with more difficulty. The testator's signature was still more completely marked out in like manner. In the margin were several additions in his handwriting, apparently designed for a new will. It was held that the will was revoked.

Effect of Writing the Word "Canceled," "Obsolete," etc., on Will.—In *Warner v. Warner*, 37 Vt. 356, the testator made his will in 1857, and wrote it mostly upon one side of a half sheet of foolscap paper, the signature and attestation clause being upon the other side of the same paper near the top, and two years afterward wrote below all the writing, and near the middle of the sheet, "This will is hereby canceled and annulled in full this 15th day of March, 1859." It was held to amount to a revocation of the will by "canceling," which could not be thereafter revived by parol declarations of such a purpose or desire on the part of the testator. The court, by Barrett, J., said: "From the fact that the cross marks were so easily made, and, when made upon the face of a written instrument, were so significant that thereby, the

maker of them designed to put an end to the continuing validity of the instrument, this mode was recognized and adopted into the statute, in common with tearing, burning and obliterating, as one by which wills might be revoked. In some instances this mode might be preferable to either of the others, as when it should be desirable to preserve the legibility of the entire instrument, which might not happen as the result of burning, tearing or obliterating. While, therefore, a common and customary mode of manifesting the intent to abrogate the instrument, by drawing cross lines over the face of it, gave rise to the use of the term cancel, still the entire judicial history of the subject shows that that manner of marking an instrument is by no means essential in order to answer to the full force and effect of the term in its legal sense. The net result of all the cases and all the text books, as well as the reason of the thing, and the appropriate analogies, seems to be this,—that, when the instrument is so marked by the maker of it as to show clearly, whenever it is produced, that the act was designed by him to be a canceling, that act becomes effectual, by force of the statute, as a revocation of the will by canceling.

"In the present case the act of the testator was done, not only upon the paper on which the will was written, but upon such a part of it as always to go with that part of the will which contained the disposition of the property,—not indeed on the face, but on the back of such disposition. It is obvious that the act itself was designed to constitute a revocation by canceling. This is not a mere memorandum or declaration, which, as such, operates a legal effect by force of the terms, but it was the performing of an act upon the instrument itself, which act operates the legal effect. If cross lines had been drawn over the face of the writing of the will, they would have been effectual, because they would have constituted an act done to the instrument, showing the intent of the testator, by that act, to destroy the validity of it. Instead of thus drawing lines, he equally

must so completely efface the original writing that it cannot be read.¹ A somewhat similar construction has been placed upon an

performed an act to the substance of the instrument, and as inseparable from the written text as cross lines over its face, showing, with even clearer certainty, the intent, by that act, to destroy its validity. Instead of leaving the significance of informal marks to be fixed by the location they occupy, he formed the marks into letters and words expressive of their significance, and as effectually placed them upon the instrument as if they had been made upon the face of the script of the will. If he had drawn a slight mark from the top to the bottom of the writing, though that would not have been *canceled*, within the etymological and primary meaning of the term, still it is conceded that it would have been a canceling of the will, if done with that intent, within the legal meaning of that term. We think that writing upon a will, as was done in this case, as nearly answers to the primary sense of that term, as such mark would, and, having regard to the ground on which effect is given to an act of cancellation, such writing answers every reason and requisite of the law."

The reasoning in this case was approved by Strong, J., in *Evan's Appeal*, 58 Pa. St. 247. See also *Witter v. Mott*, 2 Conn. 67.

But in *Lewis v. Lewis*, 2 W. & S. (Pa.) 455, under an act similar in phraseology to the Statute of Frauds, it was held that the word "obsolete," written by a testator on the margin of his will, but not signed by him or any person for him in the mode prescribed by the sixth section of the Act of April 8, 1833, did not operate as a revocation of the will under the thirteenth section of that act.

Parol declarations as to the testator's intent to die intestate are inadmissible to show a revocation of his will. See further *Grantley v. Garthwaite*, 2 Russ. 90; *In re Gosling*, 11 Prob. Div. 79; *In re Ladd's Will*, 60 Wis. 187.

Canceled Legatee's Name in Some Places and Not in Others.—The testator directed his executors to pay an annuity to his sister —, the wife of Francis Betley, or to such persons as the said Elizabeth Betley should appoint, to the intent that the same might be for the separate use of the said E. Betley,

and the receipt of the said — to be a sufficient discharge. The testator, after executing his will, drew his pen through his sister's name in those places where dashes are left. It was held that the request was not revoked. *Martins v. Gardiner*, 8 Sim. 73.

Obliterating Title on Envelope.—Striking a pen through the words "last will and testament," on the back of the envelope in which the will is contained, and entering thereon "superseded by a later will," which was improperly executed, does not revoke the first will. *Grantley v. Garthwaite*, 2 Russ. 90.

In *Re Ladd's Will*, 60 Wis. 187, the will was written upon a large double sheet, the first page being a printed blank. This was filled in by the testator, and the will was wholly upon the first page. The second and third pages were blank, and the usual indorsement by the scrivener was upon the fourth page, being the outside wrapper leaf. Here, also, in pencil, in the handwriting of the testatrix, signed and dated by her, were the words, "I revoke this will." This was held not to be a cancellation.

1. The Statute 1 Vict., ch. 26, § 20, enacts "that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (*i. e.*, by marriage), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed as a will," or "by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same;" and (section 21) "that no obliteration, interlineation, or other alteration, made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at

analogous statute in *Iowa*.¹ A testator may, by obliteration or cancellation (where the latter is permitted by statute), reduce a

the foot, or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will." . . . The change, therefore, is that a revocation by cancellation or obliteration is not (as before) placed upon the same footing as a revocation by burning or tearing. Obliteration, or other alteration which does not wholly efface the will, is no longer effectual unless executed in manner prescribed for the execution of a will. 1 Jarm. on Wills (5th ed.) *140. See *In re Horsford*, L. R., 3 P. & D. 211; *Hobbs v. Knight*, 1 Curt. 779; *Stephens v. Taprell*, 2 Curt. 458; *In re Brewster*, 29 L. J. P. 69; *In re Fary*, 15 Jur. 1114.

Under the statute just set forth, providing that no cancellation or obliteration shall operate as a revocation unless the original writing be wholly effaced, it has been held, in controversies depending upon the effect of cancellation or obliteration, that magnifying glasses may be used to discover what the words obliterated originally were. *In re Ibbetson*, 2 Curt. 337; *Lushington v. Onslow*, 6 No. Cas. 187. And see also *In re Horsford*, L. R., 3 P. & D. 211.

Parol evidence for this purpose is inadmissible, except in those cases where the obliteration was made for the purpose merely of altering the amount of the gift, and not of revoking it, in which cases, there was no intention to revoke except for the purpose of substituting a gift of a different amount. If the latter amount cannot take effect by reason of the substituted words not being properly attested, the former gift will remain good, and evidence will be admitted to show what the original words were. *Townley v. Watson*, 3 Curt. 761; 8 Jur. 111; 3 No. Cas. 17; *Soar v. Dolman*, 3 Curt. 121; 6 Jur. 512; *Brooke v. Kent*, 3 Moo. P. C. 334; 1 No. Cas. 99; *In re Ibbetson*, 2 Curt. 337; *In re Reeve*, 13 Jur. 370.

Probate in Blank.—In such a case as that last mentioned, if there is no evidence what the words were which had been substituted by words not properly attested, probate is decreed in blank. *In re James*, 1 S. & T. 238.

Erasure of Name of Legatee.—It is presumed that where the name of a legatee was obliterated simply for the

purpose of substituting another legatee, where such substitution is not properly attested, that parol evidence will be received of the name of the original legatee. As to this question, see *Short v. Smith*, 4 East 419.

This rule, it appears, has been adopted in reference to the name of an executor. See *In re Parr*, 1 S. & T. 56; 29 L. J. P. 70; 6 Jur. N. S. 56; *In re Harris*, 1 S. & T. 536; 29 L. J. P. 79. See also *Hale v. Tokelove*, 2 Rob. 318; 14 Jur. 817; *In re McCabe*, L. R., 3 P. & D. 94; *In re Bedford*, 5 No. Cas. 188. This last case would seem of contradictory import.

While, under the Statute of Victoria, ch. 26, § 20, merely running a pen through a testamentary disposition to a legatee is not sufficient to revoke the legacy, and not to be noticed in probate, such circumstance may nevertheless be not altogether without significance, for where the testator has paid a sum in his lifetime to the legatee, it seems that the fact of the gift being struck out in the will might be received as evidence that the payment was intended to be in satisfaction of the legacy. *Twining v. Powell*, 2 Coll. 262.

Fac-simile Probate.—The court of probate has in some instances granted a fac-simile probate of a will containing interlineation, showing the parts of the will struck through, and the court of construction has then considered the alteration as made before execution, and therefore effectual. Where this is really so, the duty of the court of probate, at all events since the Judicature Act of 1873, would seem to be to grant probate of the will as altered, in the same way as if the alterations had been referred to in the attestation clause. *Gann v. Gregory*, 3 De G. M. & G. 777; *Shea v. Boshetti*, 18 Jur. 614; 23 L. J. Ch. 652; Jarm. on Wills (5th ed.) 143.

1. *Gay v. Gay*, 60 Iowa 415. In this case it was held, under the local statute, that canceling the signature did not revoke the will unless the cancellation was witnessed as required. The court, by Day, J., said: "In the Code of 1851 the provisions of our present statute were adopted, as follows: 'Section 1288. Wills can be revoked, in whole or in part, only by being canceled or

greater estate to a less, as a fee to a life estate;¹ but cannot convert a smaller estate into a greater, as a life estate into a fee, for

destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. Section 1289. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will.' Revision, §§ 2320, 2321; Code of 1873, §§ 2329 and 2330. When a statute provides the manner in which a will may be revoked, that manner must be pursued. *Wright v. Wright*, 5 Ind. 391; *Runkle v. Gates*, 11 Ind. 95; *Blanchard v. Blanchard*, 32 Vt. 62; *Gains v. Gains*, 2 A. K. Marsh. (Ky.) 190; *Clingan v. Mitcheltree*, 31 Pa. St. 25; *Doe v. Harris*, 6 Ad. & El. 209; 33 E. C. L. 57. Our statute provides that a will may be revoked, in whole or in part: *First*. By being destroyed. *Second*. By being canceled, the cancellation being witnessed in the same manner as the making of a new will. If the scroll drawn over the name of the testator had entirely obliterated the signature, this might have worked a destruction of the will, upon the ground that it had destroyed that without which the will could not exist. See *Hobbs v. Knight*, 1 Curt. 768; *Price v. Powell*, 3 H. & N. 341; *In re Harris*, 3 S. & T. 485; *Goods of Gullan*, 1 S. & T. 23; *In re Coleman*, 2 S. & T. 314. In this case, however, the scrolls drawn across the signature of the testator do not obliterate it, nor render it illegible. They do not, therefore, constitute a destruction of the will. See *In re Dyer*, 5 Jur. 1016; *In re Fary*, 15 Jur. 1114; *In re Brewster*, 6 Jur. N. S. 56; *Lushington v. Onslow*, 12 Jur. 465; *Stephens v. Taprell*, 2 Curt. 458; *In re Beavan*, 2 Curt. 369; *In re Ibbetson*, 2 Curt. 337; *In re Horsford*, L. R., 3 P. & D. 211. It is insisted by the appellant that, as the statute provides for the partial revocation of a will by its being destroyed, the word destroyed cannot mean annihilated, but is sufficiently answered by what was done in this case. It is apparent, however, that there may be a destruction of a particular part of a will by erasure or complete obliteration, and that, admitting that destroyed does not, as used in the statute, mean annihilated, it does not follow that a will may be destroyed by simply drawing a scroll through the signature. The most that can be said

for what was done in the present case is, that it constitutes a cancellation of the signature not rendering it illegible, and, as it was not witnessed in the manner required by section 2330 of the Code, it is inoperative."

1. *Swinton v. Bailey*, 45 L. J. Exch. 427. In this case a testator, by his will made in 1826, devised his realty to E., her heirs and assigns forever. He subsequently obliterated the words, "her heirs and assigns forever," with pen and ink. It was held (*reversing* the decision of the Exchequer Division) that the obliteration effected a revocation and not an alteration in the subject-matter of the devise, and that the words obliterated were "a clause" within the meaning of the 6th section of the Statute of Frauds. E. therefore took an estate for life. *Cockburn, C. J.*, said: "Now I quite agree that you cannot alter a will, so as to enlarge the estate of some one else who takes under the will, by striking out words so as to give it the effect of granting a new estate to some one, but when the purpose is simply to revoke and undo something which has been done, and the effect of striking out certain words is to revoke what has been given and no more, it does not seem to me to be brought at all within the mischief contemplated by the act, or to be inconsistent with the terms of the act. That the testator intended to cut down the estate in fee simple, which he had given to his mother, to a life estate, I cannot, looking at the will, entertain the slightest doubt in the world. It is said that this is not a clause, and that consequently, the sixth section having said that a devise shall not be altered except by a certain form of revocation, or by a new writing of a will or codicil, or writing for the purpose of revocation, this is not a clause to which a power of revocation attaches. If it is not, then it is not within the section. But I do not desire to place my judgment upon that narrow ground. I think this is a clause within the section, because, although it is a devise in fee simple by the terms of the will, I think that it is (so far as it is a matter of revocation) divisible into two parts, and that the man who has given the larger estate may revoke the gift to that extent and

any alteration which amounts to a new devise requires the will to be re-executed according to the statute.¹

cut it down to the smaller gift, or devise of an estate for life. And that is all that this man has done here. It may be you cannot add to the will without satisfying the requirements of the second part of the sixth section, but you may, by striking out words, have the effect of revoking, and without militating against the provisions of that statute. You may have a case in which the phraseology of the will is such as that you cannot, by striking out words, effect your purpose. Then your case falls within those instances which Mr. Romer pointed out in his able argument. But here the words are such as that by expunging a portion of them you have the effect of revoking, seeing that an estate in fee simple may be revoked to the extent, not of taking away all the estate, but of taking away that portion of it which is an estate of inheritance. If the phraseology of the will is such, that by striking out certain words, you revoke the estate in fee simple and leave the estate for life standing, I see no reason why that should not be done. That is what I think the testator intended to do, and I think has done. The view taken of the matter in the court below was a mistaken one, especially as it was based on the question of whether this was a 'clause' or not. I think, for all practical purposes of the application of this act, it is a clause and is one therefore which might be revoked."

Mellish, L. J., said: "The difference between revocation and alteration seems to me to be this: If what is done simply takes away what was given before, or a part of what was given before, then it is revocation; but if it gives something in addition, or gives something else, then it is more than revocation and cannot be done by mere obliteration. Here it appears to me that it does simply take away something that was given before. It makes the estate less than what it was. It does not give anything which the devisee had not before, because she had an estate for life before. The estate in fee included an estate for life, and she had an estate for life. It simply takes away something which had previously been given. That, to my mind, is a revocation, and it seems to be the intention of the legislature, as far as one can

judge from the language they have used, that revocation might be accomplished by simple obliteration without making a new attested will. It appears to me, this does merely amount to a simple revocation, because it simply amounts to taking away a part of the estate which has been before given." This decision was *affirmed* in the House of Lords, 48 L. J. Exch. 57. But *compare* next note.

1. Lord Ahanley, in *Larkins v. Larkins*, 3 Bos. & P. 21; *Lovell on Wills* 349; *Eschbach v. Collins*, 61 Md. 478. See *Wolf v. Bollinger*, 62 Ill. 368. But see *Swinton v. Bailey*, 48 L. J. 57.

In *Eschbach v. Collins*, 61 Md. 478, the effect of the erasures was to enlarge the estates of the devisees from life estates to fees. The court held the erasures inoperative, and by *Yellott, J.*, said: "If this was simply a question of revocation its determination would involve a construction of section 302 of article 93 of the *Maryland Code of General Laws*, which prescribes the mode by which a revocation may be effected. The language of the statute is, 'No devise, in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable,' except in the manner designated. An entire will can thus be revoked, or any clause thereof. What then is a clause? Does it consist of two or three words which, disjoined from the context and transferred to a separate sheet of paper would be devoid of sense or meaning? Do the mere names of two persons constitute a clause? Is not a clause always understood to mean one of the subdivisions of a written or printed document? Is the word ever used in any other sense? Wills are frequently subdivided into a number of clauses. In one the testator may provide for the payment of debts; in another, dispose of his personal property; in a third, devise his real estate; in a fourth, leave legacies; and then there may be a residuary clause. Is it not apparent that the statute has reference to one of these subdivisions of a will when the word clause is used in connection with revocation? It is true that a whole will might be revoked, or any clause thereof, by obliterating all the words necessary to give it meaning. To deprive a will of all meaning would be as effectual

6. Dependent Relative Revocation, or Revocation with a View to Another Disposition.—A revocation made in such immediate contemplation of another disposition as to raise an inference that the testator intended the revocation of the old disposition to depend upon the efficacy of the new, will take effect only in case the new disposition is effectually made;¹ and, therefore, if the will

a revocation as if it had been consumed to ashes.

"It is manifest that in the construction of this will a question is encountered which involves something more than mere revocation. The will has not been revoked; it has been altered. It cannot be supposed that when the legislature uses the word 'revocation' it is to be construed to mean mutation. Revocation is certainly not a synonym of alteration. To revoke a testamentary disposition plainly means to annul it; and the revocation of a clause implies the destruction of that clause. In legal contemplation it ceases to exist, and is as inoperative as if it had never been written. It is not necessary that the words erased should be wholly illegible, but the act of the testator must be such as to clearly indicate an intention to expunge the whole clause, so that it shall no longer constitute a subdivision of the will. But when by the obliteration of certain words a different meaning is imparted, there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation by which a new clause is created. There is another and a distinct testamentary disposition which must be authenticated by the observance of the statutory requirements. The statute, after designating the modes of revocation whereby that, which has already been done, is rendered inoperative by being destroyed, says, in language wholly free from ambiguity, and therefore needing no construction: 'or unless the same be altered by some other will or codicil in writing, signed in the presence of three or four witnesses declaring the same.'

"There can, therefore, be no alteration in a testamentary disposition of real estate, except by an observance of the formalities prescribed by the statute. In the will now to be construed the obliterations, so far from operating as a mere revocation, by destroying the sense of the context, impart to the clause a different and more important significance. Not only does this become ap-

parent, but it is also evident that the construction, which has been contended for, would be productive of the very evils which the legislature intended to provide against. The obliteration of two or three words might wholly change the character of a devise. As aptly illustrated by learned counsel in argument, if the words were 'to my son William I give nothing, and give all my estate to my son John,' the will could be made to read, without the insertion of any additional words, 'to my son William I give all my estate.'

"But, as already intimated, this record does not present a question of revocation. It is clear that the testator did not contemplate an intestacy. He evidently intended to make a testamentary disposition of the whole of his property. It was supposed by the learned judge of the circuit court that he intended by the obliterations to diminish the fee simple estates of Leo and John E. Eschbach to life estates. If such was his purpose he has attempted to make another and a different devise of one-fifth of his whole property. He transfers the legal title, vested in Leo and John E. Eschbach, to trustees, and carves out of the fee simple equitable life estates, with remainders to the children of the life tenants. This is a new will as respects the disposition of the one-fifth of his property. Let it be supposed, by way of illustration, that the entire estate had been devised to Leo in fee simple. How could the testator subsequently vest the legal title in trustees, and create an equitable life estate with remainders? Not certainly by obliterations and interlineations, without attestation or the observance of any of the formalities prescribed by the statute. And is a testamentary disposition of the one-fifth of an estate governed by a different principle? The intention of a testator is only to be regarded when the law sanctions the means which he has adopted to carry it into effect. If what he has done is invalid the intent cannot be respected."

1. 1 Jarm. on Wills (5th ed.) *135; Theobald on Wills (2d ed.) 37; Onions

v. Tyrer, 1 P. Wms. 345; *Thynne v. Stanlope*, 1 Add. 52; *Ex p. Ilchester*, 7 Ves. Jr. 372; *Winsor v. Pratt*, 5 J. B. Moore 484; 2 Br. & B. 650; *Scott v. Scott*, 1 S. & T. 258; *Clarkson v. Clarkson*, 3 S. & T. 497; *Dancer v. Crabb*, L. R., 3 P. & D. 98; *Clarke v. Scripps*, 2 Rob. 563; *Laughton v. Atkins*, 1 Pick. (Mass.) 543; *Stickney v. Hammond*, 138 Mass. 116; *Sewall v. Robbins*, 139 Mass. 164; *Stover v. Kendall*, 1 Coldw. (Tenn.) 557; *Youse v. Forman*, 5 Bush (Ky.) 338; *Barksdale v. Barksdale*, 12 Leigh (Va.) 535; *Pringle v. M'Pherson*, 2 Brev. (S. Car.) 279; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394. See *Bethel v. Moore*, 2 Dev. & B. (N. Car.) 311; *Means v. Moore*, 3 McCord (S. Car.) 282; *Semmes v. Semmes*, 7 Har. & J. (Md.) 390; *Wilbourn v. Shell*, 59 Miss. 205; *McClure v. McClure*, 86 Tenn. 179.

In *Ex p. Ilchester*, 7 Ves. Jr. 372, Lord Alvanley said: "Where a disposition is made so as to have legal effect, and afterwards another, by which the former would be revoked, but the other substituted, and it is evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation."

Cancellation of a will by drawing lines across it, is an equivocal act; and whether it amounts to a revocation, depends upon the intention with which it was done. This intent may be gathered from contemporaneous acts of the testator; and where he canceled his signature, and afterward signed the will anew, and by a codicil attached referred to it; sealed the whole up together, and deposited it among his valuable papers; the jury may, from these facts, infer that the cancellation was not intended as an absolute revocation, but made with the view to another will, which was afterward abandoned. *Bethel v. Moore*, 2 Dev. & B. (N. Car.) 311.

Clause of Revocation — Effect. — The fact that the later will contains a clause expressly revoking former wills, does not prevent the application of the doctrine, since it must be inferred that the testator intended to revoke former wills for the purpose of giving effect to the new disposition, and if, for want of

proper execution of the subsequent will, its defective construction, or other sufficient cause, proper effect cannot be given to it, we are not to suppose that he designed to die intestate. *Stickney v. Hammond*, 138 Mass. 120. See *Powell v. Powell*, L. R., 1 P. & D. 209; *Onions v. Tyrer*, 1 P. Wms. 345; *Pringle v. M'Pherson*, 2 Brev. (S. Car.) 290; *Barksdale v. Barksdale*, 12 Leigh (Va.) 535; *Rudy v. Ulrich*, 69 Pa. St. 183; *Peck's Appeal*, 50 Conn. 566.

A contrary view seems to have been taken in *Hairston v. Hairston*, 30 Miss. 276. See further *Burns v. Travis*, 117 Ind. 45; *Barksdale v. Hopkins*, 23 Ga. 339.

Subsequent Will Canceled to Set up Prior Will. — Similarly a will canceled in order to set up a prior will, which under the statute of Victoria cannot be so revived, is not thereby revoked. *Theobald on Wills* (2d ed.) 38; *Powell v. Powell*, L. R., 1 P. & D. 209. See *Dickinson v. Swatman*, 4 S. & T. 205; *Eckersley v. Platt*, L. R., 1 P. & D. 281; *In re Weston*, L. R., 1 P. & D. 633.

In *Powell v. Powell*, L. R., 1 P. & D. 209, a testator executed a will in 1864 revoking all former wills. In 1865 he destroyed this will, saying at the time that he wished to substitute for it a will of 1862, which he held in his hand. It was held that there was no revocation. Sir J. P. Wilde said: "It is not contended that effect could be given by law to this object, but failing that, it is argued that effect ought not to be given to the destruction of the will of 1864 as an act of revocation. I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done '*animo revocando*' it is no revocation. What, then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is

intended to be substituted is not made,¹ or from defect of attestation, or other cause, is inoperative, the original will remains in force.² So, where a testator strikes out the name of a devisee or legatee, and at the same time interlines that of another, or substitutes a larger or smaller interest or share for that which he had previously given, if the interlineation is inoperative for want of attestation or other cause, the obliteration will also fail of effect.³

clear that in such case the '*animus revocandi*' had only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argument. But then, it is said, that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution of the instrument intended in substitution; and that no decided case can be found in which the instrument intended to be established has been a long previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say, 'I tear this will of 1860 because I have this day (1st of January, 1861) executed another designed to replace it,' or, 'I tear this will of 1860 because I desire and expect that the effect of my so doing will be to set up my old will of 1840?' In either case, the revocatory act is based on a condition, which the testator imagines is fulfilled. In both cases the act is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the '*animus revocandi*' present. It is only necessary to add that, in the above observations, it has been assumed that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary paper. And such was, I think, upon the evidence given in this case, the reasonable conclusion of fact. Cases may, and probably will, arise in which the intention is either mixed or ambiguous, and such are for future consideration."

1. Theobald on Wills (2d ed.) 38; Goods of Eles, 2 S. & T. 600; Goods of Bode, 5 No. Cas. 189. See Youse v. Forman, 5 Bush (Ky.) 338.

2. 1 Jarm. on Wills (5th ed.) *135; Theobald on Wills (2d ed.) 38; Hyde

v. Mason, Vin. Abr. Devise (R. 2), pl. 17; Com. Rep. 451; Dancer v. Crabb, L. R., 3 P. & D. 209; Pringle v. M'Pherson, 2 Brev. (S. Car.) 279; Stover v. Kendall, 1 Coldw. (Tenn.) 557; Laughton v. Atkins, 1 Pick. (Mass.) 543; Sewall v. Robbins, 139 Mass. 164; Carpenter v. Miller, 3 W. Va. 174. See Stickney v. Hammond, 138 Mass. 116; Wilbourn v. Shell, 59 Miss. 205.

3. 1 Jarm. on Wills (5th ed.) *135, 142; Theobald on Wills (2d ed.) 39. See Keike v. Keike, 4 Russ. 435; Locke v. James, 11 M. & W. 901; Brooke v. Kent, 3 Moo. P. C. 334; Soar v. Dolman, 3 Curt. 121; Unison v. Pratt, 2 B. & B. 650; *In re* Horsford, L. R., 3 P. & D. 211; Goods of Past, 1 S. & T. 56; *In re* Harris, 1 S. & T. 536; Short v. Smith, 4 East 418; Wolf v. Bollinger, 62 Ill. 374, citing McPherson v. Clark, 3 Bradf. (N. Y.) 92; Jackson v. Holloway, 7 Johns. (N. Y.) 394; Laughton v. Atkins, 1 Pick. (Mass.) 535.

"If there is an erasure simply, without any substitution or interlineation, the doctrine does not apply, even though the erasure may be of part of a legacy—as, for instance, where a legacy of one hundred and fifty pounds is given and the words 'and fifty' are erased. *In re* Ibbetson, 2 Curt. 337; *In re* Horsford, 3 P. & D. 211; *In re* Nelson, 1 R., 6 Eq. 569. The distinction between a case where the words 'one hundred and fifty' are obliterated, and the word 'fifty' is written over them, and a case where the words 'one hundred and,' are obliterated, leaving the word 'fifty,' is somewhat thin. Upon similar principles, when the name of an executor has been obliterated, and another executor substituted after the execution of the will, the name of the original executor will be restored, if it can be shown by external evidence what the name was. The presumption that the testator intended to appoint some executor or other, is a strong one. *In re* Parr, 29 L. J. P. 70; 6 Jur. N. S. 56; *In re* Harris, 1 S. & T. 536; 29 L. J. P. 79. It is clear that, where the name of

But a mere intention to make, at some indefinite future time, a new will is not enough to prevent revocation.¹ The better opinion is that the doctrine is inapplicable to cases in which the second

a legatee is obliterated, and that of another legatee substituted after execution, and there is no further evidence of intention, no case of dependent relative revocation arises. Under such circumstances, however, a case of dependent relative revocation may be raised by proper evidence. Thus, if it appears from external evidence that a gift has been made to a person only on the supposition by the testator that another person was incapable of taking, and after the execution of the will the name of the first person has been obliterated and the name of the second substituted, the original legatee takes on the ground that he was intended to take in the event of the substituted legatee being incapable of taking. *In re McCabe*, L. R., 3 P. & D. 94." Theobald on Wills (2d ed.) 39, 40.

A person, after his will was duly executed, struck out with his pen certain clauses devising to his daughter, adding at the end of his will that the reason was bad treatment on her part. He also attempted to dispose of the property bequeathed to the daughter, by striking out of the residuary clause the words "my children," and inserting "my two sons." It was held that though as a mere revocation *pro tanto* of the will the cancellation would have been sufficient, the subsequent disposition not being executed in due form, the revocation, being a part of the same intent, must fail also. *McPherson v. Clark*, 3 Bradf. (N. Y.) 92.

1. 1 Jarm. on Wills (5th ed.) *135; Wood, V.C., in *Williams v. Tyley*, 5 Jur. N. S. 35; *In re Mitcheson*, 32 L. J. P. M. & A. 202; 1 Redf. on Wills (4th ed.) 308. See *Banks v. Banks*, 65 Mo. 435; *Brown v. Thorndike*, 15 Pick. (Mass.) 388; *Youse v. Forman*, 5 Bush (Ky.) 338.

"To bring the case within this doctrine (dependent relative revocation) it must appear that the testator considered the substitution of some valid disposition as part of the act of revocation at the time when the act was done. The mere revocation of a will, followed by a subsequent ineffectual disposition, will not set up the original will if the two acts are not so connected that it can be said the substitu-

tion of an effectual disposition was the condition of the revocation of the original will. *In re Mitcheson*, 32 L. J. P. M. & A. 202; *In re Weston*, L. R., 1 P. & D. 633; *In re Gentry*, 3 L. R. P. 80. The point in these cases is not that a revoked will is set up again, if a subsequent disposition is ineffectual, but that the original will is not itself intended to be revoked, unless or until an effectual disposition of the property is made. See *Powell v. Powell*, L. R., 1 P. & D. 209; *In re Weston*, L. R., 1 P. & D. 633; *Eckersley v. Platt*, 1 P. & D. 281." Theobald on Wills (2d ed.) 37, 38. See *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 278; *Semmes v. Semmes*, 7 Har. & J. (Md.) 388; *Hairston v. Hairston*, 30 Mis. 305; *Barksdale v. Barksdale*, 12 Leigh (Va.) 535; *Rudy v. Ulrich*, 69 Pa. St. 183.

In *Dancer v. Crabb*, L. R., 3 P. & D. 98, the testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. The testatrix, feeling unwell, desired her friend to stop there, and then tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by the testatrix and locked up, and she believed when she did so that these papers constituted a new will, and were not merely instructions for such a will. It was held that it was a case of dependent relative revocation, a revocation dependent on the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained and the draft of the part which was destroyed. Sir J. Hannen said: "If the testator's act can be interpreted thus, 'Whatever else I may do, I intend to cancel this as my will from this time forth,' the will is revoked; but if his meaning is, 'As I have made a fresh will my old one may now be destroyed,' the old will is not revoked if the new one be not in fact made. I think that the latter form of words correctly expresses the state of

disposition is duly executed, but fails through the legal construction of its terms,¹ or the incapacity of the legatee or devisee to take.²

7. Whether an Earlier Will Is Revived by Revoking a Later One.—Where the later of two inconsistent wills was revoked by the testator in his lifetime, it was held by the courts of common law that the earlier will was thereby revived, and, unless afterwards revoked by some subsequent act, came into operation on his decease, whether the later will contained an express clause of revocation or not.³ In the ecclesiastical courts it was held that the revocation of the later will raised no presumption in favor of the revival

the testatrix's mind at the time when she tore her will of June, 1865. I may add that I have no doubt that the testatrix attached special importance to the striking out of Mr. Upward's name from her will."

In *Banks v. Banks*, 65 Mo. 432, a testator, intending to revoke a will, caused it to be burned. He had already prepared and signed a second will making materially different dispositions of the property. At the time of the burning, the second will was not attested, and the testator understood that until attested, it would not be complete. It was subsequently attested, and after the death of the testator, was offered for probate, but was rejected by the probate court. In an action to establish the first will, it was held that the burning operated a complete revocation, and this result was not changed by the fact that the second will never took effect. The court, by Henry, J., said: "In the English cases which we have cited, the alterations in the original wills were in immaterial particulars, and did not indicate any dissatisfaction of the testator with the disposition of the property made by the original wills. Here the disposition which he proposed to make of his property by the will of 1866, was substantially and materially different from that made by the will of 1865, clearly indicating that he was not satisfied with the original will. Here the testator had no impression or opinion that the last will was complete, but had a purpose subsequently to perfect it, and did so. He burned the will expressly to revoke it. We cannot say that he would not have done so, if he had known that the second will would never be completed or probated."

The position that the doctrine of dependent relative revocation is inappli-

cable, unless the second will was completely executed when the first was destroyed, is not sustained; it would seem upon principle sufficient if the first is canceled in such immediate contemplation of the second as to raise an inference that the testator intended the revocation of the old disposition to depend upon the efficacy of the new, even though the latter be not drawn up. *Goods of Applebee*, 1 Hagg. 143.

1. Schouler on Wills (2d ed.), § 398.

2. *Tupper v. Tupper*, 1 K. & J. 665; *Quinn v. Butler*, L. R., 6 Eq. 225; *Barksdale v. Hopkins*, 23 Ga. 342; *Hairston v. Hairston*, 30 Miss. 304, citing *Eggleston v. Speke*, 3 Mod. 258; *Roper v. Radcliffe*, 10 Mod. 230; *Ex p. Ilchester*, 7 Ves. Jr. 378; *Onions v. Tyrer*, 1 P. Wms. 345; *Ellis v. Smith*, 1 Ves. 17.

"But this is a mere distinction of fact and not of principle. It may even be doubted whether it reconciles the cases in fact. See *Quinn v. Butler*, L. R., 6 Eq. 225. The true theory seems to be, that the doctrine of dependent relative revocation applies equally where the second legatee is incapacitated from taking, provided the case can be brought within the doctrine, or in other words, provided it can be shown that the original legacy was intended to be revoked only in the event of the second taking effect. The mere fact that a legacy is revoked and a different legacy to a different legatee substituted, affords no argument, either in the court of probate or in a court of construction, that the capacity of the second legatee to take was the condition of the revocation of the earlier legacy." *Theobald on Wills* (2d ed.) 41.

3. 1 Jarm. on Wills (5th ed.) *135; *Goodright v. Glazier*, 4 Burr. 2512; *Rainier v. Rainier*, 1 Jur. 754; *Bates v.*

of the earlier will, but that the question depended upon the intention of the testator as shown by the peculiar facts and circumstances of the case, and was open to decision either way.¹ The Statute of Victoria abolished the doctrine by expressly providing that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a duly executed codicil showing an intention to revive the will.² In several of the states similar statutes exist, under which the revocation of the second will does not

Holman, 3 Hen. & M. (Va.) 502. See Roper on Revocation 94.

In *Harwood v. Goodright*, Cowp. 92. Lord Mansfield said: "If a testator makes one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former, if he afterwards destroy the revocation, the first will is still in force and good." See *Taylor v. Taylor*, 2 Nott & M. (S. Car.) 482; *Randall v. Beatty*, 31 N. J. Eq. 643.

1. *Ustick v. Bawden*, 2 Add. 116; *Moore v. Moore*, 1 Ph. 412; *James v. Cohen*, 3 Curt. 770; *Welch v. Phillips*, 1 Moo. P. C. 299; *Wilson v. Wilson*, 3 Ph. 554.

"The question is not whether the deceased meant to die testate or intestate, but whether he meant to revive the earlier will by the destruction of the later." Sir H. James Fust in *James v. Cohen*, 3 Curt. 770.

A testator made a will in due form of law, to which he subsequently subjoined a codicil. He then made a second will, and added a postscript to it, by which he "revoked all former wills," and signed the postscript. The second will was canceled by cutting his name out from the body of it, but leaving the postscript with his name subjoined to it. This paper was carefully preserved by the testator, as also his first will. It was held that the postscript to the second will was a substantive revocation of the first will, and that the canceling of the second will did not necessarily cancel the postscript also, so as to set up the first as the will of the testator. *Bates v. Holman*, 3 Hen. & M. (Va.) 502.

2. By 1 Vict., ch. 26, § 22, it is enacted, that "No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when

any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

In *Rudisill v. Rodes*, 29 Gratt. (Va.) 149, the court, by Burks, J., said: "It seems to have been held generally by the common-law courts, that in such a case it was a necessary conclusion of law, admitting of no proof to the contrary, that the former will was revived. This rule was deduced from the nature of the revoking instrument, which is itself revocable and never becomes final and absolute until the death of the testator; and it was considered that the effectual revocation of such instrument restored the former will and left it to operate in like manner and with like effect as if the revoking will had never been executed. *Goodright v. Glazier*, 4 Burr. 2512; *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Bates v. Holman*, 3 Hen. & M. (Va.) 525; 1 Jarm. on Wills (5th ed.) 123; 4 Kent's Com. (13th ed.) 531; 1 Redf. on Wills (4th ed.) 374, 375; 1 Tuck. Com. (Book 2) 295; 2 Minor's Inst. 931, 932. On the other hand, in the ecclesiastical courts, the revival or restoration of the former will was made to depend on the intention of the testator, to be gathered from the facts and circumstances of each particular case, and parol evidence was admissible to show the intention. 1 Jarm. on Wills (5th ed.), 123, and cases cited in notes on *Lawson v. Morrison*, 2 Am. Lead. Cas. (5th ed.) 482, 518-523. The effect of the rule in the law courts was to exclude arbitrarily all extrinsic evidence of intention upon the question of revival, and thus oftentimes to set up a will contrary to the intention of the testator; while the rule in the ecclesiastical courts threw the door wide open to the admission of such evidence, and suffered

revive the first, unless such intent appear in the terms of the revocation, or the first will be duly republished afterwards.¹ In the absence of such legislation the rule varies greatly in the different states. In *Mississippi* it has been held that a revocation of a subsequent will does not *ipso facto* revive a former one expressly or impliedly revoked by the latter.² In *Connecticut* and *South Carolina*, it has been held, on the authority of the common-law cases, that the revocation of the later will revives the earlier;³ and in *New Jersey* and *Pennsylvania* such seems to be the rule, although the second will contains a clause of revocation.⁴ In *Michigan*,

the intention of the testator to be determined by 'the uncertain testimony of slippery memory.' It was the object of the English statute, by the 22d section, to abrogate both of these rules, which were attended with the mischiefs just indicated, and to establish in their stead a safer rule, by which the intention of the testator would be manifested with more certainty, and be less liable to be defeated by acts and circumstances of an equivocal character."

Construction of Victorian Statute.—The second section of this statute changed the formerly prevailing rule that the revocation of a posterior will revived a former will, which such posterior instrument, if it had remained in force, would have revoked. Nor is it material, in such cases, whether such subsequent will owed its revoking efficacy to an express clause of revocation contained in it, or to mere inconsistency of disposition. *Brown v. Brown*, 8 El. & Bl. 876; 92 E. C. L. 875; *Hale v. Tokelove*, 2 Rob. 318; 14 Jur. 817; *Boulcott v. Boulcott*, 2 Drew. 25.

How Former Will May be Revived.—This statute above referred to permits the resurrection of the former will by one of two means only: Re-execution of the will, or the execution of a codicil having the effect of reviving. Even the destruction of the second will for the express purpose of setting up the first, will not accomplish the desired object, for parol evidence of intention is not admissible to effectuate this end. *Major v. Williams*, 3 Curt. 432; *nom. Major v. Iles*, 7 Jur. 219.

1. Stimson's Am. Stat. Law, § 2679, and Supp. See also 4 Kent's Com. (13th ed.) 532; *Pickens v. Davis*, 134 Mass. 256; *Rudisill v. Rodes*, 29 Gratt. (Va.) 147; *Beaumont v. Keim*, 50 Mo. 28; *Harwell v. Lively*, 30 Ga. 315; *In re Hodgkinson* (1893), P. 339; *MacDonell v. Purcell*, 23 Can. Supreme Ct. 101.

Compare Matter of Johnston, 69 Hun (N. Y.) 157.

As to effect of destroying a subsequent codicil which revoked a prior will, see *Matter of Simpson*, 56 How. Pr. (N. Y. Surrogate Ct.) 125.

2. *Bohanon v. Walcot*, 1 How. (Miss.) 336. See also *Harwell v. Lively*, 30 Ga. 315.

3. *Taylor v. Taylor*, 2 Nott & M. (S. Car.) 482; *Peck's Appeal*, 50 Conn. 562.

4. *Randall v. Beatty*, 31 N. J. Eq. 643; *Flintham v. Bradford*, 10 Pa. St. 85; *Peck's Appeal*, 50 Conn. 562.

In *Randall v. Beatty*, 31 N. J. Eq. 643, the court said: "The law declares the manner in which a will is to be revoked. It must be by burning, canceling, tearing, or obliterating it by the testator, or in his presence and by his direction and consent, or by a writing executed with the same formalities as a will. No proof of declarations of revocation, made by the testator, will avail. *Boylan v. Meeker*, 28 N. J. L. 274. The will of 1870 is produced uncanceled. It is admitted that there is no revocatory will or writing extant, but it is alleged that all such instruments subsequently made by the testatrix, have been canceled. The execution of the will of 1873 was not attended or followed by the cancellation of the will of 1870. Notwithstanding the revocatory clause in the will of 1873, the will of 1870 was retained by the testatrix uncanceled, up to the day of her death. The fact that she so kept the will is the most cogent evidence of her intention that it should be revived by the cancellation of the will of 1873."

This view would probably now be taken in *Connecticut*. *Peck's Appeal*, 50 Conn. 562.

In *Pennsylvania*, such is the rule, unless it be clearly proved that the second will was destroyed with a view

Texas, and *Massachusetts*, if the later will contains a clause revoking former wills, its revocation does not revive the earlier will, in the absence of evidence that such was the testator's intent.¹ In

to die intestate. *Flintham v. Bradford*, 10 Pa. St. 85; *Boudinot v. Bradford*, 2 Dall. (U. S.) 266.

Thus, where a testator died in 1838, leaving a will dated in 1821, with an unsigned addition; a will dated in 1824, which had been canceled at an uncertain time, and which was inconsistent with the will of 1821; and a will dated in 1835, which did not purport to pass real estate, it was held that the will of 1821, so far as it passed real property then held by the testator, was revived by the cancellation of the will of 1824. *Flintham v. Bradford*, 10 Pa. St. 82.

A codicil will operate to republish a will, and revoke another made before the codicil and after the will to which it is annexed, unless its effect to do so is negated by the contents of the codicil itself. *Neff's Appeal*, 48 Pa. St. 501.

1. *Scott v. Fink*, 45 Mich. 241; *Pickens v. Davis*, 134 Mass. 252; *Hawes v. Nicholas*, 72 Tex. 481. But see *Williams v. Williams*, 142 Mass. 515.

In *Scott v. Fink*, 45 Mich. 246, the court, by Graves, J., said: "There seems to have been a material distinction, and on good ground, between the state of a former will after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have had the effect to do away with its predecessor. Being cut off before having its dispositions of property awakened into life, it could have no affirmative operation through its dispositions upon the estate. In the second case the written declaration is express and in plain terms immediate and absolute. It is a verbal act done solemnly and deliberately for present effect, and not an

act contemplating that future circumstances are to determine whether after all it shall have any force. It is not a needful ingredient of the will. That is perfect without it. The addition of it is a mode of immediate cancellation of prior wills, and quite as unequivocal and unambiguous as many others within the statute whose meaning is open to no controversy. It operates at once, and does not apply as a mere contingent caveat against the objects at which it is aimed. It revokes them without reserve or qualification. And in case the document with which it is connected is itself revoked, that fact can have no effect as a restoration and republication of former revoked wills."

In *Pickens v. Davis*, 134 Mass. 256, the court, by Allen, J., said: "The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would be comparatively seldom found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators in the majority of instances. The wisdom which has come from experience, in *England* and in this country, seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to

Maryland, it has been held that cancellation of a revoking will is *prima facie* evidence of an intent to revive the previous will, but the presumption may be rebutted by evidence of the circumstances and motives of the testator.¹ In *Tennessee* the destruction of the second of two inconsistent wills with intent to make a third, does not revive the first, even though no will is made and the first will is found among the testator's valuable papers; for in such case, as the motive for destroying the second will is explained, no presumption in favor of reviving the first can arise.²

8. Will Executed in Duplicate—Destruction or Alteration of One Part.—If a testator who has executed a will in duplicate destroys one part, the presumption is that he meant thereby to revoke the will;³ so an alteration or obliteration in one part has the same

have existed at the time of canceling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. Under the statute of *England* and of *Virginia*, and perhaps of other states, such revival cannot be proved in this manner. Major *v. Williams*, 3 Curt. 432, and *Dickinson v. Swatman*, 4 S. & T. 205, above cited. *Rudisill v. Rodes*, 29 Gratt. (Va.) 147. But this results from the express provision of the statute." Compare *Williams v. Williams*, 142 Mass. 515.

1. *Colvin v. Warford*, 20 Md. 359.

2. *McClure v. McClure*, 86 Tenn. 174.

3. 1 *Jarm. on Wills* (5th ed.) *137; *Pemberton v. Pemberton*, 13 Ves. Jr. 310; *Seymore's Case*, 1 P. Wms. 346; *Colvin v. Fraser*, 2 Hagg. 266; *Boughey v. Moreton*, 3 Hagg. 191, n. See *Hubbard v. Alexander*, 3 Ch. Div. 738; *Doe v. Strickland*, 8 C. B. 724; 65 E. C. L. 722; *Crossman v. Crossman*, 95 N. Y. 150; *O'Neill v. Farr*, 1 Rich. (S. Car.) 80; *Asinari v. Bangs*, 3 Dem. (N. Y.) 385. See also *Biggs v. Angus*, 3 Dem. (N. Y.) 93.

In *Rickards v. Mumford*, 2 Ph. 24, Sir J. Nicholl said: "Where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is that he has destroyed it himself—it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority, for that would be presuming a crime. Again, if a testator executes a duplicate and keeps one part himself and deposits the other part with some other person, and the testator voluntarily cancels, or destroys the part in his own custody, it is a revocation of both.

So, also, the act of cancellation, or destruction, is *prima facie* done *animo cancellandi*, and a presumptive intention to revoke, till the contrary is shown. The reason is that the act of voluntarily destroying the instrument implies the intention of revoking its whole effect. These positions have frequently been laid down in this court as legal presumptions; but, like all other legal presumptions, they may be repelled by evidence."

So, also, if the testator himself has possession of both, the presumption of revocation holds, though weaker. *Pemberton v. Pemberton*, 13 Ves. Jr. 310; *Goods of Haines*, 5 No. Cas. 621. But see *Asinari v. Bangs*, 3 Dem. (N. Y.) 385.

Furthermore, even if, having both in his possession, he alters one and then destroys that which he has altered, a presumption of revocation, though slight, arises. *Pemberton v. Pemberton*, 13 Ves. Jr. 310.

"Perhaps, in such a case, the presumption can hardly be said to lean in favor of the revocation at all; for the testator having made alterations in one part, and then canceled the part so altered only, the conclusion would rather seem to be, that he merely intended, by the destruction of that part, to get rid of the alterations, and to restore the will to its original state. And it is observable that, in *Roberts v. Round*, 3 Hagg. 548, where one of two duplicate wills was found partly mutilated, and the other carefully preserved in the testator's own possession, it was held that the will remained unrevoked. The evidence in *Pemberton v. Pemberton*, 13 Ves. Jr. 310, as to the intent with which the act of cancellation was done, consisted partly of subsequent

effect as if made in both; for the two parts together form (if such be the intention) but one will.¹

9. Where Same Expressions Occur in Both Will and Codicil, and Testator Cancels or Obliterates Them in One Only.—Upon the same principle that the destruction of one part of a duplicate is held to give rise to a presumption that the testator meant thereby to revoke the will, it has been held that where the testator has expressed the same purpose in both will and codicil, and afterwards canceled or obliterated the provision in the codicil, the corresponding provision in the will was also revoked.²

10. Effect of Destroying Will and Leaving Codicil Intact—Revocation of Codicil by Destruction of Will.—Where a testator destroys the will, leaving the codicil intact, if the provisions of the codicil are inseparably blended with those of the will, the act which revokes the will revokes the codicil also; but if the provisions of the codicil are such as to enable it to subsist independently of the will, its validity is not affected by the destruction of the latter.³

declarations of the testator, and these tended rather to favor the revocation than otherwise; but both Lord Eldon and Lord Erskine adverted to the very little weight due to expressions thrown out by testators in conversation with persons, respecting their wills." 1 Jarm. on Wills (5th ed.) *138.

1. 1 Jarm. on Wills (5th ed.) *138; Doe v. Stickland, 8 C. B. 724; 65 E. C. L. 722.

Simultaneous Execution of Duplicates.—It has been held that duplicates need not be executed at the same time. Hubbard v. Alexander, 3 Ch. Div. 738. But see O'Neill v. Farr, 1 Rich. (S. Car.) 80.

2. 1 Jarm. on Wills (5th ed.) *139. Thus, in Utterson v. Utterson, 3 Ves. & B. 122, as stated in 1 Jarm. on Wills (5th ed.) *138, "a testator, after disposing of the residue of his real and personal property among his children, introduced into the will an interlineation excepting his son J., to whom he gave one shilling. By a codicil (being the fifth), after expressing his disapprobation of the conduct of this son, he declared it to be his determination that he (the son) should have no more of his property than one shilling. It appeared that the testator subsequently became reconciled to his son, and canceled the codicil by drawing his pen across it, but did not strike out the interlineation in his will. This raised the question, whether the canceling of the codicil destroyed the effect of the interlined clause in the will, with reference to some copyhold property; for, as to the

freeholds, it was admitted that the interlineation was inoperative, for want of an attestation; and in regard to the personalty, the ecclesiastical court had held the cancellation of the codicil to have canceled the excluding clause in the will; and of this opinion was Sir W. Grant, with respect to the copyholds. 'Even independently of the parol evidence of reconciliation,' he said, 'it seems to me that the act of obliteration speaks as clearly as words could have done a change of intention as to the exclusion, and not merely as to the mode of effecting it. It is the same as if he had said, "this codicil no longer speaks my sentiments; I am no longer dissatisfied with my son, and no longer mean to make any distinction between him and my other children."'"

3. Schouler on Wills (2d ed.), § 400; 1 Jarm. on Wills (5th ed.) *139; Coppin v. Dillon, 4 Hagg. 361; Medlycott v. Assheton, 2 Add. 229; Tagart v. Squire, 1 Curt. 289. Compare CODICILS, vol. 3, p. 299.

In Medlycott v. Assheton, 2 Add. 230, Sir J. Nicholl said: "A codicil is, *prima facie*, dependent on the will; and the cancellation of the will is an implied revocation of the codicil. But there have been cases where the codicil has appeared so independent of, and unconnected with, the will, that, under circumstances, the codicil has been established, though the will has been held invalid. It is a question altogether of intention. Consequently, the legal presumption in this case may be repelled,

11. Revocation by Subsequent Will, Codicil, or Other Writing.—A will or codicil may be revoked by a subsequent will, codicil, or other writing, duly executed as required by the governing statute. Although, under the Statute of Frauds,¹ a writing which merely revoked a prior will or codicil need not be executed with the same formality as the will or codicil revoked,² under the Statute of Victoria and corresponding statutes in nearly all the *United States*, such instrument, whether it be a formal instrument, an informal letter, or a mere memorandum written upon the will or codicil

namely, by showing that the testatrix intended the codicil to operate, notwithstanding the revocation of the will."

1. 29 Car. II., ch. 3, §§ 6, 22.

2. "The Statute of Frauds, 29 Car. II., ch. 3, § 6, enacts 'that no devise in writing, of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same (or by burning, etc.); but all devises and bequests of lands and tenements shall remain and continue in force (until the same be burnt, etc.); or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses declaring the same.' The same statute (section 22) provides 'that no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.' Unless these enactments had placed the revocation of wills under positive restrictions, they might have been revoked in the same manner as before, there being no necessary implication that what is required to constitute a valid execution of an instrument is essential to its revocation; on which principle it was held before the Statute of Frauds, that a will required to be in writing by the statute of 34 Hen. VIII., ch. 5, might be revoked by parol. *Cranvel v. Sanders*, Cro. Jac. 497. See also *Ex p. Ilchester*, 7 Ves. Jr. 348; *Richardson v. Barry*, 3 Hagg. 249. Though the Statute of Frauds required that a will which revoked a devise of freehold lands should be attested by the same number of witnesses as a will devising

such lands, yet, in some particulars, the prescribed ceremonial differed in the respective instances. Thus, a devising will was required to be subscribed by the witnesses in the testator's presence, which a revoking will was not, and a revoking will was required to be signed by the testator in the presence of the witnesses, while a devising will needed not to be signed in their presence; each, therefore, had a circumstance not common to both. This difference, however (which probably occurred without design), has been attended with little practical effect; for it seldom happens that a testamentary instrument is executed for the mere purpose of revoking a previous will, and if it contain a new disposition, any revoking clause therein will be a nullity, whether the substituted devise takes effect or not, though for widely different reasons in the respective cases. If the devise with which the clause in question is associated be effective, it reduces the latter to silence by rendering it unnecessary, the new devise itself producing the revocation; so that the efficacy of the will as a revoking instrument cannot, in such a case, become a subject of consideration. If, on the other hand, the new devise be ineffectual, on account of the attestation being insufficient for a devising, though sufficient for a revoking, will, the revoking clause becomes inoperative on the principle before noticed, that the revocation is conditional and dependent on the efficacy of the attempted new disposition, and that failing, the revocation also fails; the purpose to revoke being considered to be, not a distinct, independent intention, but subservient to the purpose of making a new disposition of the property; the testator meaning to do the one so far only as he succeeds in effecting the same." 1 Jarm. on Wills (5th ed.) * 168. See *supra*, this title, *Dependent Relative Revocation, or Revocation with a View to Another Disposition*.

itself, must be executed with the same formalities as a dispositive testamentary paper.¹ In regard to wills of personalty, the requirements of the Statute of Frauds were satisfied by the intent to revoke being reduced to writing in the lifetime and by the direction of the testator, though not authenticated by his signature, and hence, a letter addressed by a third person, at the request of the testator, to one who had custody of the will, requesting him to destroy it, was a sufficient revocation although the will was not destroyed.² Under the Statute of Victoria, and corresponding

1. 1 Vict., ch. 26, § 20; Stimson's Am. Stat. Law, § 2673 and Supp. See *In re Fraser*, L. R., 2 P. & D. 40; *Lansing v. Haynes*, 95 Mich. 16; *Heise v. Heise*, 31 Pa. St. 249; *Barksdale v. Barksdale*, 12 Leigh (Va.) 535; *In re Noyes' Will*, 61 Vt. 14; *Lewis v. Lewis*, 2 W. & S. (Pa.) 455; *Ladd's Will*, 60 Wis. 187; *Reid v. Borland*, 14 Mass. 208; *Stickney v. Hammond*, 138 Mass. 116; *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Peck's Appeal*, 50 Conn. 562; *Nelson v. Public Administrator*, 2 Bradf. (N. Y.) 210. See also *Sherry v. Lozier*, 1 Bradf. (N. Y.) 437; *DeLafield v. Parish*, 1 Redf. (N. Y.) 1; *Blanchard v. Blanchard*, 32 Vt. 62; *Wikoff's Appeal*, 15 Pa. St. 281. Compare *Witter v. Mott*, 2 Conn. 67; *Clark v. Eborn*, 1 Law Repos. (N. Car.) 91.

A deed from the husband to his wife, and an agreement by which she releases him from all demands made pending a divorce suit, do not constitute an express revocation of mutual wills made by them contemplated by How. (Mich.) Stat., p. 5793, providing that no will shall be revoked except by burning, tearing, canceling, or obliterating it with the intent to revoke, or by some will, codicil, or other writing signed, attested, and subscribed in the manner prescribed for the execution of the will. *Lansing v. Haynes*, 95 Mich. 16.

Will Revoked by Subsequent Memorandum.—A testator made his will, and then disposed of a portion of his real property. Several years afterward he drew up a paper headed "memorandum of the last will," etc.; he showed it to a third person to be put into form, and was referred to counsel. He lived five months after this time, attended to his business, but never made any alterations in the memorandum, and left the original will, in due form, uncanceled. It was held that "the memorandum of a will," attested by two witnesses, was

a sufficient revocation of the former will, so far as it was inconsistent. *Arndt v. Arndt*, 1 S. & R. (Pa.) 256.

In *New Jersey* and *Florida*, wills of personal property, and in *Maryland*, wills of both real and personal property, may be revoked by word of mouth proved by three witnesses to have been reduced to writing in the testator's lifetime, read over to him, and allowed. *New Jersey Rev. Stat.*, Wills 14; *Florida Digest*, ch. 200, § 3; *Maryland Rev. Code*, ch. 49, § 6.

So in *Tennessee*, in regard to wills of both real and personal property, where the oral revocation is proved by two witnesses to have been reduced to writing in the testator's lifetime, read over to him and approved. *Tennessee Code*, § 3008.

In *Illinois* and *Colorado*, it is expressly provided that a duly executed written will shall not be revoked orally. *Illinois Rev. Stat.*, ch. 148, § 17; *Colorado Gen. Stat.*, § 3484.

Whether Such Writing Be Entitled to Probate.—The better opinion seems to be that an informal writing, letter, or memorandum, which merely revokes a former testamentary disposition, is not entitled to probate. *In re Fraser*, L. R., 2 P. & D. 40. Compare *In re Hicks*, L. R., 1 P. & D. 683; *Laughlin v. Atkins*, 1 Pick. (Mass.) 535. Otherwise if the writing is dispositive although in the form of a letter, *In re Durance*, L. R., 2 P. & D. 406; or expresses a wish that the property may pass as though under intestacy. *In re Hicks*, L. R., 1 P. & D. 683; *Brenchley v. Still*, 2 Rob. 164.

2. In *Walcott v. Ochterlony*, 1 Curt. 588, Sir H. Jenner said: "The Statute of Frauds provides that no will in writing of personal estate shall be repealed, nor any clause or bequest therein altered or changed by any words. Is this a revocation by words? I apprehend not; the deceased did not say, 'I revoke

statutes in the *United States*, such a letter would be inoperative unless duly executed and attested as a testamentary paper.¹ Under both the Statute of Frauds and the Statute of Victoria, it is essential that the writing disclose a present intent to revoke, as distinguished from a mere intimation of a future intent.²

A duly executed will or codicil may operate as a revocation of a prior testamentary instrument, by the effect either of an express clause of revocation, or of an inconsistent disposition of the previously devised property.³ An express clause of revocation, to be

my will,' but in effect says, 'Mr. George is in possession of my will; I am not able to destroy it myself, but I desire that he will destroy it;' and this amounted to a present intention absolutely to revoke, which was written down at the time, approved of by the deceased, and by her direction communicated to the person in whose custody the will was; it was an absolute direction to revoke, reduced into writing in the deceased's lifetime. There is nothing in the Statute of Frauds which prevents such revocation having effect, and it is clear that, prior to that statute, a will might be so revoked. Further, the deceased subsequently directed a letter to be written to Mr. George, intimating that she would give her reasons thereafter, and evinced anxiety for a reply to that letter down to the time of her death; there can be no doubt that she died in the intention to revoke the will, and in the belief that it was revoked." See *Meredith v. Maunsell*, Milw. Ir. Ecc. Rep. 132.

1. See *Mundy v. Mundy*, 15 N. J. Eq. 291; *Tynan v. Paschal*, 27 Tex. 302; *Hollingshead v. Sturgis*, 21 La. Ann. 450. Compare *Bohanon v. Walcot*, 2 Miss. 336.

In *Re Durance*, L. R., 2 P. & D. 406, the testator, in a letter addressed to his brother, which was signed by him in the presence of two witnesses, directed his brother to obtain his will and burn it without reading it. It was held that the letter was a writing duly executed, declaring an intention to revoke the will, and administration, with the letter only annexed, was granted to the next of kin to the deceased. The soundness of this position is questionable, since such a request shows that the testator regarded the act of destruction rather than the letter as effective to work the revocation. *Tynan v. Paschal*, 27 Tex. 303.

In states in which the statute requires the will to be destroyed in the testator's

presence, it would seem that such a letter, even if the request were complied with, would be ineffectual. *Mundy v. Mundy*, 15 N. J. Eq. 291.

2. *Burton v. Gowell*, Cro. Eliz. 306; *Ray v. Walton*, 2 A. K. Marsh. (Ky.) 74; *Tynan v. Paschal*, 27 Tex. 303.

A memorandum on the will: "This will was canceled this day," duly attested, has been held sufficient. *In re Fraser*, L. R., 2 P. & D. 40; *In re Hicks*, L. R., 1 P. & D. 683. But an indorsement on the will: "This will is intended to be altered and will be—time is given" is insufficient. *Ray v. Walton*, 2 A. K. Marsh. (Ky.) 74.

3. 1 Jarm. on Wills (5th ed.) *170; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158. See *Reese v. Probate Court*, 9 R. I. 434; *Jones v. Jones*, 2 Dev. Eq. (N. Car.) 387; *Warner v. Warner*, 37 Vt. 356; *Simmons v. Simmons*, 26 Barb. (N. Y.) 68; *Marston v. Marston*, 17 N. H. 503; *Deakins v. Hollis*, 7 Gill & J. (Md.) 311; *Belt v. Belt*, 1 Har. & McH. (Md.) 409; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Hamilton's Estate*, 74 Pa. St. 69; *Burden's Estate*, 11 Phila. (Pa.) 130; *Heise v. Heise*, 31 Pa. St. 246; *Price v. Maxwell*, 28 Pa. St. 23; *Rudy v. Ulrich*, 69 Pa. St. 177; *Brant v. Willson*, 8 Cow. (N. Y.) 56; *Boylan v. Meeker*, 28 N. J. L. 274; *Smith v. McChesney*, 15 N. J. Eq. 359; *Den v. Snowhill*, 23 N. J. L. 447; *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Reid v. Borlan*, 14 Mass. 208; *Colvin v. Warford*, 20 Md. 357; *Boudinot v. Bradford*, 2 Dall. (U. S.) 266; *Holley v. Larrabee*, 28 Vt. 274; *Taylor v. Taylor*, 2 Nott & M. (S. Car.) 482; *Fisk's Succession*, 3 La. Ann. 705; *Mercer's Succession*, 28 La. Ann. 564; *Kelley v. Johnson*, 34 Mo. 400; *Bobb's Succession*, 42 La. Ann. 40; *Young v. Sadler*, 15 Ky. L. Rep. 531; *Kelly v. Richardson* (Ala. 1893), 13 So. Rep. 785; *Hallyburton v. Carson*, 86 N. Car. 290; *Hollingshead v. Sturgis*, 21 La. Ann. 450; *Sturgis v.*

Work, 122 Ind. 134; *Clarke v. Ransom*, 50 Cal. 595; *In re Fisher's Will*, 4 Wis. 254; *Neff's Appeal*, 48 Pa. St. 501. Compare *Gelbke v. Gelbke*, 88 Ala. 427; *Derby v. Derby*, 4 R. I. 414; *Green v. Lane*, 1 Busb. Eq. (N. Car.) 102; *Howland v. Union Theological Seminary*, 5 N. Y. 193; *Coster v. Coster*, 3 Sandf. Ch. (N. Y.) 111; *Ennis v. Smith*, 14 How. (U. S.) 400; *Homer v. Brown*, 16 How. (U. S.) 354; *Bosley v. Wyatt*, 14 How. (U. S.) 390. Compare *Gelbke v. Gelbke*, 88 Ala. 427.

Subsequent Inconsistent Disposition.

—Where a specific devise and bequest of a mansion house, with the furniture and the personal property therein, was made in a codicil, and the will to which the codicil was appended had previously directed the mansion, with the other real estate, and the personal property of the testator, house, etc., to be sold by the executor for the payment of debts and legacies, it was held that the codicil, by this devise and bequest, revoked the power to sell, so far as the mansion house and personal property therein specifically given was concerned; the disposition made by the codicil, of the same, being entirely inconsistent with the power and purpose of selling them. *Derby v. Derby*, 4 R. I. 414.

A testator, by his will, ordered his slaves, consisting of a mother and her children of various ages, to be removed in as short a time as practicable, and with the intent to a permanent settlement in some state or country where emancipation was unrestricted, and there to be entirely emancipated, and also provided for their subsistence and education; and eight years thereafter made a codicil, and republished his will, and gave to trustees a house and lot in Newbern, and certain personal property, including household furniture, and a cow and calf, on trust that they should permit the mother to use, occupy, and enjoy the same during her life, and at her death to surrender up the estate to the other slaves. It was held that this provision indicated a change of mind of the testator, and his intention that the mother should reside on the lot, so as to revoke the provision of the will for her removal; and that as the testator had then shown a disposition to evade the law, as to the mother, it ought to appear by the codicil that he wished the children's fate to be different from hers, or it must be presumed that he intended that they

also should remain. *Green v. Lane*, 1 Busb. Eq. (N. Car.) 102.

A testator, in 1869, executed, in the city of New York, a will, whereby he devised his interest in a house and lot in said city to two cousins. On April 30, 1875, at Nyon, in *Switzerland*, he executed, in accordance with the laws of this state, a second will whereby, after giving certain legacies to his servant, he devised the remainder of his property, all situated or invested in *America*, to his natural heirs. The second will did not in express terms revoke the first. It was held that the first will, being inconsistent therewith, was revoked by the second. *Ludlum v. Otis*, 15 Hun (N. Y.) 410.

Effect Upon Prior Will of Subsequent Imperfect Instrument.

—In *Laughton v. Atkins*, 1 Pick. (Mass.) 543, *Parker, C. J.*, said: "An instrument intended to be a will, but failing of its effect as such on account of some imperfection in its structure, or for want of due execution, cannot be set up for the purpose of revoking a former will, for this substantial reason, that it cannot be known that the testator intended to revoke his will except for the purpose of substituting the other, and that it would be making the testator die without a will, though it was clearly his design not to do so." See *Eccleston v. Spelke*, *Carth.* 79; *Limbery v. Mason*, *Comyns* 451; *Ex p. Ilchester*, 7 Ves. Jr. 348; *Hyde v. Hyde*, 3 L. J. Ch. 130; *Stickney v. Hammond*, 138 Mass. 116; *Barksdale v. Barksdale*, 12 Leigh (Va.) 541; *Pringle v. M'Pherson*, 2 Brev. (S. Car.) 290; *Rudy v. Ulrich*, 69 Pa. St. 183. But see *Hairston v. Hairston*, 30 Miss. 276; *Barksdale v. Hopkins*, 23 Ga. 339; *Burns v. Travis*, 117 Ind. 45.

In *Heise v. Heise*, 31 Pa. St. 246, it was held that the addition of an unexecuted codicil would not revoke a prior will. The court, by *Strong, J.*, said: "The question is not, whether the paper offered for probate contains the whole counsel of the testator, all his intentions at the time of his death, but whether it expressed his whole counsel at the time it was signed. If it did, then the statute declares that it shall continue to speak, until its power has been destroyed in one of the modes which the legislature has designated."

A subsequent will which contains no express clause of revocation, and never becomes operative, does not revoke the prior will, *Peck's Appeal*, 50 Conn. 562; as where the condition upon

which the second will was to take effect failed. *Hamilton's Estate*, 74 Pa. St. 69; *Bradish v. McClellan*, 100 Pa. St. 607.

A holographic will is not revoked by the defective execution of a copy, even though the original be destroyed. *Wilbourn v. Shell*, 59 Miss. 205.

Under the Statute of Frauds, the ecclesiastical courts tried the validity of the second instrument by the same principles by which they determined the validity of other testamentary instruments, and hence a regularly executed testament might be revoked by a subsequent unfinished instrument, although the presumption was always against such construction. See 1 *Jarm. on Wills* (5th ed.) *170; *Masterman v. Maberley*, 2 Hagg. 235; *Clark v. Eborn*, 2 Murph. (N. Car.) 234; *Glasscock v. Smither*, 1 Call (Va.) 479.

Distinction Between Revocation of a Gift and of so Much of the Will as Contains the Gift.—"Express revocation may, it seems, be produced in two different modes, having different effects. Thus, if there be a bequest by will to several persons as tenants in common, and by codicil the testator revoke the bequest to one of them, his share will not accrue to the others. *Cresswell v. Cheslyn*, 2 Eden 123; *Humble v. Shore*, 7 Hare 247. Compare *Shaw v. McMahon*, 4 D. & W. 431. This is the ordinary mode. But if the testator revoke so much of his will as contains the gift to one of such persons, here, if the words that remain are sensible *per se*, and amount without further alteration to a gift of the whole subject to the others, these will take the whole, the will being read as if the revoked words had never been in it. *Harris v. Davis*, 1 Coll. 416, affords an example of the latter mode. In that case there was first a gift to A and B in common; then, in a subsequent part of the will, a direction that C should take a share with A and B; and afterwards a codicil revoking 'that part written in the will which left' the share to C; and it was held that A and B took the whole. The frame of the will was peculiar, and lent itself easily to this construction. If the words that are left require (as they generally would) some further alteration or addition to make them sensible, the construction will not be made. *Sykes v. Sykes*, L. R., 4 Eq. 200." 1 *Jarm. on Wills* (5th ed.) *170.

Where Subsequent Will Is Lost.—Where the subsequent will or codicil,

relied upon to revoke a prior testamentary instrument, is lost or missing, its contents must be clearly established by secondary evidence, so that it may appear that it contained a clause of revocation or made an inconsistent disposition. The mere fact that such a will existed without proof of its contents, is sufficient. 1 *Jarm. on Wills* (5th ed.) 172; *Schouler on Wills* (2d ed.), § 412. See *Seymour v. Nosworthy*, Hard. 374; *Shaw C. P.* 146; *Harwood v. Goodright*, 2 W. Bl. 987; *Cowp.* 87; *Hitchins v. Bassett*, 3 Mod. 203; *Shaw C. P.* 146; *Peck's Appeal*, 50 Conn. 562; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158.

In *Cutto v. Gilbert*, 9 Moo. P. C. 131, a testator executed a will in 1825, which was found uncanceled at his death, which took place in 1853. In 1852 he executed another testamentary paper, the contents of which were wholly unknown except the circumstance of the paper commencing with the words, "This is the last will and testament." This latter instrument was not forthcoming at his death, but there was no evidence of its destruction. The prerogative court held that the instrument executed in 1852 was not to be considered as a codicil, but as a substantive will, which operated as a revocation of the prior will of 1825, and that under the Statute of Wills, 1 Vict. ch. 26, § 22, the deceased must be considered to have died intestate, as the former will was not revived by the destruction of the latter. It was held on appeal, that the first will was entitled to probate. Dr. Lushington said: "There is not one authority which lays down the proposition that the execution of a subsequent will destroyed *animo revocandi* by the testator, the contents of which are not known, revokes a prior will. On the contrary, in all the cases where revocation has been held to be effected there has been proof of a difference of disposition. These considerations alone would induce us to doubt the correctness of the judgment in the court below in the case now under consideration, but the very foundation of that judgment appears to us to be unsound; that judgment is mainly based upon the evidence that the latter paper contained the words 'This is my last will and testament.' We are of opinion that these words do not import that the paper contained a different disposition of the property, nor that the mere fact of so calling it could possibly render it

effectual, must express an actual and present intent to revoke, as distinguished from a mere intimation of a future intent;¹ and if contained in a codicil to the will, the intent to revoke must be as clear as the original intent to devise, for if there is any doubt as to whether the clause of revocation was intended to include a particular devise, the devise remains unrevoked.² In the absence of an

a revocatory instrument. We think that the interpretation put upon these words by Lord Truro, in his judgment in the case of *Stoddart v. Grant*, 1 Macq. H. L. 171, is the true meaning to be attributed to them. With regard to any auxiliary circumstances in this case, we think that the evidence wholly fails to render any assistance to the case of the respondent. Considering, therefore, that the respondent, upon whom the *onus probandi* lies, has failed to prove what the law requires, the execution of a subsequent will expressly revoking the former, or of different contents, we must reverse the judgment of the court below and pronounce for the will propounded by Mrs. Cutto." See *Freeman v. Freeman*, 5 De G. M. & G. 704.

Admission of Subsequent Will as Evidence of Revocation.—An objection to the admission of a will to probate, upon the ground that it has been revoked by a subsequent will, cannot be taken until the subsequent will is put in evidence; and such will cannot be put in evidence until it is admitted to probate. *Sewall v. Robbins*, 139 Mass. 164; *Stickney v. Hammond*, 138 Mass. 116.

1. *Burton v. Gowell*, Cro. Eliz. 306; *Cleoburey v. Beckett*, 14 Beav. 583.

A testator wrote on his will, "It is my intention at some time to change the tenor of the above will, or rather to make another will, therefore, be it known, if I should die before another will is made, I wish the foregoing to be looked upon as revoked and of no effect." It was held that this was a present revocation. *Brown v. Thorndike*, 15 Pick. (Mass.) 388.

2. *Doe v. Hicks*, 8 Bing. 475; 21 E. C. L. 349. See *Gelbke v. Gelbke*, 88 Ala. 427; *Grimball v. Patton*, 70 Ala. 626.

See **CODICILS**, vol. 3, p. 296. In *Cleoburey v. Beckett*, 14 Beav. 583, a testator devised his real estate to his brother William for life, with remainder to his first and other sons in tail, with remainders over; and he bequeathed his residuary personal estate between his nephews and nieces. By

a codicil, he revoked his will, so far only as it was altered by the codicil, and he gave to his nephews and nieces, except (as he said) his brother William's children, "who are not intended to take any beneficial interest under his will or this codicil," £1,000 each. It was held that the devise to the children of William was not revoked. *Romilly, M. R.*, said: "The question here is, whether the codicil has revoked the gift contained in the will to the children of William Beckett. One settled rule of construction is, that the gifts contained in the will shall not be affected further than is absolutely necessary, in order to give effect to the gifts contained in the codicil. Now there is not contained in this codicil any gift inconsistent with the gift given by the will to the children of William Beckett. So far, therefore, as the gifts in the codicil are concerned, they do not, in my opinion, affect this question. But although the necessity of giving effect to the bequests contained in the codicil does not make a revocation, there is no question but that the testator may, by his codicil, have expressly revoked any portion of the will; and the question I have to consider is, whether the words 'who are not intended to take any beneficial interest under my will or this codicil' is such a revocation. Another rule of construction to be observed, is laid down in the case of *Doe v. Hicks*, 8 Bing. 475; 21 E. C. L. 349, in these words, viz.: 'If such devise in the will is clear, it is incumbent on those who contend it is not to take effect, by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise. For if there is only a reasonable doubt, whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand.' Unless, therefore, I can arrive at the conclusion that these words are equivalent to 'I revoke the beneficial interest given to the children of William Beckett in my will,' it cannot amount to revocation.

express clause of revocation, a subsequent will or codicil will not work a total revocation of a prior testamentary paper, unless the two dispositions are plainly so inconsistent as to be incapable of standing together;¹ but in applying the principle, it should be borne in

"Now it is to be observed, that these words are in a parenthesis and form part of an exception out of the class of legatees to take. The gift in the codicil is 'to my nephews and neices now living;' this would have included the children of William Beckett and Emma Ormond and William M. Williams. He accordingly excepts the children of William Beckett and Emma Ormond and William H. Williams; but in the middle of this exception, he uses the words in question. One rule of construction is, that an exception shall be treated only as so much taken out of the original gift, and if so, this cannot be treated as a distinct and separate expression of revocation. I think that those words are meant simply to be descriptive of the children of William Beckett, and do not contain an express revocation in themselves. I am confirmed in this view because the words 'in this codicil' are just as expressive as the words 'under my will,' and yet those words are wholly inoperative. They were introduced, I think, to make a distinction between the children of William Beckett and Emma Ormond and William M. Williams, inasmuch as the latter niece and nephew do take bequests under the codicil, and that those words are introduced, in order to remove any doubt as to the construction arising from the exception of the nephew and niece in one case, and the gifts to some of them in another part of the codicil. The words are themselves extremely ambiguous, except as expressive of construction. It is usual for counsel and judges to say: A. B. is not intended to take any interest under the will, by which is meant simply this, that, according to its true construction, A. B. takes no such interest. If this, therefore, is to be treated simply as an expression by the testator of what he considers to be the effect of the will he had already made, it does not amount to a revocation. If it be treated still more unfavorably to the children of William Beckett, as an expression of the testator to revoke the gifts made to them, it must still be determined, whether it means an intention thereby to revoke,

or an intention thereafter to revoke those bequests; an intention thereafter to revoke would clearly be no revocation, both on principle and authority. The result of my opinion is, that, finding by the will clear gifts to the children of William Beckett, and being unable to arrive at the conclusion that the words meant a distinct and present revocation of the bequest so contained in the will, I think that this codicil did not effect any such revocation, and that the children of William Beckett are entitled in like manner as if those words had been omitted from the codicil."

1. Schouler on Wills (2d ed.), § 407; 1 Jarm. on Wills (5th ed.) *174; Richards v. Queen's Proctor, 18 Jur. 540; Leslie v. Leslie, 1 R., 6 Eq. 332; Lemage v. Goodban, L. R., 1 P. & D. 57; Stoddart v. Grant, 1 Macq. H. L. 170; Hellier v. Hellier, 9 Prob. Div. 239. See Austin v. Oakes, 117 N. Y. 577; Hard v. Ashley, 117 N. Y. 606; Crozier v. Bray, 120 N. Y. 366; Newcomb v. Webster, 113 N. Y. 191; Brant v. Willson, 8 Cow. (N. Y.) 56; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158; Barlow v. Coffin, 24 How. Pr. (N. Y. Supreme Ct.) 54; Holley v. Larrabee, 28 Vt. 274; Buchanan v. Lloyd, 64 Md. 306; Johns Hopkins University v. Pinckney, 55 Md. 365; Boyle v. Parker, 3 Md. Ch. 42; Price v. Maxwell, 28 Pa. St. 23; Reichard's Appeal, 116 Pa. St. 232; Boudinot v. Bradford, 2 Dall. (U. S.) 266; Rodgers v. Rodgers, 6 Heisk. (Tenn.) 490; Den v. Vancleve, 5 N. J. L. 589; Grimbail v. Patton, 70 Ala. 626; Vaughan v. Bunch, 53 Miss. 513; Quincy v. Rogers, 9 Cush. (Mass.) 291; Lamb v. Lamb, 11 Pick. (Mass.) 371; Hallyburton v. Carson, 86 N. Car. 290; Lyon v. Fisk, 1 La. Ann. 444; New Orleans v. Fisk, 2 La. Ann. 78; Dawson v. Dawson, 10 Leigh (Va.) 631; Brown v. Cannon, 3 Head (Tenn.) 354.

Where the meaning sought to be attributed to a codicil would be to take away the greatest part of a legacy given in the will, on the day before, to A., and cause an intestacy as to that much of the estate, to a part of which the legatee would be again entitled under the statute, there being no change in the condition of the testator's af-

fairs, and the language of the will being ambiguous, it was held, according to the rules of interpreting such instruments, not to have been the testator's intention to revoke the former legacy. *Dalton v. Houston*, 5 Jones Eq. (N. Car.) 401.

In *Conover v. Hoffman*, 1 Abb. App. Dec. (N. Y.) 429, it was held that a power of sale in a will is not revoked by a different disposition of the estate, made by a codicil, unless there is some inconsistency between the exercise of the power and some part of the codicil.

In *Lemage v. Goodban*, L. R., 1 P. & D. 57, the testator by his first will made his sister general and residuary legatee. By a subsequent will, purported to be his "last will and testament," he bequeathed to her substantially the same property as he had bequeathed by the general legacy in the first will, but inserted a defective residuary clause. It was held that the residuary bequest was not revoked. Sir J. P. Wilde said: "Cases of the present character are properly questions of construction, and in deciding upon the effect of a subsequent will on former dispositions, this court has to exercise the functions of a court of construction. The principle applicable is well expressed in Mr. Justice Williams' book on Executors. He says: 'The mere fact of making a subsequent testamentary paper, does not work a total revocation of a prior one, unless the latter expressly, or in effect, revokes the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only where they are inconsistent.' This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so expected. Redundancy or rep-

etition in such independent papers, will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now, it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend?—not which or what number of papers did he desire or expect to be admitted to probate—is the true question. And so this court has been in the habit of admitting to probate such, and as many, papers (all properly executed) as are necessary to effect the testator's full wishes, and of solving the question of revocation by considering, not what papers have been apparently superseded by the act of executing others, but what dispositions can be collected from the language of all the papers that the testator designed to revoke or to retain. In this case such a task is not difficult. The first paper makes the testator's sister the sole object of bounty, and residuary legatee. The second is to the like general effect; no new object of bounty is introduced, and the sole reason for its execution seems to have been, that the testator's father had died in the interval, and that half a freehold house, and a share of personalty, had devolved on him by that event. These new acquisitions he devises and bequeaths in the same direction. But the residue is not disposed of, the clause apparently intended for that purpose being defective in its language, and not reading sensibly. The court can, however, see thus far into the intent of that clause—that the object of it was the same sister whose name alone appears in both papers. It would not be reasonable, under such circumstances, to conclude that the testator intended to revoke the residuary bequest in the first paper, and as effect can only be given to that disposition by granting probate of the first and second papers, as together constituting the will, the court so decides."

A testator ordered that all his slaves

mind that greater effort will be made to reconcile the provisions of the two instruments where the subsequent instrument purports to be a codicil or is inadequate to the disposition of the entire property, so that a partial intestacy would result from rejecting the prior statement, than where the subsequent instrument is adequate to the disposition of the entire property, and does not profess to be a codicil.¹

should be emancipated, and sent to a country where slavery is not tolerated, if they should elect to be emancipated on these terms, otherwise to be sold, and devised his Belle Air estate to charitable uses. By a codicil, he devised his Belle Air estate to B., for the support of his slaves thereon. It was held, that this codicil created a trust in B. for the support and maintenance of the slaves until they should be emancipated or sold, on the happening of which event his interest ceased; and that the codicil was a revocation of the will only to this extent. *Dawson v. Dawson*, 10 Leigh (Va.) 631.

Where a testator gave, in the body of his will, a fee simple in a tract of land to F., and by a codicil ordered the land to be sold by his executor, and the proceeds divided among other persons than F., it was held that until the exercise of the power of sale by the executor, the legal estate remained in F., the legatee named in the body of the will. *Jenkins v. Maxwell*, 7 Jones (N. Car.) 612.

A testator bequeathed his entire estate, with some small exceptions, to his wife for life, with remainder in fee to his two surviving children and the children of a deceased daughter, and by a codicil, executed the same day, after reciting the bequest to his wife, declared that he revoked "the same in part," and then bequeathed the "rents, issues, and profits," of a certain house and lot, immediately after his decease, to his two surviving children, "the same to be applied towards their support and education." It was held that the intent of the testator, manifest upon the face of the will (construing the will and codicil as one instrument), was simply to revoke the bequest to his wife, so far as the house was concerned, and to give the rents and profits of it for her life to his two surviving children, leaving the will after her decease to operate upon it as upon the residuum of his estate. *Boyle v. Parker*, 3 Md. Ch. 42.

Subsequent Will Described as Last

Will.—The fact that the subsequent instrument is described as the testator's "last will and testament," is entitled to very little weight. *Lemage v. Goodban*, L. R., 1 P. & D. 57. See *Hellier v. Hellier*, 9 Prob. Div. 237; *Leslie v. Leslie*, L. R., 6 Eq. 332; *Cutto v. Gilbert*, 9 Moo. P. C. 131.

Appointment of Executors.—Nor is the appointment or non-appointment of executors by the subsequent will conclusive. *Richards v. Queen's Proctor*, 18 Jur. 540; *Stoddart v. Grant*, 1 Macq. H. L. 163. But see *Plenty v. West*, 1 Rob. 264.

In the absence of a clause of revocation, if the second will appoints a fresh executor and the wills are consistent, probate may be granted to both executors. *Gearns v. Price*, 3 S. & T. 71. See *In re Leese*, 2 S. & T. 442; *Goods of Graham*, 3 S. & T. 69.

Revocation of Interest of One Devisee Inoperative in Itself as an Enlargement of Interest of Remaining Devisee.—A testator, by his will as originally executed, gave to his brother five hundred shares of certain stock for his life, and after his death to his children as an absolute estate, giving also other shares of the same stock to sundry other legatees; and by a residuary clause of the will he gave all the remaining stock of that kind of which he should die possessed, to the several persons to whom he had before given legacies of the stock, to be divided among them in the proportions in which the legacies of the stock had been given. By a codicil the testator revoked the legacy of five hundred shares to his brother and his children, and gave the shares to another legatee, and by a later codicil revoked all prior legacies to the children of his brother. It was held that the bequest to the brother of the share of the residue of the stock was not revoked, and that the interest which he took under that bequest was a life estate only. *Colt v. Colt*, 33 Conn. 270; *In re Waln's Estate*, 156 Pa. St. 194.

1. 1 Jarm. on Wills (5th ed.) *175;

If the subsequent testamentary instrument is only partly inconsistent with one of earlier date, the former instrument is revoked only as to those parts which are inconsistent, and both are entitled to probate.¹ Where both instruments profess to be the last

Henfrey v. Henfrey, 2 Curt. 468; *Moo. P. C.* 29. See *Cottrell v. Cottrell*, L. R., 2 P. & D. 397; *In re Howard*, L. R., 1 P. & D. 636; *Robertson v. Powell*, 2 H. & C. 762; *Freeman v. Freeman*, Kay 479; 5 De G. M. & G. 704; *Lemage v. Goodban*, L. R., 1 P. & D. 57; *Cookson v. Hancock*, 1 Keen 817; *Birks v. Birks*, 4 S. & T. 23. See *Crozier v. Bray*, 120 N. Y. 366; *Newcomb v. Webster*, 113 N. Y. 191; *Brant v. Willson*, 8 Cow. (N. Y.) 56; *Austin v. Oakes*, 117 N. Y. 577; *Hard v. Ashley*, 117 N. Y. 606; *Smith v. McChesney* 15 N. J. Eq. 359; *Dalton v. Houston*, 5 Jones Eq. (N. Car.) 401; *Vaughan v. Bunch*, 53 Miss. 513; *Rodgers v. Rodgers*, 6 Heisk. (Tenn.) 490. See *CODICILS*, vol. 3, p. 296.

In *Henfrey v. Henfrey*, 4 Moo. P. C. 29, a testator left two substantive wills, each disposing of his entire property. By the first, dated in 1838, he appointed executors, to one of whom he gave the residue of his estate. By the second will, dated in 1839, which contained no revocation of the prior one, he gave the whole of his property to his wife, with the exception of £5, but appointed no executors. It was held affirming the decree of the court below, that the second will operated as a revocation of the first will, and was alone entitled to probate. Dr. Lushington said: "Can two wills, both disposing of the whole property, be included in one probate? Can the will of 1838 be joined in probate with the will of 1839? Such a course would be against the whole practice of the court, and productive of utter confusion and litigation. Sir John Nicholl, in *Masterman v. Maberley*, 2 Hagg. 236, said: 'Is there any instance where two papers, both complete as to the disposition of personalty, and where the only defect of the second paper is a want of due execution, have been admitted to probate as together containing the last will?' And in that case there was much less objection, for the second set of papers was unexecuted. But it is said that there is no revocation of the appointment of executors, and that the case of *Beard v. Beard*, 3 Atk. 72, is an authority for the prayer now made; but that case was totally differ-

ent. In that case there was no revocation of the will, as a will, by any subsequent testamentary paper. The operation of the will was prevented by deed poll; so it might be by bankruptcy, loss, or giving away of property, or death of legatees; but into such facts a court of probate never inquires; it knows nothing but of revocation by subsequent will of the instrument itself, as cancellation; or, before the late statute, marriage of a woman, or marriage and birth of a child. As to the authority from *Swinburne*, that doctrine has been exploded so far back that it would be difficult to trace it; and the rule stated by Sir J. Nicholl established, viz., that a paper disposing of the whole property, is a revocation *in toto* of a previous will also disposing of the whole."

1. *Lemage v. Goodban*, L. R., 1 P. & D. 57; *Stoddart v. Grant*, 1 Macq. H. L. 163; *Hellier v. Hellier*, 9 Prob. Div. 237; *Richards v. Queen's Proctor*, 18 Jur. 540; *Holley v. Larrabee*, 28 Vt. 274; *Marston v. Marston*, 17 N. H. 503; *Jones v. Jones*, 2 Dev. Eq. (N. Car.) 387; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Brant v. Willson*, 8 Cow. (N. Y.) 56; *Robinson v. Smith*, 13 Abb. Pr. (N. Y. Supreme Ct.) 359; *Price v. Maxwell*, 28 Pa. St. 23; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Den v. Snowhill*, 23 N. J. L. 447; *Fleming v. Fleming*, 63 N. Car. 209; *Arndt v. Arndt*, 1 S. & R. (Pa.) 256.

After making her will, the testatrix sold the principal real estate devised, and acquired other real estate. She thereafter executed a codicil which, after providing for beneficiaries named in the will without any reference, however, to it, and also for new beneficiaries, gave all the rest and residue of her estate, real and personal, to certain beneficiaries named. It, by express provision, revoked so much of the will as was inconsistent with the codicil. In an action for the interpretation of the instruments, it was held that all the provisions of the will, save the clause appointing executors, were revoked by the codicil; but that, as said clause remained in force, both instruments were properly admitted to probate. *Newcomb v. Webster*, 113 N. Y. 191.

will of the deceased, the court, in determining whether one or both are entitled to probate, will be guided by the consideration, not whether the testator intended them both together to form his will, but what dispositions of his property he designed to revoke or to retain.¹ Where inconsistent wills bear the same date or are without date, extrinsic evidence is admissible to show when they were executed.² If nothing can be shown to establish their relative priority, both are held void, and the heir as to realty and the next of kin as to personalty are let in.³ Such result is, however, avoided, if possible, by collecting some consistent scheme of disposition from both instruments.⁴ Duplicate wills, being, in effect, different from copies of the same instrument, are not within the principle, and it is immaterial which is presented for probate.⁵ A mere intimation of an intent to make a new disposition, as where the testator writes on a second will, devising after acquired property, that he intends to dispose of the general residuary estate bequeathed by the first will by codicil, "hereafter to be made," does not work an actual present revocation.⁶ On the other hand, an indorsement upon the will that it is to be considered revoked in case no other will be made, has been held to

A testator made two different provisions in his will for his son A., and said son's children, one of which was a devise of a farm, to executors in trust, to sell the same, and apply the proceeds to the maintenance of said son and his children, the principal to go to A.'s children in a certain event. He subsequently in his lifetime, sold said farm, and then went to the attorney who had drawn up his will, and told him that he wished to provide for the case of selling said farm, by a codicil to his will; and a memorandum was drawn up, containing the wishes of the testator, to the effect that, "instead of the legacy and devise to the children of his son A.," his executors should pay the interest of the sum of three thousand dollars annually, towards the support of him and his family, and after the decease of said son, the principal should go to the latter's children. Said memorandum was never formally executed by the testator. It was held that, if such memorandum was to be taken as a codicil, it had the effect of only providing a substitute for the farm for A., and did not affect any other provision of the will in favor of him and his children. *Burhans v. Haswell*, 43 Barb. (N. Y.) 424.

1. *Lemage v. Goodban*, L. R., 1 P. & D. 57.

2. 1 Jarm. on Wills (5th ed.) *173.

The watermark on the paper showing the date of manufacture has been sometimes conclusive as to priority. 1 Jarm. on Wills (5th ed.) *173.

3. 1 Jarm. on Wills (5th ed.) *174; *Phipps v. Anglesea*, 7 Bro. P. C. 443.

4. 1 Jarm. on Wills (5th ed.) *175; *Schouler on Wills* (2d ed.), § 411.

5. *Odenwaelder v. Schorr*, 8 Mo. App. 464.

Both need not be produced for probate. *Crossman v. Crossman*, 95 N. Y. 145.

6. 1 Jarm. on Wills (5th ed.) *171; *Thomas v. Evans*, 2 East 488. See *Griffin v. Griffin*, 4 Ves. 197, n.; *Ray v. Walton*, 2 A. K. Marsh. (Ky.) 74; *Rife's Appeal*, 110 Pa. St. 232.

In *Thomas v. Evans*, 2 East 496, *Lawrence, J.*, said: "The circumstances relied on to show that the subsequent instrument was a revocation of the former are, first, That the testator calls it his last will; to which the true answer was given at the bar, that it is merely a word of form, and he meant no more by it than that it was the last of those instruments which he had executed. Then, secondly, stress is laid on the declaration of his intention to dispose of the rest of his real and personal estate by a codicil thereafter to be made; from whence it is contended that he must have considered all the rest of his property as undisposed of,

work a present revocation.¹ To revoke a prior will or codicil, the subsequent testamentary instrument must be perfect in form and execution; but its failure to take effect, not from the infirmity of the instrument, but from the incapacity of the devisee, or other cause, is immaterial.² If the subsequent will or codicil is

besides what he had devised in the prior part of the second will. But it would not be inconsistent with the disposition in the first will, if, in speaking of the residue, he had meant to include the same property that he had before devised; for he only says that he intended to dispose of it by a future codicil, and *non constat*, whether he would make any or what difference in the disposition he had before made. It does not, however, appear that he meant to include the same property in the residuary clause; for he had other property, both real and personal, undisposed of by either of the instruments, namely, his personal property which had lapsed by the death of his mother, and real property purchased by him after the date of his first will, which alone he might have intended to dispose of by a future codicil. In neither case, therefore, is the declaration of such intent inconsistent with the disposition made by the first instrument."

1. *Brown v. Thorndike*, 15 Pick. (Mass.) 388. Compare *Ray v. Walton*, 2 A. K. Marsh. (Ky.) 74; *Rife's Appeal*, 110 Pa. St. 232.

In *Brown v. Thorndike*, 15 Pick. (Mass.) 388, a testator wrote on his will, "It is my intention at some future time to alter the tenor of the above will, or rather to make another will; therefore, be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect." It was held that this was a present revocation and not the declaration of an intent to revoke by some future act. The court, by Shaw, C. J., said: "It was contended by the counsel for the appellant, that supposing the instrument of revocation to be well executed, still it did not separate as a revocation, because it manifested a future intent to revoke and not an actual revocation. The rule is well settled that the declaration of an intent to revoke by some future act is no actual revocation. *Cranvel v. Sanders*, Cro. Jac. 497; *Thomas v. Evans*, 2 East 488. But we think the present case not affected by that rule, because, taken together, the instrument is one of present

revocation. The testator begins by stating an intention of altering the tenor of this will, or rather of making a new will, but this is mere inducement to the latter clause, in which he says: 'therefore, be it known, that if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect.' Taking it in great strictness as hypothetical and conditional, the condition has been complied with; he has died before making another will. But we think it must be construed according to the obvious intent, and according to the subject-matter. If he should make a new will, it is to be presumed that it would embrace the whole subject of his testamentary dispositions, and so would operate as a revocation of the present. If he should die before making a new will, this was to be considered revoked and of no effect, and, of course, in that event he would die intestate. The effect, we think, is this, that 'this will is revoked at all events, and I intend to make a new will, or should I not do so, I prefer to die intestate.' It is to be remarked that the words of revocation are in the present: 'I desire that this will be considered as revoked and of no effect.' It does not declare an intent to revoke; it looks to no future act to be done, to effect such revocation, and in this respect it differs from the cases cited. The instrument written on the will, therefore, must be considered, not as a declaration of an intent to revoke by some future act, but as an actual instrument of present revocation, by which the will in question was legally revoked." Of course, if the words of revocation are inoperative for informality of execution, the intent with which they were written is immaterial. *Ladd's Will*, 60 Wis. 187.

2. *Schouler on Wills* (2d ed.), § 406; *Frenche's Case*, 8 Vin. Abr. Div. O., pl. 4; *Roper v. Radcliffe*, 10 Mod. 233; *Tupper v. Tupper*, 1 K. & J. 665; *Quinn v. Butler*, L. R., 6 Eq. 225; *Ladd's Will*, 60 Wis. 187; *Gossett v. Weatherly*, 5 Jones Eq. (N. Car.) 46; *Price v. Maxwell*, 28 Pa. St. 39; *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Colvin v.*

the result of fraud or undue influence, it will not revoke the prior instrument.¹ An express clause of revocation inserted by mistake is inoperative.² So where a testator revokes a devise or bequest in a former will or codicil, and expressly sets forth as his

Warford, 20 Md. 394; *Hairston v. Hairston*, 30 Miss. 276; *Reed v. Manning*, 30 Miss. 308. See *Goods of Gentry, L. R.*, 3 P. & M. 80. Compare *Barksdale v. Hopkins*, 23 Ga. 332. See also *Hollingshead v. Sturgis*, 21 La. Ann. 450.

In *Tupper v. Tupper*, 1 K. & J. 665, a codicil revoked valid bequests in a will, and bequeathed the property to a fund which was being raised for the purpose of buying land for a charity. It was held that, although the gift by the codicil failed, the revocation nevertheless took effect. Wood, V. C. said: "There is some difficulty in this case, because, although the difference may not be very striking, it is not precisely the case of a gift to an object incompetent to take, but I think that it falls within the principle of the case in which there was a devise to a parish; and that to make a distinction between them would be carrying the refinements, which have gone very far already, farther than would be advisable. I concede that it is very difficult to make a satisfactory distinction between *Onions v. Tyrer*, 1 P. Wms. 343, and those cases in which the gift fails for want of capacity in the devisee to take. There is this difference, that, in cases like *Onions v. Tyrer*, 1 P. Wms. 343, the testator is making an instrument which he intends to be effective as a whole, and the law takes away one-half, in the same manner as though it cut off the operative half of the instrument, leaving only the revoking part of the will; and it may be said that it was the intention of the testator that the instrument should operate in an entire and not in a mutilated form; while, in the other cases, where the testator has made certain gifts, which are invalid in law, the instrument is in a sense operative, but the party to take under it is not allowed to receive the benefit. It has been argued that the law does not render the treasurer of a charity absolutely incapable of taking, but only makes void the gift to him in trust for the purposes of this charity; and, therefore, that this part of the will is blotted out; and that makes the case still more like *Onions v. Tyrer*. I think, however, that though some-

thing is to be said for it, that is too fine a distinction to make any real difference between this case and that in which there was a gift to a parish. Although the law would prevent that from taking effect either by deed or will, yet being by will, in which the testator manifested an intention to revoke a previous gift, it was held that the revocation must take effect, although the gift was void. (*French's Case*, Roll. Abr. 'Devise,' O. 4.) In this case the gift is to a charity, and, regarding the solemn introduction to his will, it is probable that the testator did not intend to withdraw from pious uses the sum which he had set apart for them; but that does not indicate an intention that the legatees whose legacies he revokes should remain recipients of his bounty. He expressly says by the codicil that they shall not receive anything, but that the fund shall be given to another object; and though this latter cannot take it, I cannot speculate on whom he might wish to confer the benefit in such an event. He desired to devote the money to charity generally. The law prevents the particular object which he has designated from taking anything, and I must hold that the revocation remains in force, though the gift by the codicil may be void."

1. *Laughton v. Atkins*, 1 Pick. (Mass.) 546; *O'Neill v. Farr*, 1 Rich. (S. Car.) 80; *McCarthy v. Bone*, 33 Ala. 601.

2. 1 Jarm. on Wills (5th ed.) *172; *Powell v. Monchell*, 6 Madd. 216.

In *Re Oswald*, L. R., 3 P. & D. 162, the deceased by her will left a portion of her furniture and household effects to her daughter, and disposed of the residue of her property, appointing trustees and executors. Afterwards she was advised that the bequest to her daughter should be secured to her separate use, and she gave directions that a testamentary paper should be prepared to that effect. The paper thus prepared purported to be her last will and testament, and in addition to a clause to the effect above mentioned, contained one revocatory of all former wills. This paper was executed by the deceased, but was not read over to or by her, and she was not aware that it

reason for so doing the existence of a state of facts which turns out to be false, the condition upon which the revocation was to take effect is held to have failed, and the original gift remains unrevoked.¹ But if the testator has not set forth the ground

contained such words of revocation. It was held that, as the words of revocation had been introduced *per incuriam* and without the instructions of the deceased, and their presence there was unknown to the deceased when she executed the will, they ought to be omitted from the probate.

1. 1 Jarm. on Wills (5th ed.) *183; Schouler on Wills (2d ed.), § 410; Campbell v. French, 3 Ves. Jr. 321; Doe v. Evans, 10 Ad. & El. 228; 37 E. C. L. 102; Barclay v. Maskelyne, Johns. 124; Mendinhall's Appeal, 124 Pa. St. 387. See further Goods of Moresby, 1 Hagg. 378; Atty. Gen'l v. Lloyd, 1 Ves. 32; Atty. Gen'l v. Ward, 3 Ves. Jr. 327; Parker v. Nickson, 1 De G. J. & S. 177; Thomas v. Howell, L. R., 18 Eq. 198; *In re Taylor's Estate*, 22 Ch. Div. 495; Dunham v. Averill, 45 Conn. 61; Hayes v. Hayes, 21 N. J. Eq. 265; Mordecai v. Boylan, 6 Jones Eq. (N. Car.) 365; Gifford v. Dyer, 2 R. I. 102; Skipwith v. Cabell, 19 Gratt. (Va.) 784.

In Doe v. Evans, 10 Ad. & El. 228; 37 E. C. L. 102, a testatrix devised lands to L. for life, remainder to his first and other sons and daughters successively in tail. L. died, leaving one son, and one posthumous daughter. The son died. The testatrix, being ignorant of the existence of the daughter, made a codicil, reciting the death of L. without leaving any issue, and devising the land to H., in the same manner as she had before done to L. It was held that the codicil must be construed as a conditional revocation only, and was inoperative as against the daughter of L., though the testatrix, after making the codicil, and two years before she died, had become acquainted with her existence. Williams, J., said: "Now the codicil evidently does not proceed on any change of mind in regard to the original devisee. It only substitutes one devise for another, on the supposition that the first cannot take effect. The condition of revocation fails, because it appears that the party, who was always intended to be benefited, is capable of receiving the benefit intended." Little-dale, J., said: "As to her becoming acquainted with the fact after the codicil

was made, this alone cannot set it up; otherwise it might be established by showing that she lived only one day after she knew of the daughter's existence."

Thus, where a will bequeathing specific chattels to A (who was not personally known to the testator) was followed by a codicil reciting (erroneously) that by the will they were bequeathed to B (who was uncle to A and a personal friend of the testator), revoking that bequest on the ground that B was lately dead, and the testator's connection with his family thereby almost null, and bequeathing the same chattels to another family, it was held that the bequest in the will was not revoked by the codicil, and the circumstance, that it might reasonably be doubted whether, if the real effect of the will had been present to the testator's mind, he would not still have disposed of the property differently, was not held to affect this conclusion. Barclay v. Maskelyne, Johns. 124. In this case Wood, V. C., said: "It was argued that 'if there be in a will a clear and express gift of certain property to A, and in a codicil a gift as clear and express of the same property to B, the latter gift passes the property to B; the two bequests being inconsistent, the latest is that to which the court gives effect.' That proposition is true where the bequest in the codicil is made *simpliciter*; but the question in this case is, whether the bequest in the codicil is made *simpliciter*, or whether it is not coupled with the introductory part of the codicil, in which the testator states, in plain words, his belief, that by the death of the previous legatee he has now a clear field for the disposal of his property. Leaving out the words as to his connection with the family being now severed, upon which I shall comment presently, it is the simple case of a gift by will of a specific chattel to A, followed by a codicil, in which the testator says: 'Whereas, by my will, I have given a specific chattel to J. S., and J. S. is now dead, now, therefore, I give all that same chattel to B., instead of J. S.' There being, in fact, no gift whatever to J. S., who is dead,

upon which the intent to revoke was founded,¹ or has acted upon legal advice or belief only,² or the facts were peculiarly within his knowledge, the principle is inapplicable.³ Words expressing a total revocation may be controlled by a natural implication arising from the circumstances under which the will was made, or the absurdities resulting from giving them an unrestrained construction.⁴

12. Revocation by Alteration of Estate—(See LEGACIES AND DEVISES, vol. 13, p. 100).—At common law it was essential to the validity of a devise of freehold lands that the testator should be seised thereof at the making of the will, and that he should continue so seised without interruption until his decease. If, therefore, a testator, subsequently to his will, by deed aliened lands, which he had disposed of by such will, and afterwards acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise, which was necessarily void.⁵ The doctrine applied to a devise of a lease for life, which was afterwards

but a gift to B, who is alive at the death of the testator. It is not the simple case of a gift of the same chattel to one person by the will, and to another person by a codicil to the will; it is a gift to one by will, and to another by the codicil, the gift in the codicil being prefaced by a statement that the donee under the will is out of the way, and the field is clear; the object of the gift in the will being at an end, the testator feels himself at liberty to dispose of the property by his codicil to some one else. Other cases might be put, in which the point would be equally clear. Suppose a gift by will to John, and then a codicil reciting 'Whereas I gave that property by my will to Henry, and Henry has displeased me, now I hereby give it to J. S.,' no one could contend that the gift to John was displaced by the codicil. The whole codicil proceeded upon a mistake. A new gift to J. S., standing alone and without any such preface, would have displaced the gift to John; but being prefaced by a recital showing plainly that the new legatee was only substituted because the first legatee was out of the way, cannot deprive the person entitled under the previous instrument."

1. *Dunham v. Averill*, 45 Conn. 62; *Skipwith v. Cabell*, 19 Gratt. (Va.) 758; *Gifford v. Dyer*, 2 R. I. 102.

Evidence *dehors* the instrument, of the ground upon which the intent was founded, is inadmissible. *Gifford v. Dyer*, 2 R. I. 102; *Skipwith v. Cabell*,

19 Gratt. (Va.) 758. But see *Goods of Moresby*, 1 Hagg. 378.

2. 1 Jarm. on Wills (5th ed.) *183; *Atty. Gen'l v. Lloyd*, 1 Ves. 35; *Atty. Gen'l v. Ward*, 3 Ves. Jr. 327; *Skipwith v. Cabell*, 19 Gratt. (Va.) 785. But see *Thomas v. Howell*, L. R., 18 Eq. 211; *Mendinhall's Appeal*, 124 Pa. St. 387.

3. *Mendinhall's Appeal*, 124 Pa. St. 387. Thus a codicil revoking in express terms a legacy in the will, because the testator had provided the legatees with a permanent home, when in fact he had not so provided, will not be declared inoperative upon the ground of mistake, since the testator must have known whether he had provided such home. *Hayes v. Hayes*, 21 N. J. Eq. 265. But in *Re Taylor's Estate*, 22 Ch. Div. 495, it was held that a legatee could dispute an advancement alleged in the will to have been made.

4. 1 Jarm. on Wills (5th ed.) *172; *Jones v. Jones*, 2 Dev. Eq. (N. Car.) 387.

As where a testator disposed of all his estate, giving the larger portion to his wife, and a smaller to a daughter, then his only child, and upon the birth of a son, by a codicil declared, "I revoke and make void the said legacy to my wife," and then gave one moiety of it to his son, and made no disposition of the other, it was held that his intention was to revoke the legacy to his wife only for one-half, so as to make her a joint tenant with the son. *Jones v. Jones*, 2 Dev. Eq. (N. Car.) 387.

5. 1 Jarm. on Wills (5th ed.) *147.

renewed by the testator,¹ and to a conveyance limited in its purpose, which instantly vested the estate in the testator;² but not to a contingent remainder or executory interest which afterwards vested by the happening of the contingency upon which it was originally limited.³ If the testator, after making the devise, made a lease for life or years, or conveyed the land by deed to the use of himself for life, the remainder to the use of his wife for life, in jointure without disposing of the inheritance, the devise was revoked only *pro tanto*, and the reversion passed to the devisee, subject to the term or intermediate life estate.⁴ The principle applied to devises of both legal and equitable estates.⁵ A partition between tenants in common or copartners did not revoke a prior devise, provided the conveyance be confined to the object of the partition, merely assuring to the testator, in the lands allotted to him in severalty, an estate precisely correspondent to that which he previously had in the undivided share.⁶ A devise is not revoked in equity by a mortgage in fee; in such case, the mortgagee is considered a trustee for the devisee, and the

See *Donohoo v. Lea*, 1 Swan (Tenn.) 119; *Skerrett v. Burd*, 1 Whart. (Pa.) 246; *Carter v. Thomas*, 4 Me. 314. In other respects the will remained in force. *Hawes v. Humphrey*, 9 Pick. (Mass.) 350; *Carter v. Thomas*, 4 Me. 341; *Wells v. Wells*, 35 Miss. 663.

A testator devised real estate to his wife, but afterward, in his lifetime, disposed of the real estate so devised, his wife joining in the conveyance thereof, and received other lands in exchange, she, as well as the testator, believing the exchange of lands would not alter the will or affect the devise to her except to give her the lot received in exchange, in lieu of the land devised to her. The testator died leaving no real estate except the land received in exchange for the land conveyed, and without having altered his will. Upon a bill in equity filed by the wife against the heirs at law to be declared entitled under the will to all the real estate of which the testator died seised, it was held that the court had no power to correct the mistake of the testator as to the effect of the conveyance, it being a mistake of law, and the bill was dismissed. *Gilbert v. Gilbert*, 9 Barb. (N.Y.) 532.

1. *Marwood v. Turner*, 3 P. Wms. 163.

2. 1 Jarm. on Wills (5th ed.) *148; *Goodtitle v. Otway*, 2 H. Bl. 516; *Cave v. Holford*, 3 Ves. Jr. 650. See *Vawser v. Jeffrey*, 16 Ves. Jr. 519; *Walker*

v. Armstrong, 21 Beav. 284; *Power v. Power*, 9 Ir. Ch. Rep. 178.

3. *Jackson v. Hurlock*, Eden 263.

4. 1 Jarm. on Wills (5th ed.) *148. See *Hodskinson v. Wood*, Cro. Car. 23; *Lamb v. Parker*, 2 Vern. 495.

5. 1 Jarm. on Wills (5th ed.) *150; *Lincoln's Case*, Shaw P. C. 154; *Pollen v. Huband*, 1 Eq. Ab. 412.

6. 1 Jarm. on Wills (5th ed.) 151; *Luther v. Kidby*, 3 P. Wms. 169, n.; *Risley v. Baltinglass*, Raym. 240; *Webb v. Temple*, 1 Freem. 542; *Rawlins v. Burgis*, 2 Ves. & B. 382; *Atty. Gen'l v. Vigor*, 8 Ves. Jr. 281. Compare *Knollys v. Alcock*, 5 Ves. Jr. 648; *Phillips v. Turner*, 17 Beav. 194.

"The case of partition is always considered a sort of special case. Each party can compel the other to make partition." Lord Eldon in *Atty. Gen'l v. Vigor*, 8 Ves. Jr. 281.

In *Duffel v. Burton*, 4 Harr. (Del.) 290, *Harrington, J.*, said: "Such a conveyance by a coparcener or tenant in common, after he had made his will, has been held not to occasion a revocation of the will. The reason of this seems to be that the object of the conveyance is really not to pass title, but to effect a severance of the manner of holding; and the estate to which the will applies being liable to this change, without enlargement or restriction, the will is reasonably to be regarded and held as applying to it in its severed form of holding, as well as when it was held in common."

devisor continues owner as before, subject to the mortgage.¹ So a conveyance in trust to sell to pay debts,² or bankruptcy, does not revoke the will as to any surplus remaining after satisfying the claims of creditors;³ but if the partition, deed of trust, or mortgage conveyance, contain ulterior limitations by which the

1. Kent, Ch., in *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 155. See 1 Jarm. on Wills (5th ed.) 157; *Perkins v. Walker*, 1 Vern. 97; *Stubbs v. Houston*, 33 Ala. 555; *McTaggart v. Thompson*, 14 Pa. St. 149; *Woolery v. Woolery*, 48 Ind. 526.

"It is immaterial whether the testator had the legal estate or was equitable owner only (*Jackson v. Parker*, Ambl. 687); whether the mortgage conveyance was made by fine, or any other mode of assurance (*Rider v. Wager*, 2 P. Wms. 334; *Jackson v. Parker*, Ambl. 687); whether the mortgagee were the devisee himself (*Peach v. Phillips*, Dick. 538; *Baxter v. Dyer*, 5 Ves. Jr. 656. *Overruling Harkness v. Bayley*, Pre. Ch. 514), or a stranger; and whether the estate of the mortgagee were to vest in possession immediately on its execution or not until the death of the mortgagor (*Cro. Car. 23*)." 1 Jarm. on Wills (5th ed.) *151.

2. *Vernon v. Jones*, 2 Freem. 117; *Temple v. Chandos*, 3 Ves. Jr. 685; *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148; *Jones v. Hartley*, 2 Whart. (Pa.) 103. See *Clingan v. Mitchelltree*, 31 Pa. St. 25.

"Even though it were accompanied by a declaration that the surplus proceeds of the sale should be held in trust for the grantor, his executors and administrators, provided, however, that such conveyance had for its object the payment of debts only; the insertion of a further trust, as the payment of an annuity to the wife of the grantor, would have worked a revocation." 1 Jarm. on Wills (5th ed.) *152; *Hodges v. Green*, 4 Russ. 28.

It seems that a deed of trust conveying all the property of the grantor to certain persons and their heirs "forever," with warranty; "nevertheless, upon special trust that they shall pay the profits to himself during his life;" concluding with declaring its "true intent and meaning to be that, at his death, everything therein contained between the parties should become null and void;" is a conveyance to the trustees and their heirs, of an estate for the life of the grantor only, and not a

revocation of a previous will. *Hughes v. Hughes*, 2 Munf. (Va.) 209.

In 1841, B. made his will, and devised an estate for life to his wife, from the crops to be raised on the farm on which he then resided. To his son M. he devised a tract of land on which the son resided. To his son R. he devised all the rest and residuary part of the tract or tracts of land of which the testator was in possession, and on which he then (now) resided, and everything (personal) wheresoever found upon the premises, intended to be devised; provided that he, R., should grant unto the testator's widow an ample and comfortable support during her life. To his son M. he gave an estate in trust for his daughter F. In 1844, the testator conveyed his estate in trust to pay debts, and afterwards to pay over to him all moneys which remained in the hands of the trustee, or to reconvey to the testator all such portions of real and personal property as might remain unsold. The trustee sold the entire estate under the deed, and paid the surplus in money, which in fact was the proceeds of the personality, to the executor of the testator. It was held that the executor, after payment of the debts, etc., was bound to pay the balance in his hands to the son R., and that the deed of trust was not a revocation of the will in reference to R.'s interest in the surplus. *Shilling v. Shilling*, 6 Gill (Md.) 171.

Evidence in Ejectment.—Parol evidence is not admissible in ejectment between the heirs at law of a decedent and a devisee in an alleged will, to prove that a conveyance, made after the date of the will and absolute on its face, was, in fact, made in trust to pay the debts of the grantor, with a resulting interest to him. *Jones v. Hartley*, 2 Whart. (Pa.) 103.

3. 1 Jarm. on Wills (5th ed.) *151; *Charman v. Charman*, 14 Ves. Jr. 580.

In *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 155, Kent, Ch., said: "It is a settled principle in equity, that if a conveyance is only for a partial purpose of introducing a charge, and does not affect the interest of the

testator's ownership is varied or modified, it works an absolute and entire revocation.¹

testator beyond that purpose, it is only a partial revocation of the will, and equity will hold the party a trustee, not for the heir, but for the devisees. A devise is not revoked in equity by a mortgage in fee, or a conveyance in fee, for the payment of debts. The mortgagee is a trustee for the devisee, and the donor continues owner as before, subject to the mortgage. So, after a devise, if a conveyance be made in fee, in trust to sell and pay debts, and the surplus of the personal estate to the testator and his executors, and the surplus of the lands to him and his heirs, this is no revocation in equity, and so it has been determined. If, after the debts are paid, the trustee conveys to the testator and his heirs, that is no revocation; and if the estate should descend to the heir, he would be only a trustee for the devisee. This has been held so by Lord Hardwicke and Lord Thurlow; and the principle is settled. So, if the testator dies without taking back the legal estate, equity has only to decide to whom the beneficial interest belongs, and it holds the party a trustee for the devisee, and not for the heir, and directs a conveyance. When the testator, after making his will, conveys his estate in trust for the payment of debts, the estate is still, in contemplation of equity, in him substantially; and though the mode amounts to a revocation at law (for a court of law has nothing to do with the purpose), yet, subject to the debts, he remains, in equity, master of the estate, and the will continues to operate upon his interest. If he calls for a conveyance of the legal estate, his heir is a trustee for the devisee; and if he does not, but dies in the meantime, his trustee holds for the devisee, for his equitable interest still continued. (*Harwood v. Oglander*, 6 Ves. Jr. 223.) The doctrine thus laid down by Lord Alvanley, may also be collected from a series of other decisions. (*Hall v. Dench*, 1 Vern. 329; *Vernon v. Jones*, 2 Vern. 241; *Ogle v. Cook*, 3 Atk. 746; 2 Bro. 592; *Jackson v. Parker*, Ambl. 687, and the general observation of Lord Hardwicke, in *Parsons v. Freeman*, 3 Atk. 748, and in *Sparrow v. Hardcastle*, 3 Atk. 805; Lord Rosslyn, in *Bridges v. Chandos*, 2 Ves. Jr. 429.) In the prior case of *Williams v. Owens*, 2 Ves. Jr. 600, Lord Alvanley had explained, in

the same way, the principle, which he shows was evidently established by Lord Hardwicke, in *Parsons v. Freeman*, 3 Atk. 748, 'that wherever the estate is modified in a manner different from that in which it stood at the time of making the will, it is a revocation; but wherever the testator remains, after a conveyance for a mere particular purpose, as the payment of debts, seized of the same estate, and disposable by the same means, without any fresh modification, there is no revocation.'

Bankruptcy Distinguished from Disseisin.—In *Charman v. Charman*, 14 Ves. Jr. 584, Sir Wm. Grant said: "The case alluded to of a disseisin has no application. It is not for any partial or limited purpose that a disseisin is made; nor is the disseisor in any sense a trustee for the dissee. Whereas, the bankrupt laws take the property out of the bankrupt only for the purpose of paying his creditors; and from the moment that the debts are paid, the assignees are mere trustees for the bankrupt, and can be called upon to convey to him."

1. 1 Jarm. on Wills (5th ed.) *153; *Tickner v. Tickner*, 1 Wils. 309; *Kenny v. Sutton*, cited in 2 Ves. Jr. 601; *Harwood v. Oglander*, 6 Ves. Jr. 199; 8 Ves. Jr. 106; *Hodges v. Green*, 3 Russ. 28. See *Briggs v. Walts*, 2 Jur. N. S. 1041; *Power v. Power*, 9 Ir. Ch. Rep. 178.

What Words Will Modify the Ownership.—"What words introduced into the proviso for redemption amount to an indication of intention to change the equitable ownership, so as to revoke a previous devise by the mortgagor, is not clear. The cases abundantly demonstrate that such an intention will not be inferred from equivocal expressions, affording conjecture merely. The deed must distinctly and explicitly show that the estate is to be reconveyed to uses different from those which previously subsisted—a doctrine which seems to agree with the rule establishing that the interests of a husband and wife, joining in a mortgage of land held *jure uxoris*, are not liable to be varied by the inaccurate terms in which the reconveyance is directed to be made." 1 Jarm. on Wills (5th ed.) *154. See *Innes v. Jackson*,

16 Ves. Jr. 356; *Ruscombe v. Hare*, 6 Dow. 1; 2 Bl. N. S. 192; *Clark v. Burgh*, 2 Colly. 221; *Hipkin v. Wilson*, 3 De G. & S. 738. Thus, in *Brain v. Brain*, 6 Madd. 140, as stated in 1 Jarm. on Wills (5th ed.) *154, "where A, subsequently to his will, by a conveyance by way of security, in consideration of £800 advanced by B, conveyed lands to trustees in fee, upon trust to permit him (A) to enjoy until default of payment; and upon payment of principal and interest, upon trust to reconvey unto and to the use of A, the testator, his heirs and assigns, or unto and to the use of such other person or persons, and for such estate and estates, and to and for such lawful trusts, intents, and purposes, as A, his heirs or assigns, by any deed or deeds, instrument or instruments, in writing under his or their hand or respective hands, should direct, limit, or appoint, clear of all intermediate incumbrances, and, in default of payment, the trustees were empowered to sell. Sir J. Leach, V. C., held that this was a revocation *pro tanto* only. 'The true question,' his Honor observed, 'is whether by the addition of the words which follow the direction to recovery to the deviser and his heirs, he does, in fact, acquire any new estate or power, or whether these subsequent words do not leave him with the same estate, and the same powers, as he would have had if they had not been used. It is plain that he who has the right to call upon trustees to convey to himself and his heirs, has a right, by any instrument under his hand, to direct the same trustees to convey to the use of any other person, or for any estates and interests, at his pleasure. The authority to make such direction by any deed or instrument under his hand, is the necessary consequence of this conversion of his legal estate into an equitable interest; and the subsequent words are the mere *'expressio eorum quae tacite insunt.'* I am of opinion, therefore, that the conveyance in question, being by way of security for money, is a revocation *pro tanto* only.'"

Conveyance of Legal Estate; No Revocation in Equity.—"Though an absolute conveyance by a person having the equitable ownership only, does, we have seen, under the old law, revoke a prior devise, by analogy to the rule which makes a similar conveyance of the legal estate a revocation at law, yet when the testator merely clothes his equitable title with the legal estate, by

taking a conveyance of the latter to himself, or merely changes the trustee, as this produces no alteration in the beneficial ownership, which is the subject of the devise, it leaves such devise unaffected." 1 Jarm. on Wills (5th ed.) *154. See *Watts v. Fullarton*, cited Dougl. 718; *Parsons v. Freeman*, 3 Atk. 741; 1 Wils. 308; *Dingwell v. Askew*, 1 Cox 427; *Clough v. Clough*, 3 Myl. & K. 206; *Seaman v. Woods*, 24 Beav. 372.

"If, however, the conveyance does more than vest the legal estate in the testator, and newly modifies his ownership, revocation will, of course, be produced, as it would if the equitable interest separately had been so modified. This question often arose, and, of course, under a will made before 1838, may still arise, where a testator contracted to purchase lands, and in the interval between the contract and the conveyance devised them. In such case, it is clear that if the conveyance be made to the testator, to the usual limitations for preventing dower, viz., to such uses as he shall appoint, and in default, to the use of himself for life, remainder to a trustee for himself during life, with remainder to him (the purchaser), in fee, the devise will be revoked. And the same effect is produced where the conveyance is simply to such uses as the deviser shall appoint, and in default of appointment to him in fee." 1 Jarm. on Wills (5th ed.) *155. See *Rawlins v. Burgis*, 2 Ves. & B. 382; *Plowden v. Hyde*, 2 Sim. N. S. 171; 2 De G. M. & G. 684; *Schroder v. Schroder*, Kay 578; *Tickner v. Tickner*, cited 1 Wils. 311; 3 Atk. 742; *Parsons v. Freeman*, 3 Atk. 741; *Ward v. Moore*, 4 Madd. 195. See further *Ballard v. Carter*, 5 Pick. (Mass.) 112; *Brigham v. Winchester*, 1 Met. (Mass.) 390; *Swift v. Edson*, 5 Conn. 531.

Effect of Contract for Sale After Devise.—"Another obvious case of revocation in equity occurs where the testator devises lands, and then, subsequently to the will, contracts for the sale of them; such a contract, if once obligatory on the testator, will revoke the devise (*Mayer v. Gowland*, Dick. 563), though it should happen to be rescinded after the testator's decease (*Tebbutt v. Voules*, 6 Sim. 40), and also, by the better opinion, even though such transaction should have taken place in his lifetime (see *Knollys v. Alcock*, 7 Ves. Jr. 566; *Bennett v. Tankerville*, 19 Ves. Jr. 170; *Curre v. Bowyer*, 5 Beav. 6), supposing, of course, the will to be

Under the Statute of Victoria,¹ and corresponding statutes in the *United States*, which in effect provide that the will shall speak from the death, and that no conveyance or act subsequent to the execution of the will shall prevent its operation with respect to such estate as the testator may have power to dispose of at his death, the doctrines peculiar to revocation by alteration of estate have ceased to be of practical importance in *England* and many of the *United States*.²

13. Change of Condition and Circumstances—(See LEGACIES AND DEVICES, vol. 13, p. 101).—The more generally accepted view seems to be that a change in the testator's condition and circumstances, as the death of his wife or children, or of the objects of his bounty, the increase or decrease of his fortune, or the alienation of his property, will not work a total revocation of the will.³

subject to the old law. Notwithstanding the contract for sale, the legal estate passes under the devise, and the devisee is bound to convey it to the purchaser, in pursuance of the contract. If the devise, which might thus in event become operative upon the legal inheritance, would have the effect of tying up the property in a manner incompatible with the convenient execution of the contract, as by creating limitations in favor of minors or unborn persons, the testator should immediately after the sale execute a codicil, devising the property to trustees, for the purpose of carrying the contract into effect. But if the contract is rescinded or abandoned, either before or after the testator's decease, there is no purchaser to convey to; and the will being revoked, the devisee is a trustee for the heir (see *Tebbot v. Voules*, 6 Sim. 40). So where a testator devised an estate and then contracted to sell it, but no conveyance was executed, and afterwards the testator repurchased the estate, it was held that the will, once revoked in equity, was not set up again. (*Andrew v. Andrew*, 8 De G. M. & G. 336. See observations on this case, Sug. R. P. S., p. 361.) 1 Jarm. on Wills (5th ed.) *160, *161. See further *Bosley v. Wyatt*, 14 How. (U. S.) 390; *Hall v. Bray*, 1 N. J. L. 212; *Chadwick v. Tatem*, 9 Mont. 354. See *Donohoo v. Lea*, 1 Swan (Tenn.) 119.

Marriage Articles.—"Antenuptial articles for a settlement have, of course, the same revoking effect in equity, upon a previous devise of the property agreed to be settled, as a contract to sell. Jarm. on Wills (5th ed.), § 161. See *Cotter v. Layer*, 2 P. Wms. 624;

Vawser v. Jeffery, 16 Ves. Jr. 519; 2 Sw. 268; *Langdon v. Astor*, 16 N. Y. 9."

1. 1 Vict., ch. 26, § 23.

2. LEGACIES AND DEVICES, vol. 13, pp. 102, 103. See *Prater v. Whittle*, 16 S. Car. 40; *Wells v. Wells*, 35 Miss. 663; *Floyd v. Floyd*, 7 B. Mon. (Ky.) 290; *Carter v. Thomas*, 4 Me. 341; *Morey v. Sohler*, 63 N. H. 507; *Graham v. Burch*, 47 Minn. 171; *Skerrett v. Burd*, 1 Whart. (Pa.) 246; *Woolery v. Woolery*, 48 Ind. 527; *Brush v. Brush*, 11 Ohio 291; *Blandin v. Blandin*, 9 Vt. 210; *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148; *Taylor v. Kelly*, 31 Ala. 59; *M'Rainy v. Clarke*, 2 Tayl. (N. Car.) 278; *Powell v. Powell*, 30 Ala. 607; *Jones v. Hartley*, 2 Whart. (Pa.) 103. Compare *Wogan v. Small*, 11 S. & R. (Pa.) 143; *In re Tillman's Estate* (Cal. 1892), 31 Pac. Rep. 563. See also *Vreeland v. McClelland*, 1 Bradf. (N. Y.) 393; *Welsh v. Pounders*, 36 Ala. 668.

Conveyance on Ground Rent.—Conveyance in fee of land devised reserving ground rent, revokes the devise. *Skerrett v. Burd*, 1 Whart. (Pa.) 246.

3. *Schouler on Wills* (2d ed.), § 427; *Graves v. Sheldon*, 2 D. Chip. (Vt.) 74; *Doe v. Edlin*, 4 Ad. & El. 587; 31 E. C. L. 143; *Hoitt v. Hoitt*, 63 N. H. 475; *Morey v. Sohler*, 63 N. H. 507; *Fellowes v. Allen*, 60 N. H. 439; *Blandin v. Blandin*, 9 Vt. 210; *M'Rainy v. Clarke*, 2 Tayl. (N. Car.) 278. See *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148; *Barksdale v. Barksdale*, 12 Leigh (Va.) 535; *Hughes v. Hughes*, 2 Munf. (Va.) 209; *Warner v. Beach*, 4 Gray (Mass.) 162; *Jackson v. Betts*, 9 Cow. (N. Y.) 208; *Sherry v. Lozier*, 1

Bradf. (N. Y.) 437; *Brown v. Thordike*, 15 Pick. (Mass.) 388; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350; *Clark v. Eborn*, 2 Murph. (N. Car.) 235; *Carter v. Thomas*, 4 Me. 341; *Bethell v. Moore*, 2 Dev. & B. (N. Car.) 311; *Wells v. Wells*, 35 Miss. 663; *Verdier v. Verdier*, 8 Rich. (S. Car.) 135; *Moore v. Spier*, 80 Ala. 130; *Balliet's Appeal*, 14 Pa. St. 451; *Epps v. Dean*, 28 Ga. 533; *Parkhill v. Parkhill*, *Brayt.* (Vt.) 239; *Bowen v. Johnson*, 6 Ind. 110; *Dungan v. Hollins*, 4 Md. Ch. 139; *Warren v. Taylor*, 56 Iowa 182. *Compare Garrett v. Dabney*, 27 Miss. 335; *Young's Appeal*, 39 Pa. St. 115.

"No man is presumed to have revoked his testament once made, unless it be proved, insomuch that if a man do live by the space of forty years after he have made his testament, yet is not the testament presumed to be revoked by the course of so long time. And albeit, during the same time his wealth and substance do greatly increase, yet is not the testament presumed to be revoked. And albeit, the testament be in prejudice of such as otherwise were to have the administration of the goods of the deceased, yet all those things occurring, viz., the long time, the increase of the testator's wealth, and the prejudice of such as are to have the administration of the testator's goods, the testament is not presumed to be revoked. And albeit, the testament be made in time of sickness and peril of death, when the testator doth not hope for life, and afterwards the testator recover his health, yet is not the testament revoked by such recovery; or albeit, the testator make his testament by reason of some great journey, yet it is not revoked by the return of the testator." *Swinburne*, pt. 7, § 15, pl. 2, § 3.

In *Clements v. Horn*, 44 N. J. Eq. 595, a husband, entitled *juri mariti* to the proceeds of sale of certain lands, which descended to his wife before 1852 (when the Married Woman's Act was passed), executed a deed of trust, directing the trustee to invest the fund on bond and mortgage, and giving to her the income thereof for life, with a testamentary power of disposing of the principal and its accumulations. After the husband's death she made a will, giving the fund to a subsequent husband. At her request, the trustee, who had previously invested the fund according to the trust deed, bought a house and lot, using the fund to pay

therefor, and taking the title in her name, but without any mention of the trust in the deed, and she and her husband occupied the premises until her death. It was held that the will was not revoked by the diversion of the trust fund, nor the fund itself destroyed or lost beyond identification, and that the husband is entitled to have the amount of the fund decreed to be a first lien on the house and lot. *Bird, V. C.*, said: "It seems to me that it would be a very dangerous doctrine to hold that a donee, after the exercise of a power conferred, destroys the operation and effect of the instrument by which the power is exercised, simply because a consent is given to some use or disposition of the funds, which is the object of the power, in a manner not precisely contemplated by the original declaration of trust which gives the power. In this case the only departure or irregularity was in investing the moneys by taking an absolute title in fee for the land, rather than a mortgage; the money, nevertheless, being secured, its identity placed beyond dispute, and the object in nowise indeterminate."

Revocation of a will cannot be implied by law from the birth of a child to the testator, contemplated in the will; the death of the testator's wife, and of another child leaving issue; the testator's insanity for forty years, from soon after the making of the will until his death; and a fourfold increase in the value of his property, so as greatly to change the proportion between the specific legacies given to some children and the shares of other children, who were made residuary legatees. *Warner v. Beach*, 4 Gray (Mass.) 162. In the above case *Shaw, C. J.*, said: "Our Statute of Wills, in providing that wills should not be revoked unless by canceling or by another will, etc., excepts revocations implied by law from subsequent changes in the condition and circumstances of the testator. *Massachusetts Rev. Stat.*, ch. 62, § 9. What those changes are, the statute does not intimate; it is left to be decided by the general rules of law. . . . The death of the wife in the present case, could have no effect. She had a life interest only, and the death of a devisee is a contingency always in view. The death of a daughter, under any circumstances, could have no such effect; but in the present case her legacy would not lapse, as she left several descendants, who would take it. *Massachusetts*

Exceptions, to be hereafter considered, exist in the case of subsequent marriage and birth of children.¹

Rev. Stat., ch. 62, § 24. The birth of a posthumous child could have no effect, for his birth was contemplated and provided for by the will; besides, all children not provided for by will, including posthumous children, are provided for by law. *Massachusetts* Rev. Stat., ch. 62, §§ 21, 22; *Bancroft v. Ives*, 3 Gray (Mass.) 367. The only other circumstances, intimated as ground of revocation of this will, are the increase in value of the real estate, and the long continued insanity of the testator, which disabled him from altering his will. The former circumstance alone would have no weight; and it is only the great length of time, during which this disability lasted, which appears to give it any plausibility. It is said that a will is ambulatory during the life of the testator because he may at any time alter or change it. If this could be held to mean that he must always have the capacity to revoke, it would follow that any attack of insanity would operate as a revocation, which would prove far too much. And we have no law, no rule or maxim, intimating a distinction in this respect, between the existence of insanity for a longer or shorter period of duration."

New York.—The revised statutes provide that if the provisions of an instrument of conveyance executed by the testator are wholly inconsistent with a previous testamentary disposition of his property, it shall work a revocation. 2 Rev. Stat. 65, § 48. See, as to construction, *Walker v. Steers* (Supreme Ct.), 14 N. Y. Supp. 398. Compare *Nottbeck v. Wilks*, 4 Abb. Pr. (N. Y. Supreme Ct.) 315.

Pennsylvania.—In *Re Cooper's Estate*, 4 Pa. St. 88, the court appears to have proceeded upon the principle that a subsequent alienation by the testator, of so much of his property as rendered his scheme of distribution impractical, worked a total revocation of the will. As to the application of the principle, see *Marshall v. Marshall*, 11 Pa. St. 430; *Balliet's Appeal*, 14 Pa. St. 457. Compare *Wogan v. Small*, 11 S. & R. (Pa.) 141; *Clingan v. Mitcheltree*, 31 Pa. St. 25.

Revocation Pro Tanto by Alienation of Estate.—Where a testator devised the south half of certain land, called the

"Cook Farm," to B, and the north half to A, and after the execution of the will, and previous to the death of the testator, a portion of said south half was sold to A, under a levy by the collector of taxes, it was held that the alienation of the part sold by the collector was a revocation *pro tanto* of the will. *Borden v. Borden*, 2 R. I. 94. *Brayton, J.*, in delivering the opinion of the court in this case said: "A voluntary alienation is *ipso facto* a revocation to the extent of such alienation. A man cannot dispose of more than he owns, and he is supposed, therefore, conclusively, not to intend to give away the property of another, and if that which, being his own at the time of making his will, he in fact devises, becomes before his death another's, he is presumed to revoke it; and whether it were presumed or not, the title of this other could not be defeated by the will, and such devise would and must be void, or such as it would be if the testator never owned the land." See also *Claggett v. Hall*, 9 Gill & J. (Md.) 90.

In *Marshall v. Marshall*, 11 Pa. St. 430, the more extensive meaning was given to the words revocation *pro tanto*. In that case, it was held that the revocation of a will *pro tanto* comprises all that part of the will, the execution of which is either entirely destroyed or prevented by alienation, or so far mutilated as to remove from the remnant the impress of the testator's intent. The true test of the extent of the words *pro tanto* appears to be the intent of the testator as gathered from the act or deed, and the bequests and devises in the will on which it operated. Thus, where a testator devised an estate to B charged with certain legacies, and devised another estate to A charged with other legacies, and before his death, he sold the estate devised to B, and B received a portion of the purchase-money, and after the testator's death paid or tendered all the legacies which he was directed by the will to pay, it was held that the sale of the estate devised to B was not a revocation of the entire will, but was only a revocation *pro tanto*.

1. See *infra*, this title, *Revocation by Marriage and Birth of Issue*.

14. Revocation by Void Conveyance.—At common law, an instrument purporting to be a conveyance, but incapable of taking effect as such, might, nevertheless, operate to revoke a previous devise on the principle that the attempted act of conveyance was inconsistent with the testamentary disposition, and, therefore, though ineffectual to vest the property in the alienee, produced a revocation of the devise. The rule obtained with some exceptions wherever the failure of the conveyance arose from the incapacity of the grantee, or from want of some ceremony essential to the efficacy of the instrument.¹ As, under the Statute of Victoria,² and corresponding statutes in most of the *United States*,³ an actual conveyance does not produce revocation except so far as it may, by alienating the testator's interest, leave the devise nothing to operate upon, it is obvious that a void or attempted conveyance cannot, under any circumstances, as such, have the effect of revocation, and the doctrine, therefore, has ceased to be of importance in such jurisdictions.⁴

15. Revocation by Marriage and Birth of Issue.—At common law, the will of an unmarried woman was revoked by her subsequent marriage,⁵ and in many states the rule has been expressly sanctioned by

1. 1 Jarm. on Wills (5th ed.), § 166; *Beard v. Beard*, 3 Atk. 72. See 1 Powell on Devises 584; *Montague v. Jefferies*, Moore 429, pl. 599; *Doe v. Bishop of Dandoff*, 2 B. & P. N. R. 404; *Shove v. Pincke*, 5 T. R. 124; *Vawser v. Jeffery*, 16 Ves. Jr. 519; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 269.

An exception existed where the conveyance was to charitable uses, and void under 9 Geo. II., ch. 36, on account of the grantor's death within twelve months of the execution. *Mathews v. Venables*, 9 J. B. Moore 286. Or where the grantor was under legal disabilities. *Eilbeck v. Wood*, 1 Russ. 564; *Lawrence v. Wallis*, 2 Bro. C. C. 319. Or the conveyance was void at law for fraud; although if valid at law, even if voidable in equity, it worked a revocation. 1 Jarm. on Wills (5th ed.) *167; *Simpson v. Walker*, 5 Sim. 1; *Hick v. Mors*, Ambl. 215.

2. 1 Vict., ch. 26, § 23.

3. LEGACIES AND DEVISES, vol. 13, p. 103.

4. 1 Jarm. on Wills (5th ed.) *167.

5. 1 Jarm. on Wills (5th ed.) *122; *Forse's Case*, 4 Rep. 81; *Doe v. Staple*, 2 T. R. 695; *Cotter v. Laver*, 2 P. Wms. 624; *Hodsdon v. Lloyd*, 2 Bro. C. C. 534; *Long v. Alfred*, 3 Add. 48. The doctrine seems to have been based upon the theory that as an unmarried woman could not modify the will after

coverture it ceased to be ambulatory, and could not therefore be relied upon as representing her wishes. See Lord Kenyon's observations in *Doe v. Staple*, 2 T. R. 695; *Morton v. Onion*, 45 Vt. 145; *Carey's Estate*, 49 Vt. 236.

Where Power of Disposing of Separate Property Is Preserved by Antenuptial Agreement.—Since an unmarried woman's will was held to be revoked by her subsequent marriage, upon the ground that coverture destroyed her testamentary capacity, and the instrument ceased to be revocable, it was held that where her powers of disposing of her separate property was preserved by an antenuptial agreement, her will previously made was not revoked by such marriage. *Cassady, J.*, in *Ward's Will*, 70 Wis. 255, citing 1 Sugd. Powers 182-190; *Wright v. Englefield*, Ambl. 468; *Rippon v. Dawding*, 2 Ambl. 565; *Rich v. Beaumont*, 6 Bro. P. C. 152; *Churchill v. Dibben*, 2 Kevy., pt. 2, p. 82; *Logan v. Bell*, 1 C. B. 872; 50 E. C. L. 872; *Doe v. Bird*, 2 N. & M. 679; *Downs v. Timperon*, 4 Russ. 334; *Dillon v. Grace*, 2 Sch. & Lef. 456. To the same effect see *Stewart v. Mulholland*, 88 Ky. 38. See also *Osgood v. Bliss*, 141 Mass. 474. But compare *Nutt v. Norton*, 142 Mass. 242. Compare *Morton v. Onion*, 45 Vt. 145.

In *Lant's Appeal*, 95 Pa. St. 279, a

woman in contemplation of marriage obtained from her intended husband his verbal consent that she should dispose of her property by will or otherwise as she pleased. The day before her marriage she executed a will whereby she made a liberal provision for her husband, and gave the residue of her estate to relatives, friends, and charities. It was held that while said will was revoked by her subsequent marriage, by reason of the Act of April 8, 1833, it might, nevertheless, take effect in equity as an antenuptial settlement, and that on every principle of equitable estoppel, the husband's mouth ought to be shut from interposing an objection to its full enforcement. The court, by Sharswood, C. J., said: "There are some matters involved in this controversy which must be assumed, if not conceded, as not in dispute. First, that the instrument purporting to be the last will and testament of Elizabeth M. Dunn, dated February 8, 1876, cannot take effect as a will, having been revoked by her marriage with the appellee on the following day. Probate of it was refused by the tribunal having exclusive jurisdiction as far as personal property is concerned, and its decree unappealed from is conclusive. Second, this revocation was by the positive provision of the statute April 8, 1833, § 14, Pamph. L. 250: 'A will executed by a single woman shall be deemed revoked by her subsequent marriage.' This law was not known to her, and not adverted to by her counsel called in by her to give his advice and prepare the instrument.

"It was certainly not thought by her that such a result would follow. She did not mean it to be revoked by her marriage. On the contrary, both she and her counsel meant to make a disposition which would be effectual after her marriage which was to be celebrated within twenty-four hours after the paper was executed. The execution of the will at the time and under the circumstances was a plain mistake. Had it been postponed only a few hours, until after the marriage ceremony was performed, it would have been a valid and effectual disposition of her property. Third, there was a contract made by John A. Mullen, the intended husband, at or about the time the instrument was executed, by which she was to have the power 'to dispose of her fortune, by will or otherwise, any way she pleased.' That this was the contract is established by the most

conclusive testimony, confirmed by the admission of the husband afterwards, who put his refusal to give effect to it, not on the ground that he had not freely and fairly so agreed, but that because it was not in writing he was not bound by it. In this he was mistaken, for a parol antenuptial contract such as this, being in consideration of marriage, which is a valuable one, is unquestionably binding on the parties. *Gackenback v. Brouse*, 4 W. & S. (Pa.) 546. That he knew and considered, at the time the instrument in question was executed, that it was intended to carry out and give effect to his antenuptial agreement, is proved by the clearest and most convincing evidence. If, as it has been earnestly contended, the decree of the court below must be affirmed, and the entire personal estate of the decedent awarded to the appellee, then it is not to be disputed that there must be some palpable defect in equitable jurisdiction in this commonwealth, to render necessary so gross an injustice, so revolting to the moral sense of what is right and wrong. We think, however, that fortunately there are two very familiar and well settled principles of equity often recognized and applied by our courts which prevent such a result. One of these principles is, that whatever a chancellor on the facts of a case would have decreed to be done, the courts, will consider as having actually been done. Another principle is, that wherever a person has the legal right to dispose of property and means to do so, the form of the instrument adopted for the purpose, if at law ineffectual, will be disregarded, and it will be reformed so as to be made effectual. Suppose then, that at the time the paper of February 8, 1876, was executed by Elizabeth M. Dunn, she had filed a bill in equity setting forth the antenuptial contract made by John A. Mullen, and the marriage about to be solemnized, and praying that it might be carried into execution by some instrument of writing to be signed by him, what would have been the decree of the court? Surely, upon the undisputed facts, the prayer of the bill would have been granted, and the decree would have been either that the husband and wife should join in a conveyance to trustees in trust for the separate use of the wife, with full power in her to dispose of the same in lifetime by sale or gift, and after her death by a will in

statute.¹ On the other hand, at common law, the will of an unmarried man was not revoked by his subsequent marriage, probably on the ground that the law had made a provision for the wife

writing, or any writing in the nature of a last will and testament. Such is the ordinary form of such powers in marriage settlements. If the complainant was willing, the court might decree simply that the husband himself should execute a declaration of trust to the same effect. Nothing is better settled than that a court of equity, in decreeing the specific performance of marriage articles, will make such a decree as will give full effect to the intention of the parties, without regard to the legal construction of the words used in them. Thus, if by the words, according to their legal construction, a fee-tail would be vested in the parties or either of them, a strict settlement will be decreed to the husband or husband and wife for life, with remainders to the children of the marriage—successively in tail—according to the most approved forms of deeds of marriage settlement. 2 Story's Eq. Jur. (13th ed.), § 983, and authorities there cited. Now if we are to consider as having actually been done what a chancellor would have decreed to be done, then we have at the time of the execution of the paper of February 8, 1876, either a conveyance to a trustee or a declaration executed by the husband to the same effect. Surely, then, under such a declaration or deed of settlement, this paper, though ineffectual as a will under the statute, was still a writing in the nature of a last will and testament, a clause introduced into such powers for the very purpose of providing against mere technical objection, which would prevent the instrument from being admitted to probate as a will. It was a disposition of property to take effect at death if not revoked by the party during life. That is a writing in the nature of a last will and testament. This paper was so intended beyond all question. It was executed under, and in pursuance of, the contract on the eve of the marriage—indeed it might almost be said to have been, in the consideration of equity, cotemporaneous with the ceremony—executed for the express purpose, with the knowledge and consent of John A. Mullen, of having just the effect here stated. It makes most liberal provision for him, and upon every principle of equitable estoppel his

mouth ought to be shut from interposing an objection to its full enforcement.

"The case, too, is equally within the second principle of equity adverted to; a paper executed by a person who had a perfect legal right to dispose of her property, and intended to do so, but by a plain mistake of the scrivener it was drawn in the form of a will when it ought to have been a deed or declaration of trust. Surely, it must be in the power of a court of equity in this commonwealth to correct so gross and palpable a mistake, to reform the instrument and decree it to be such as it ought to have been, so as effectually to carry out the intentions of the parties." *Compare McAnnulty v. McAnnulty*, 120 Ill. 26.

Wills Under Powers.—Exceptions existed in the case of a will which operated as an appointment under a power. *Logan v. Bell*, 1 C. B. 872; 50 E. C. L. 872. See *Doe v. Staple*, 2 T. R. 695; *Douglas v. Cooper*, 3 Myl. & K. 378.

In *Osgood v. Bliss*, 141 Mass. 477, Allen, J., said: "The reason given for holding that marriage is deemed to be a revocation of a woman's will—that she thereby divests herself of the power of revoking it, and destroys the ambulatory character necessary to a will—does not apply to an appointment by will. The woman has the same authority to execute the power of revocation and appointment when married as when sole. The nature, and not the form, of the instrument determines whether, at common law or under statutes, it is a will of which marriage is a revocation." See *McMahon v. Allen*, 4 E. D. Smith (N. Y.) 519.

1. See the various state statutes. See *Crum v. Sawyer*, 132 Ill. 457; *Duryea v. Duryea*, 85 Ill. 41; *Ellis v. Darden*, 86 Ga. 368; *Swan v. Hammond*, 138 Mass. 45; *Blodgett v. Moore*, 141 Mass. 75; *Brown v. Clark*, 77 N. Y. 369; *Matter of Davis' Estate*, 1 Tuck. (N. Y.) 107; *Lathrop v. Dunlop*, 14 Hun (N. Y.) 213.

Remarriage of Widow.—A widow is an unmarried woman within the statute. *Matter of Kauffman's Will* (Supreme Ct.), 16 N. Y. Supp. 113; *Blodgett v. Moore*, 141 Mass. 75.

independently of the act of the husband, by means of dower; nor did the subsequent birth of a child revoke a will made after marriage, since a married testator must be supposed to have had such an event in contemplation.¹ But where the whole, or at least

If a testator's circumstances be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will, such as may be presumed to produce a change of intentions, this will amount to an implied revocation, except as to persons who could gain nothing by a revocation or whose remedy is perfect without it; and therefore, where a will was made by a testatrix under special power contained in articles of marriage settlement, and a son is born to her thereafter, it will be revoked by operation of law, so far as regards the son. *Young's Appeal*, 39 Pa. St. 115.

Ohio.—It is expressly provided that the will of an unmarried woman is not revoked by her subsequent marriage. *Ohio Rev. Stat.* (1880), § 5958.

Effect of Husband's Death.—At common law the husband's subsequent death did not revive the will. 1 *Jarm. on Wills* (5th ed.) *122; *Long v. Aldred*, 3 Add. 48; and such is the statutory rule in *Pennsylvania, California, Dakota, Montana and Nevada*. *Purd. Dig.*, tit. "Wills," par. 19; *California Civ. Code*, § 6300; *Dakota Civ. Code*, § 709; *Montana Prob. Code*, § 460; *Nevada Comp. Laws*, § 822; *Stimson's Am. Stat. Laws*, § 2676.

Under the statute, a woman's subsequent marriage revokes her prior will without regard to her intention. Hence, the fact that the will was made in contemplation of the marriage, and left the property to the intended husband, does not prevent its being revoked. *Fransen's Will*, 26 Pa. St. 202; *Walker v. Hall*, 34 Pa. St. 488. Compare *Stewart v. Mulholland*, 88 Ky. 38; *Lant's Appeal*, 95 Pa. St. 279.

1. *Hoitt v. Hoitt*, 63 N. H. 475.

Rhode Island.—Under the *Rhode Island* statute, revocation of a will by marriage is presumptive only, not absolute, and evidence of the acts of the testator, and circumstances showing clearly an intention that the will shall stand, ought to be admitted. *Wheeler v. Wheeler*, 1 R. I. 364; *Miller v. Phillips*, 9 R. I. 141.

Thus, where a testator, having children by a former marriage, in contemplation of a second marriage, conveyed

his real property in trust for his children, or for such uses as he should, by will, appoint, and his intended wife released in the said conveyance all claim of dower in said estate, and, on the same day, the said intended wife made a conveyance of her property in trust for her heirs, and the testator released all claim, as future husband, thereto, and on the following day the testator made his will and two days thereafter the parties married, it was held that the will was not revoked by the marriage. *Wheeler v. Wheeler*, 1 R. I. 364.

In *Georgia*, the will is revoked unless made in contemplation of marriage. *Ellis v. Darden*, 86 Ga. 368.

In *Indiana*, the rule of the common law, that the mere marriage of a man, after he has made a will, does not revoke the will, is not changed by statute. So where the testator had an illegitimate son, and had taken, raised, and provided for him, and made a will devising all his property to him, and afterward married, but had no child by the marriage, and died without legitimate issue, it was held that the marriage did not revoke the will. *Bowers v. Bowers*, 53 Ind. 430.

Effect of Legislation Conferring Testamentary Capacity Upon Married Women.—In several states it has been held that unless it is provided by statute that the will shall be revoked by a subsequent marriage, legislation conferring testamentary capacity upon married women has abrogated the common-law doctrine. *In re Tuller's Will*, 79 Ill. 99; *Webb v. Jones*, 36 N. J. Eq. 163; *Noyes v. Southworth*, 55 Mich. 173; *Ward's Will*, 70 Wis. 251; *Emery, Appellant*, 81 Me. 275. Compare *Morton v. Onion*, 45 Vt. 145; *In re Carey's Estate*, 49 Vt. 236.

In *Noyes v. Southworth*, 55 Mich. 174, the court, by Campbell, J., said: "Laying aside such decisions as are made under statutes, the only foundation which has been suggested for holding a woman's marriage to operate as an implied revocation, is the common-law rule to that effect, which was based on the effect of marriage on a woman's property and testamentary capacity."

By marriage, her personalty devolved on her husband, and left nothing for a will to operate on, unless, possibly, such rights in action as should not be reduced to possession during coverture. So it was further held that she could make no testamentary provisions during coverture relating to her own property, without her husband's concurrence, and this would prevent a revocation, as well as any other testamentary act; and a will cannot be recognized which is not subject to revocation by the testator. These were reasons enough to maintain the common-law doctrine. And the exceptions show that these were the only reasons, for they only extended to wills under powers of appointment, and devises which were suspended during coverture and revived by the husband's death. These doctrines are elementary, and a general reference to the authorities cited on the argument will suffice. See, especially for the old doctrine, *Forse's Case*, 4 Rep. 61, and notes to modern editions, and the reference to *Plowden* 343; also 4 Kent's Com. (13th ed.) 523-527. Our constitution has done away with all the disabilities of coverture on this head, and expressly authorized every married woman to make wills of her estate as if she were sole. This leaves her case to be governed by the same rule which would apply to anyone else on change of condition. Apart from some decisions based on statutory or peculiar local usages, the doctrine is quite uniform that marriage alone, without birth of issue, will not revoke a man's will. It may be doubtful whether, under our statutes concerning children born subsequently, the birth of issue would have the same significance. That question is not before us. But there is no sound reason that we can perceive why, in the absence of statute, implied revocations should be extended, or should be differently treated as between men and women, when the property rights of married women have ceased to be hampered by marriage."

In *Webb v. Jones*, 36 N. J. Eq. 163, a widow made her will disposing of her property. She afterward entered into a marriage settlement, whereby she assigned a very large part of her property (it was all personal) and the income thereof, and of all her other property, to trustees in trust for herself for life, and after her death to distribute the property assigned to certain

persons whom she named, and who, with a few exceptions, were the same persons who were named as legatees in the will, reserving to herself, with the express assent of her future husband, a testamentary power of disposition over her estate, which was, by the settlement, put into the hands of her trustees. She married and died without any further execution of the power. It was held that her will was not revoked by her marriage, and was a good execution of the power.

In *Massachusetts*, however, it was expressly held that the common-law doctrine was not abrogated by such legislation. *Swan v. Hammond*, 138 Mass. 45. The court, by Colburn, J., said, in regard to the above reasoning: "This argument is not without force, but its force would be much greater if we could see any good reason why, in the case of a man, both marriage and the birth of a child should be held necessary for the revocation of his will. The rule was adopted from the civil law, and is now firmly established as part of the common law; but the reason upon which it is founded is not obvious. Marriage alone in the case of a man or woman would seem to be a sufficient change in condition and circumstances to cause an unimplied revocation of a will previously made. A will made before marriage, and taking effect after marriage, must take effect in a very different manner from that in the mind of the testator when the will was made. The rights of the husband or wife must greatly modify its provisions; and it can hardly be supposed that an unmarried person would make the same will he or she would make after marriage. If we were under no restraint, we might well hesitate to hold that, since testamentary capacity has been given to women, a will made by a woman when sole should be revoked only by marriage and the birth of a child, as in case of a man, for the sake of uniformity only, when we are inclined to think a better rule would be, that, in case of a man, his will should be revoked by marriage alone. But such a rule can only be introduced by the Legislature. In *England*, by the Stat. of 7 Will. IV. and 1 Vict., ch. 26, § 18, and in many of the states in this country, it has been provided by statute that the wills of both men and women shall be revoked by marriage. See collection of statutes in 1 Jarm. on Wills (5th ed.) 122, note. But we are of opinion that the question

substantially the whole, estate was devised, the will was revoked by the testator's marriage and the birth of a child conjointly,¹ unless provision was made for the wife and children by the will or

now before us has been so far settled by statute as not to admit of change by construction. Section 8 of the *Massachusetts* Pub. Stat., ch. 127, after providing that no will shall be revoked, unless by burning, tearing, etc., or some other writing executed in the manner required in the case of a will, goes on as follows: 'But nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.' It is not apparent that an entire revocation by implication of law results from any change of condition or circumstances, except that of a subsequent marriage. See the discussion in *Warner v. Beach*, 4 Gray (Mass.) 162. This clause as to implied revocations was first introduced in the *Massachusetts* Rev. Stat., ch. 62, § 9. The other provisions as to revocation were substantially taken from the Statute of 1783, ch. 24, § 2. The commissioners, in their note to this section, say: 'The clause as to implied revocations recognizes and adopts the existing law, as established and understood among us.' And their further discussion of this subject shows clearly that they had in mind the rule of the common law, that, in case of a man, marriage and the birth of a child, and, in case of a woman, marriage alone, revoked a will previously made. We are of opinion that this provision as to implied revocations, from its language, and the reasons given for its introduction, has substantially the force of an express enactment of the rules of the common law, which we are not at liberty to change, even if the reason for the rule, in case of a woman, no longer exists. This was the view taken in *Brown v. Clark*, 77 N. Y. 369, upon a similar question, under a statute of *New York*." See *Blodgett v. Moore*, 141 Mass. 75. Compare *Ward's Will*, 70 Wis. 255; *Brown v. Clark*, 77 N. Y. 369.

Of course, where a statute provides, that the will shall be revoked by marriage, there is no room for controversy. *McAnnulty v. McAnnulty*, 120 Ill. 26; *Brown v. Clark*, 77 N. Y. 369.

1. 1 Jarm. on Wills (5th ed.) *123; 4 Kent's Com. (13th ed.) 527; *Doe v. Edlin*,

4 Ad. & El. 587; 31 E. C. L. 143; *Doe v. Lancashire*, 5 T. R. 49; *Christopher v. Christopher*, Dick. 445, citing 4 Burr. 2182; *Spraag v. Stone*, Amb. 721; *Kenebel v. Scrafton*, 2 East 530; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506; *Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27; *Warner v. Beach*, 4 Gray (Mass.) 163; *Wilcox v. Rootes*, 1 Wash. (Va.) 140; *Baldwin v. Spriggs*, 65 Md. 373. See *Jacks v. Henderson*, 1 Desaus. (S. Car.) 556; *Tomlinson v. Tomlinson*, 1 Ashm. (Pa.) 224; *Yerby v. Yerby*, 3 Call (Va.) 334; *Morgan v. Davenport*, 60 Tex. 230.

Where Testator Is Married.—Where a married man made a will, survived his wife, married again, and had issue by his second wife, it was held that the will was revoked. *Christopher v. Christopher*, Dick. 445, citing 4 Burr. 2182; *Baldwin v. Spriggs*, 65 Md. 373.

So where a married man made his will, had issue, survived his wife, and married again, *Sir R. R. Arden, M. R.*, inclined to the opinion that the will was revoked. *Gibbons v. Caunt*, 4 Ves. Jr. 848. Compare *Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27.

Subsequent Acquisition of Property, which is not affected by the will, affords no ground for not applying the rule. *Baldwin v. Spriggs*, 65 Md. 373.

Posthumous Children.—It was immaterial that the birth of the child was posthumous, and the probability of such event not disclosed to the testator. *Doe v. Lancashire*, 5 T. R. 49; *Israell v. Rodon*, 2 Moo. P. C. 51; *Matson v. Magrath*, 1 Rob. 680. See *Hart v. Hart*, 70 Ga. 764; *Squire's Estate*, 11 Phila. (Pa.) 110; *Warner v. Beach*, 4 Gray (Mass.) 163.

But in *Ordish v. McDermott*, 2 Redf. (N. Y.) 460, it was held that a will made in ignorance of the existence of a living child, is not revoked, even at common law, by the discovery of its existence.

Substantially Whole Estate Must Be Devised.—Where less than the whole estate is disposed of it has been said that the will is not revoked. *Lord Mansfield* in *Brady v. Cubitt*, Doug. 31; *Lord Ellenlough* in *Kenebel v. Scrafton*, 2 East 541; *Tindal, C. J.*, in *Marston v. Roe*, 8 Ad. & El. 14; 35 E.

by previous settlement, or unless they would derive no benefit from setting it aside; for circumstances producing such a change in the testator's situation naturally lead to the presumption that he could not have intended a previous disposition which was without provision for them to continue unchanged.¹

C. L. 303; Denman, C. J., in *Doe v. Edlin*, 4 Ad. & El. 587; 31 E. C. L. 143; Havens v. Van Den Burgh, 1 Den. (N. Y.) 27.

"Supposing this to be clear (though it has never been positively decided), it would remain to be considered whether a will which actually, though not professedly, disposes of the testator's entire estate, as where there are particular gifts sufficient to absorb the whole, but no residuary disposition, falls within the principle. Considering, however, that the inquiry is not what the testator intended, but of the fact whether the wife and children be provided for, it can scarcely be doubted that this question would, if it arose, be answered in the affirmative." 1 Jarm. on Wills (5th ed.) *125.

1. 1 Jarm. on Wills (5th ed.) *128. See *Kenebel v. Scrafton*, 2 East 530; *Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27; *Warner v. Beach*, 4 Gray (Mass.) 163; *Baldwin v. Spriggs*, 65 Md. 373.

In *Doe v. Edlin*, 4 Ad. & El. 587; 31 E. C. L. 143, Denman, C. J., said: "The rule as to marriage and the birth of a child, amounting to an implied revocation of a will of lands, is not of universal application; for it does not apply in cases where the whole estate is not devised by the former will; nor where a man has been married before, and there are children of the first marriage (at least not in all such cases); nor where the marriage is in contemplation, and the intended wife, and the children the testator may have by her, after her marriage, have a provision made for them under a former will."

Rule Independent of Actual Intention—Settlement After Will—Settlement on Children.—"The doctrine does not suppose that, in every particular instance, an intention to revoke actually exists, but it annexes to the will a tacit condition that the party does not intend it to come into operation, if there should be a total change in the situation of his family." 1 Jarm. on Wills (5th ed.) *124. See *Doe v. Lancashire*, 5 T. R. 49; *Israell v. Rodon*, 2 Moo. P. C. 51;

Matson v. Magrath, 1 Rob. 680; 6 No. Cas. 709; 13 Jur. 350; *Marston v. Roe*, 8 Ad. & El. 14; 35 E. C. L. 303; *Baldwin v. Spriggs*, 65 Md. 373.

Hence a provision for the wife and children, under settlement executed after the will, cannot prevent revocation, as it might have done had the question been one solely of intention. 1 Jarm. on Wills (5th ed.), § 125; *Israell v. Rodon*, 2 Moo. P. C. 51. See *Matson v. Magrath*, 1 Rob. 680. See *Corker v. Corker*, 87 Cal. 643.

"Neither was a provision for the wife alone suffice, though made before the will; and it is not clear that a provision for children alone, though made before the will, would be sufficient for that purpose; for since the revocation by marriage and the birth of children results from a tacit condition annexed to the will, that it shall be so revoked unless both wife and children are provided for, and is not dependent on the testator's intention, no circumstance demonstrative of a contrary intention on his part, such as a provision for children (though the birth of children necessarily supposes marriage), can effect the question." 1 Jarm. on Wills (5th ed.) *125; *Marston v. Roe*, 8 Ad. & El. 14; 35 E. C. L. 303.

Extrinsic Evidence.—Evidence (not amounting to proof of republication) cannot be received in a court of law to show that the testator meant his will to remain in force, notwithstanding the subsequent marriage and birth of issue. *Marston v. Roe*, 8 Ad. & El. 14; 35 E. C. L. 303. See *Baldwin v. Spriggs*, 65 Md. 381; *Hoitt v. Hoitt*, 63 N. H. 498; *Gay v. Gay*, 84 Ala. 44; 4 Kent's Com. (12th ed.) 578.

This doctrine was placed partly upon the ground that the presumption in favor of revocation is *juris et de jure*, and partly upon the ground that the admission of such evidence (in the case of a devise of realty) was inconsistent with the Statute of Frauds. *Marston v. Roe*, 8 Ad. & El. 59; 35 E. C. L. 303.

In some states, such evidence has been admitted upon the authority of the ecclesiastical decisions which held

In *New York, California*, and several other states, it is expressly provided that if a testator marry and leave a widow or issue, the will is revoked unless provision be made for them in the will, or by settlement, or they are in such way mentioned in the will as to show an intention not to provide for them, and no other evidence to rebut the presumption of revocation can be received.¹

the presumption merely one of intention. *Yerby v. Yerby*, 3 Call (Va.) 341; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506.

Whether Will Is Revoked in Favor of Pre-existing Children.—"It seems, also, that marriage and the birth of a child or children revoke a will which is subject to the old doctrine, only where the effect of throwing open the property to the disposition of the law, would be to let in such after born child or children; for, if it would operate for the exclusive benefit of a pre-existing child, the ground for subverting the will fails. Thus, in *Sheath v. York*, 1 Ves. & B. 390, where a testator, having a son and two daughters, directed his real and personal estate to be sold for payment of his debts and for the benefit of those children. The testator was at that time a widower, he married again, and had issue, one child. The question arose, on a bill filed by the creditors for a sale, whether the will was revoked as to the real estate. Sir W. Grant held that it was not. 'In all cases,' he said, 'the will has been that of a person who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been to let in such after born heir to an estate disposed of by will made before his birth. The condition implied in these cases was, that the testator, when he made his will in favor of a stranger or more remote relation, intended that it should not operate if he should have an heir of his own body. In this case, there is no room for the operation for such a condition, as this testator had children at the date of the will, of whom one was his heir apparent, and was alive at the period of the second marriage, of the birth of the children by that marriage, and of the testator's death. Upon no rational principle, therefore, can this testator be supposed to have intended to revoke his will on account of the birth of other children, those children not deriving any benefit whatever from the revoca-

tion, which would have operated only to let in the eldest son to the whole of that estate, which he had by the will divided between the eldest son and the other children of the first marriage.' The reason of the M. R. extends only to cases in which the heir is among the pre-existing children, and it is probable that the revocation would take effect, notwithstanding the existence of such children, where the consequence of the intestacy would be to cast the estate on one of the subsequently born children (being an eldest or only son), or upon the children of both marriages (all being daughters). Such is the rule in regard to personal estate (this, or at least, the children's share of it, being distributable among all the children *pari passu*), a testamentary disposition of which has been decided to be revoked by a subsequent marriage and birth of children, notwithstanding the prior existence of children. *Holloway v. Clarke*, 1 Ph. 339 (*Walker v. Walker*, 2 Curt. 854). See also *Gibbon v. Caunt*, 4 Ves. Jr. 849; *Wright v. Netherwood*, 2 Salk., by Evans, 593. These observations assume that the effect of the will being revoked by the application of the doctrine in question, will be to produce intestacy; but this is not necessarily the case; for the consequence of the revocation might have been (*Helyar v. Helyar*, cited 1 Ph. 413; *Sullivan v. Sullivan*, cited 1 Ph. 343; *Emerson v. Boville*, 1 Ph. 324), to revive a prior uncanceled will, which contained a provision for the wife and children, protecting it from the revocation which the marriage and the birth of children produced on the subsequent will." 1 Jarm. on Wills (5th ed.) *126, 127.

1. So in *Nevada, Dakota, Montana*, and *Alabama*.

See *Gay v. Gay*, 84 Ala. 44; *Belton v. Summer*, 31 Fla. 139; *Parish v. Parish*, 42 Barb. (N. Y.) 274; *Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506; *Baldwin v. Spriggs*, 65 Md. 373; *Matter of Burton's Will* (Surrogate

The Statute of Victoria expressly provides that every will made by a man or woman shall be revoked by his or her marriage, with the exception of certain wills made in the exercise of powers of appointment,¹ and similar provisions exist in some states.² Under such legislation marriage alone produces complete revocation, irrespective of the testator's intent, without the birth of issue.³ In most of the *United States*, however, statutes also exist which provide, with slight modifications and exceptions in the several states, that a will made when there are no issue living, without mention of possible issue, is revoked if the testator leave a legitimate child.⁴

Ct.), 25 N. Y. Supp. 824; *Nutt v. Norton*, 142 Mass. 242.

An unmarried man by will ordered the sale of his real and personal property, the investment of the proceeds, and the payment of the interest to a lady whom he subsequently married; after his decease a son was born, who was not provided for in the will. It was held that as to the widow, the will was revoked by the marriage; and as to the son, by his birth after the testator's death, without being provided for therein; and that the estate must be distributed as in cases of intestacy. *Edward's Appeal*, 47 Pa. St. 144.

1. 1 Vict., ch. 26, § 18. For review of recent English decisions upon the subject, see 89 Law Times 20.

2. See local statutes; also *Byrd v. Surles*, 77 N. Car. 435.

In *Rhode Island*, *Connecticut*, *Illinois* and *Georgia*, a will is revoked by the testator's subsequent marriage. *Stimson Am. Stat. Law*, § 2676, citing *Rhode Island Pub. Stat.* (1882), ch. 182, § 6; *Connecticut Laws* (1885), ch. 110, § 135. Compare *Goodsell's Appeal*, 55 Conn. 171; *Illinois Rev. Stat.* (1883), art. 39, § 10; *Georgia Code* (1882), § 2477. See *Tyler v. Tyler*, 19 Ill. 151; *Duryea v. Duryea*, 85 Ill. 41; *Morgan v. Ireland*, 1 Idaho 786; *Loomis v. Loomis*, 51 Barb. (N. Y.) 257; *Blodgett v. Moore*, 141 Mass. 75; *Fransen's Will*, 26 Pa. St. 202; *American Board, etc. v. Nelson*, 72 Ill. 564; *Brown v. Scherrer* (Colo. 1894), 38 Pac. Rep. 427; *Wheeler v. Wheeler*, 1 R. I. 364; *Phaup v. Wooldridge*, 14 Gratt. (Va.) 332; *Morgan v. Davenport*, 60 Tex. 230; *Roane v. Hollingshead*, 76 Md. 369. And see also *Church v. Crocker*, 3 Mass. 17; *Noyes v. Southworth*, 55 Mich. 173; *Sanders v. Simcich*, 65 Cal. 50.

In *Morgan v. Ireland*, 1 Idaho 786,

it was held that whenever new moral and testamentary duties arise subsequent to the execution of a will, the will is revoked by presumption or operation of law, unless the objects of those duties are provided for, either by the law or the will.

3. 1 Jarm. on Wills, § 129; 1 Vict., ch. 26, § 19; *North Carolina Code* (1883), § 2178. See *Morgan v. Ireland*, 1 Idaho 786; *McAnnulty v. McAnnulty*, 120 Ill. 26; *Sanders v. Simcich*, 65 Cal. 52; *Corker v. Corker*, 87 Cal. 643. Such is the effect in regard to a woman's will under analogous statutes. See *Fransen's Will*, 26 Pa. St. 202; *Walker v. Hall*, 34 Pa. St. 483.

4. So in *Connecticut*, *New Jersey*, *Delaware*, *Virginia*, *West Virginia*, *Kentucky*, *Texas*, *Mississippi*, *Indiana*, *Georgia* and *Louisiana*. *Stimson's Am. Stat. Law*, § 2676, citing *Connecticut Rev. Stat.* (1875), tit. 18, ch. 11, § 6; *New Jersey Revision* (1877), "Wills," § 8; *Delaware Rev. Code* (1874), ch. 84, § 11; *Virginia Code* (1873), ch. 118, § 17; *West Virginia Laws* (1882), ch. 84, § 16; *Kentucky Gen. Stat.* (1873), ch. 113, § 24; *Texas Rev. Stat.* (1879), § 4869; *Mississippi Code* (1880), § 1263; *Indiana Rev. Stat.* (1881), § 2560; *Georgia Code* (1882), § 2477; *Louisiana Rev. Civ. Code* (1875), § 1705.

Construction.—See further, as to construction of local statutes referred to in above section, *Branton v. Branton*, 23 Ark. 569; *Rhodes v. Weldy*, 46 Ohio St. 234; *Evans v. Anderson*, 15 Ohio St. 324; *Ash v. Ash*, 9 Ohio St. 383; *Alden v. Johnson*, 63 Iowa 124; *Squire's Estate*, 11 Phila. (Pa.) 110; *Ward v. Ward*, 120 Ill. 111; *Gay v. Gay*, 84 Ala. 38; *Baldwin v. Spriggs*, 65 Md. 373; *Armistead v. Dangerfield*, 3 Munf. (Va.) 20; *Parham's Succession*, 11 La. Ann. 646; *Coudert v.*

Coudert, 43 N. J. Eq. 407; Stevens v. Shippen, 28 N. J. Eq. 487; Hackett v. Stephens, 3 La. Ann. 271; Lewis v. Lewis, 8 La. Ann. 378; Morse v. Morse, 42 Ind. 365; Hughes v. Hughes, 37 Ind. 183; Bloomer v. Bloomer, 2 Bradf. (N. Y.) 339; Church v. Crocker, 3 Mass. 17; Prentiss v. Prentiss, 11 Allen (Mass.) 47; Nutt v. Norton, 142 Mass. 242; Hart v. Hart, 70 Ga. 764; Holloman v. Copeland, 10 Ga. 79; Thomas v. Black, 113 Mo. 66; Negus v. Negus, 46 Iowa 487; Fallon v. Chidester, 46 Iowa 588; McCullum v. McKenzie, 26 Iowa 510; Carey v. Baughn, 36 Iowa 540; Osborn v. Jefferson Nat. Bank, 116 Ill. 130; Tomlinson v. Tomlinson, 1 Ashm. (Pa.) 224; *In re Wardell's Estate*, 57 Cal. 484; Beck v. Metz, 25 Mo. 70; Pounds v. Dale, 48 Mo. 270; Hockensmith v. Slusher, 26 Mo. 237; Guitar v. Gordon, 17 Mo. 408; Wetherall v. Harris, 51 Mo. 65; Cotheal v. Cotheal, 40 N. Y. 405; Moon v. Evans, 69 Wis. 667; Coates v. Hughes, 3 Binn. (Pa.) 498; Fidelity Ins., etc., Co.'s Appeal, 121 Pa. St. 1; Chace v. Chace, 6 R. I. 407; Potter v. Brown, 11 R. I. 232; Sanford v. Sanford, 4 Hun (N. Y.) 753; Matter of Huell, 6 Dem. (N. Y.) 352; Mercantile Trust, etc., Co. v. Rhode Island Hospital Trust Co., 36 Fed. Rep. 863; Morgan v. Davenport, 60 Tex. 230; Waterman v. Hawkins, 63 Me. 156; Cunningham v. Cunningham, 30 W. Va. 599; Wilcox v. Rootes, 1 Wash. (Va.) 140. *Compare* Ellis v. Ellis, 2 Desaus. (S. Car.) 556; Savage v. Mears, 2 Rob. (Va.) 570; M'Cay v. M'Cay, 1 Murph. (N. Car.) 447.

Pennsylvania.—In *Pennsylvania*, a will is revoked under the following circumstances. First. The will of a single woman is revoked by her subsequent marriage, and is not revived by the death of her husband. Second. If a man makes his will and marries, and dies leaving a widow, so far as regards the widow he dies intestate; that is, his will is revoked *pro tanto*. Third. If a man makes his will, and has an after born child, or children, not provided for in such will, and dies leaving such after born child, or children, so far as regards such child, or children, he dies intestate, and his will is revoked *pro tanto*. Fourth. If a man makes his will and marries, and dies leaving a widow and child not provided for in such will, his will is not revoked absolutely, as at common law, but only *pro tanto*. Fifth. If a man makes his will, mar-

ries, and dies, leaving a widow, but no known heirs or kindred, it is clearly revoked, so far as to give to his widow, both the real and personal estate absolutely. Walker v. Hall, 34 Pa. St. 483. See Edward's Appeal, 47 Pa. St. 144; Hollingsworth's Appeal, 51 Pa. St. 518; Fidelity Ins., etc., Co.'s Appeal, 121 Pa. St. 1.

Ohio.—B. made his will June 20, 1830, devising all his estate to his wife, and died, without issue, on the 7th of July following, seised of lands. The will was admitted to probate Oct. 7, 1830; and on the 4th of December following, the widow of B. was delivered of a son, the child of M. It was held that at the time of making such will, the testator had no child *in esse*, within the meaning of section five of the Act of 1824, relating to wills, and therefore that the birth of the child avoided the will. Evans v. Anderson, 15 Ohio St. 324.

Georgia.—Where a testator made his will devising his property to his wife and children then in life, and two years after the date of his will had another child born, for whom no positive provision was made, and departed this life without altering said will after the birth of such after born child, it was held that according to the provisions of the Act of 1834, the testator must be considered as having died intestate, notwithstanding such after born child might be entitled to some portion of the testator's property under the will, on the happening of certain contingencies mentioned therein, under the general description of "children." Holloman v. Copeland, 10 Ga. 79.

In *Deupree v. Deupree*, 45 Ga. 415, it was held that the marriage of a testator or the birth of a child to him subsequent to the making of a will, in which no provision is made in contemplation of such an event, is, by presumption of law, a revocation of the will, and this presumption cannot be rebutted by any declarations of the testator, whether by parol or in writing, at the time of the marriage, or even by a settlement on the wife, and a renunciation by her of all interest in the estate of her husband, unless the declarations or provisions be testamentary in their character, and be executed by the testator with the forms and solemnities required for making a will.

Illegitimate Children.—**Iowa.**—Under the statutes of this state, an illegitimate child, which has been notoriously recognized by its father, inherits from the

16. Extrinsic Evidence.—Where the effect of doubtful acts of revocation is to be established, extrinsic evidence of the surrounding circumstances, and even of the verbal or written declarations of the testator, is admissible, to show the intent with which the act was committed.¹ But when the act is insufficient to constitute a legal revocation, evidence of the intent is irrelevant and

father share and share alike with his legitimate children; and the birth and recognition of an illegitimate child, after the execution of a will by the father, has the effect to revoke the will, the same as the birth of a legitimate child. *Milburn v. Milburn*, 60 Iowa 411. Compare *Kent v. Barker*, 2 Gray (Mass.) 535.

Adopted Children.—Subsequent adoption of a child is held no revocation in *Indiana* and *North Carolina*. *Davis v. Fogle*, 124 Ind. 41; *Davis v. King*, 89 N. Car. 441.

Retrospective Operation of Such Statutes.—Such statutes are not retrospective. Thus in *Connecticut*, before the act of 1885 (Session Laws of 1885, ch. 110, § 135), a man's will was revoked by marriage and the birth of a child, but not by marriage alone.

The act provides that "if after the making of a will the testator shall marry, or if a child is born to the testator, and no provision is made in the will for such contingency, such marriage or birth shall operate as a revocation of such will." It was held to be prospective only, and that it could not operate upon any will where the marriage or birth had already occurred at the time the act was passed, although the testator died afterwards, *Goodsell's Appeal*, 55 Conn. 171. The court, by Pardee, J., said: "As a rule of interpretation all statutes are to operate prospectively unless they contain language unequivocally and certainly retrospective. The above statute looks forward and not backward. It can be said to be a remedial statute only in the sense that all statutes are passed because they are expected to benefit the public either by lifting burdens or conferring privileges. It is not the casting of a common-law rule into the fixed form of a statute; for there was no such rule in existence. It is the gift of a right to the wife to demand and receive a greater share of her husband's estate, under specified circumstances, than she previously could receive. We may be of opinion that the right given to the wife in this statute

should have been given to her long before; but that is not a valid reason why a law giving additional rights should operate retrospectively. Possibly estates in like situation with the one before us have been settled and property vested; possibly wrong would be inflicted if we should give retrospective effect to this statute."

1. *Schouler on Wills* (2d ed.), § 403; *Evan's Appeal*, 58 Pa. St. 238; *Patterson v. Hickey*, 32 Ga. 156; *Boudinot v. Bradford*, 2 Yeates (Pa.) 170; *Eyster v. Young*, 3 Yeates (Pa.) 511; *Bethell v. Moore*, 2 Dev. & B. (N. Car.) 311; *Tynan v. Paschal*, 27 Tex. 286. See *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Law v. Law*, 83 Ala. 432; *Collagan v. Burns*, 57 Me. 449; *Pickens v. Davis*, 134 Mass. 252; *Kidder's Estate*, 66 Cal. 487; *Tucker v. Whitehead*, 59 Miss. 594; *Vining v. Hall*, 40 Miss. 83; *Caeman v. Van Harke*, 33 Kan. 333.

After the death of the testatrix, a will twenty-five years old was discovered in a barrel among waste papers, and either torn or worn into several pieces, which were scattered loose among the papers in the barrel. It was held that whether the injury to the instrument was done by the testatrix or by some other person, and, if by her, whether accidentally, or intentionally, and for the purpose of revoking the will, are questions of fact for the jury; and to aid them in determining these questions, and not as separate and independent evidence of a revocation, the declarations of the testatrix, made after the date of the will, that she had destroyed it, are competent evidence. *Lawyer v. Smith*, 8 Mich. 412.

Intent to Revoke Wholly or in Part—How Shown.—In *Clarke v. Scripps*, 2 Rob. 568, Sir J. Dodson said: "The intention of a testator to revoke wholly, or in part, may, I conceive, be proved. First. By evidence of the expressed declaration of a testator, especially if such declaration was contemporaneous with the act. If in doing the act, whether burning, tearing, or destroying the whole or a part, he should

inadmissible.¹ Inasmuch as marriage and birth of issue are, in themselves, an absolute revocation of a will made previous to the marriage, but not in contemplation of it, extrinsic evidence of the testator's intent to the contrary is inadmissible.²

XIII. REVIVAL AND REPUBLICATION—1. **At Common Law.**—Until the passage of the Statute of Frauds, 29 Car. II., ch. 3, wills of both real and personal property could be revived or republished by an informal writing or even by parol evidence of the testator's acts or declarations showing an intent to revive.³

declare that he so did with the intention to revoke, there would be the act and intention; to whatever extent the act was carried, if he declared that it was his intention thereby to revoke the instrument, that declaration, I apprehend, coupled with the act, would be sufficient. Secondly. The intention may, in the absence of any express declaration, be inferred from the nature and extent of the act done by a testator; *i. e.*, it may be inferred from the state and condition to which the instrument has been reduced by the act. From the face of the paper itself, it may be inferred, either he did intend to destroy it altogether, or did not. Thirdly. The intention may, in some degree at least, be inferred from extrinsic circumstances. There may have been declarations, not direct as to the revocation, but such as would lead to the inference, whether he did intend to revoke the will, or did not."

Under the *Alabama* statute, which, after excepting certain implied revocations, provides that "a will in writing can be revoked by burning, tearing, canceling, or obliterating the same, with the intention of revoking it," etc., it was held that where a testator had drawn his pen through the name of one of several devisees, evidence of his declarations that he thereby intended to revoke his will should have been admitted; but that since the statute omitted the words "or any clause thereof," which occur in the original English Statute of Frauds, such evidence could only be admitted to prove an intention to revoke the whole will, and not merely the devise to the person whose name was canceled. *Law v. Law*, 83 Ala. 432.

Evidence that a subsequent will had been made and afterward stolen from the testator, without any evidence as to its contents, and proof of his declarations, after the will was stolen, that he

would die intestate, and leave his property to be distributed according to the statute, was held insufficient as evidence of the revocation of a former will. *Hylton v. Hylton*, 1 Gratt. (Va.) 161.

1. *Shouler on Wills* (2d ed.), § 403; *Smith v. Fenner*, 1 Gall. (U. S.) 170; *Hargroves v. Redd*, 43 Ga. 143; *Gay v. Gay*, 60 Iowa 415; *Wittman v. Goodhand*, 26 Md. 25; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31. See *Clark v. Smith*, 34 Barb. (N. Y.) 140; *Hoitt v. Hoitt*, 63 N. H. 499; *Davis v. King*, 89 N. Car. 441.

The legal effect of revoking a subsequent will containing a clause expressly revoking prior wills, cannot be controlled by evidence of the testator's intent to revive a former will. *Vurtzell v. Beckman*, 52 Mich. 478.

2. *Marston v. Roe*, 8 Ad. & El. 14; 35 E. C. L. 303; *Israell v. Rodon*, 2 Moo. P. C. 51; *Matson v. Magrath*, 1 Rob. 680. See *Hoitt v. Hoitt*, 63 N. H. 498; *Baldwin v. Spriggs*, 65 Md. 381; *Gay v. Gay*, 84 Ala. 44; 4 Kent's Com. (12th ed.) 578.

Formerly the ecclesiastical courts admitted such evidence. *Gibbons v. Cross*, 2 Add. 455; *Johnston v. Johnston*, 1 Ph. 447; *Yerby v. Yerby*, 3 Call (Va.) 341; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506. See *supra*, this title, *Revocation by Marriage and Birth of Issue*.

3. *Schouler on Wills* (2d ed.), § 444; *Jackson v. Hurlock*, Amb. 494; *Alford v. Earle*, 2 Vern. 209; *Peekford v. Parne-cott*, Cro. Eliz. 493; 1 Saund. 277. See 1 Roll. Abr. 617; Tr. Pl. 2; *Long v. Alfred*, 3 Add. 48; *Braham v. Burchell*, 3 Add. 264; *Miller v. Brown*, 2 Hagg. 209; *Abney v. Miller*, 2 Atk. 599; *Harvard v. Davis*, 2 Binn. (Pa.) 425; *Jones v. Hartley*, 2 Whart. (Pa.) 103; *Harwell v. Lively*, 30 Ga. 315; *Bohanon v. Walcot*, 2 Miss. 336.

Before the Statute of Frauds, it was held that anything which showed an

intent that a will of lands should take effect as of a subsequent date, was a sufficient republication. 1 Roll. Abr. 618, pl. 7; Anonymous, 2 Hun (N. Y.) 48; Barnes v. Crowe, 1 Ves. Jr. 497; Cotton v. Cotton, *citing* Alford v. Earle, 2 Vern. 209.

In Braham v. Burchell, 3 Add. 264, Sir John Nicholl said that the mere conservation of a will for many years, taken in connection with its place of deposit, may so evidence adherence to and approval of it as to amount to republication.

In Miller v. Brown, 2 Hagg. 209, as stated 1 Wms. on Exrs. 207, "which also was a question whether a widow had republished a will made during her coverture, the evidence established that after the death of her husband she frequently recognized the instrument as her will, and expressed her satisfaction that it was made; and that three months before her death, and eighteen months after that of her husband, she delivered to one of the executors a tin box, which she told him contained her will (and in which it was found after her death); and on the same day told the father-in-law of the executor that she had that day deposited her will with him. Sir John Nicholl held that this was a republication to all intents and purposes, as far as regarded the personality."

So a canceled or obliterated will, which remains legible, might be revived by words or acts of the testator showing that he meant it to operate notwithstanding. Schouler on Wills (2d ed.), § 445; Slade v. Friend, *citing* 2 Cas. temp. Lee 84; Brotherton v. Hellier, 2 Cas. temp. Lee 55.

"If one of the executor's names be stricken out," says Wentworth, Office of Ex. (4th ed.), ch. 1, p. 68, "and afterwards a *stet* be written over his head by the testator or by his appointment, now he is a revived executor. So if the testator express by word, in the presence of witnesses, that the party put out shall be executor. But now I mean where the executor's name is not so blotted out but that it may be read and discerned, for else the *stet* is upon nothing; and if the verbal reaffirmance should renew his executorship, then must the will be partly in writing, and partly nuncupative, his name not being to be found in the written will."

But where the testator was in search of another paper, and a person who was assisting him took up the will by

mistake, whereupon the testator said: "That is my will," Lord Hardwicke held the evidence insufficient to establish the *animus republicandi*. Abney v. Miller, 2 Atk. 599.

Where There Are Two Wills of Different Dates.—So "where there are two wills of different dates, both remaining uncanceled, some direct and very unequivocal act of republication is required to set up the will of the earlier date, and so revoke that of the later; for the presumption of law is strongly in favor of the last dated will uncanceled." Wms. on Exrs. 209, *citing* Stride v. Cooper, 1 Ph. 336.

Where Republication of an Earlier Will Revokes a Later Will.—Where the effect of republishing an earlier will was to revoke one of later date which remained uncanceled and contained an express clause of revocation, it seems that the testator's declarations alone were held insufficient.

In Daniel v. Nockolds, 3 Hagg. 777, as stated in 1 Wms. on Exrs. 210, "the deceased, by a will made in the year 1819, attested by three witnesses, gave his brother a legacy of one hundred pounds and after bequeathing further legacies left the residue to Mary Tomkins, and appointed Daniel and Bush his executors, without a legacy to either. In the year 1823 he made a new will, in which he devised a small freehold to Tomkins, and appointed Parkinson sole executor and residuary legatee. This will contained a clause of revocation, and was duly executed. Both Tomkins and Parkinson died in the testator's lifetime. In 1827, the deceased, on several occasions during his last illness, conversed with different persons respecting his affairs, produced and read to them his will of 1819, declared that it was his last will, and what he wished to be carried into effect; and that Daniel and Bush were his executors, and would have the management of his affairs. After his death the will of 1819 was found carefully deposited and locked up in one of the drawers of his bedroom, and that of 1823 at the bottom of the same drawer, but much soiled and crumpled among old and useless papers. It was held that the will of 1819 was not revived, and administration with the will of 1823 annexed was decreed to the brother; and Sir John Nicholl, in giving judgment, said: 'This is not like the case of a later canceled will, because then the very act of cancellation revokes the

2. Under English and American Statutes.—The Statute of Frauds,¹ which made formal execution essential for all wills of land, provided as part of the same scheme that no will of lands should be republished, except by its re-execution in the presence of three witnesses, or by a codicil duly executed in like manner.² The Statute of Frauds, however, left wills of personalty untouched.³

latter, and lays a foundation for an inference that the testator intended the former will to operate; but here is a later revocatory will entire, and in force as a revocation of the former, though the devises and bequests may have lapsed. Can the former will be revived without an act of republication, or indeed of re-execution; or rather can the latter will be revoked by mere declarations? If it were merely a will of realty, it clearly could not have been contended that there had been a republication of the former will, because the words of the sixth section of the Statute of Frauds are express. It is clear, also, under section twenty-two, that the latter will could not have been revoked by mere declarations, unaccompanied by some writing; but here is no declaration in writing; nothing reduced into writing during the deceased's lifetime; nor are there any acts; the circumstances of the finding are too slight—they might be merely accidental. The latter will was in an envelope; and there is no appearance that it was rumpled. Why did not the deceased, a professional man, cancel, if he intended to revoke it, and revive the former will? Declarations without acts are always dangerous evidence; they are frequently insincere—liable to be misapprehended—not accurately recollected. The case of *Miller v. Brown*, 2 Hagg. 209, does not apply. In that case there had been no revocation; all that was there required was to show adherence. In this case there is an express revocation, and that revocation is to be removed by parol—that is the difficulty."

In *Williams v. Williams*, 142 Mass. 515, a testator executed three wills, each containing a revocatory clause, and each of which he published and declared to be his last will. At the time he executed the third will, he said he would keep them all until he made up his mind which he wanted, and would then destroy the two he did not want. He afterward destroyed the first and third wills. It was held that

these facts would warrant a finding that the testator, in canceling the third will, intended to revive the second will, without further evidence of a republication of this will.

1. 29 Car. II., ch. 3, § 5.

2. Schouler on Wills (2d ed.), § 442; *Osborne v. Rogers*, 1 Saund. 268; 1 *Powell on Devises* (3d ed.) 609. See *Jackson v. Holloway*, 7 Johns. (N. Y.) 394; *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Love v. Johnston*, 12 Ired. (N. Car.) 355; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 269; *Cogdell v. Widow, etc.*, 3 Desaus. (S. Car.) 346; *James v. Marvin*, 3 Conn. 576; *Harwell v. Lively*, 30 Ga. 315; *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272. See also *Bohanon v. Walcot*, 2 Miss. 336. Compare *Boudinot v. Bradford*, 2 Dall. (U. S.) 266; *Lawson v. Morrison*, 2 Dall. (U. S.) 286; *Burns v. Burns*, 4 S. & R. (Pa.) 295.

3. *Long v. Aldred*, 3 Add. 48; *Braham v. Burchell*, 9 Add. 264; *Miller v. Brown*, 2 Hagg. 209; *Cogdell v. Widow, etc.*, 3 Desaus. (S. Car.) 346.

"By reason of the enactments of the fifth section of the Statute of Frauds (29 Car. II., ch. 3), no will of lands could be republished, except by re-execution in the presence of three attesting witnesses, or by a codicil duly executed according to the statute. But as that section did not apply to wills of personalty, such a will might be republished, not only by an unattested codicil, or other writing, but by the mere parol acts or declarations of the testator. It has, indeed, been said, that there must be some difficulty in holding that the statute, by the prohibition in section nineteen, of nuncupative wills, has not in effect prohibited nuncupative republications. But, upon a closer examination of the subject, it should seem that the statute does not affect the question. It must be remembered, that no publication nor formalities of execution are required either by the Statute of Frauds, or the general law, for the validity of a will of personalty, if made before the Statute of Victoria

Chapter 26, section 22, of the English Statute of Victoria¹ expressly provides that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by its re-execution, or by a duly executed codicil showing an intent to revive the same.² In the *United States*, it has been held, under

came into operation. It has already been shown that such a will need not be executed by the testator; it is sufficient if it be in writing, and approved of by him before his death. Hence, it should appear, that if a will of personality, which has been revoked, or made at a distant period, be afterwards sufficiently recognized as his operative will, by the parol acts or declarations of the testator, the will so recognized becomes, as any other written document would, his legal will of the date of the recognition." 1 Wms. on Exrs. *206.

1. 1 Vict., ch. 26, § 22.

2. The text of this provision of the English Wills Act, 1 Vict., ch. 26, § 22, is as follows: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

Construction.—"Inasmuch as the old doctrine of the republication of wills by parol acts or declarations, depends on the principle that the will so recognized becomes a new will, of the date of the recognition, no such republication can take place, in respect of any will whatever, since the new statute came into operation, because no new will can be made unless with the prescribed formalities. Again, it is clear that no republication can now in any case be affected by a codicil, unless the codicil be executed according to the exigencies of the new statute, because such republication depends on the codicil becoming a part of the will, and it cannot become a part unless it be so executed. But if it be so executed, it will still amount to a republication of the will according to the old law, as above stated, unless it appears on the face of it that it was not the intention

of the testator to republish; or unless the will has been in some manner revoked, in which case the new statute further requires that the codicil should show an intention to revive the will."

1 Wms. on Exrs. 215. See *Doe v. Walker*, 12 M. & W. 591; *Skinner v. Ogle*, 1 Rob. 363; *Hale v. Tokelove*, 2 Rob. 318.

The result of the decisions upon this provision is thus stated by Mr. Theobald: "Where a testamentary disposition is revoked by a subsequent disposition, which latter is in its turn revoked, the former disposition is not thereby revived. *Burtenshaw v. Gilbert*, Cowp. 49; *Goods of Brown*, 1 S. & T. 32; *Brown v. Brown*, 8 El. & Bl. 876; 92 E. C. L. 875; *Wood v. Wood*, L. R., 1 P. & D. 309. It has recently been doubted, whether, since the Wills Act, a codicil, described as a codicil to a will of a particular date which has been revoked, would be sufficient to revive the revoked will in the absence of any additional evidence of 'intention to revive the same.' *In re Steele*, L. R., 1 P. & D. 575. There is an obvious distinction between a codicil incorporating and giving effect to earlier untested instruments, for which purpose a mere reference is sufficient, and a codicil reviving a revoked instrument. There are, however, cases in which a codicil described as a codicil to a particular will which had been revoked by marriage, there being no other will in existence, has been held sufficient to revive the revoked will. *In re Chapman*, 1 Rob. 1; *Payne v. Trappes*, 1 Rob. 583. This was clearly the rule before the Wills Act, *Walpole v. Orford*, 3 Ves. Jr. 402; 7 T. R. 138. In the case of *Neate v. Pickard*, 2 No. Cas. 406, and in *The Goods of Reynolds*, L. R., 3 P. & D. 35, there appear to have been express words of confirmation. It seems a codicil, described as a codicil to a will of a particular date, though the codicil is directed to take effect only in events which do not happen, may have the effect of reviving the will. *In bonis Da Silva*, 2 S. & T. 315. See *Parsons v. Lanoe*, 1 Ves. 100. If there are two wills, the latter of

local statutes, more or less positively worded, that the republication of a will is essentially at the present day equivalent to the making of a new will, and the usual formalities of execution must be followed.¹

which revokes the earlier, it seems a codicil described as a codicil to the testator's last will, but giving the date of the revoked will, will not revive that will or revoke the second will. *In re May*, L. R., 1 P. & D. 581; *In re Ince*, L. R., 2 P. & D. 111. These cases may very well be supported on the ground that the description of the will by the codicil was ambiguous, the will of the date mentioned not being the last will of the testator, or, in fact, his will at all, as it had been revoked. In *Re Anderson*, 39 L. J. P. 55, the principle applied was the same. In that case the codicil was expressed to be a codicil to the testator's last will, but confirmed a will by date which had been revoked. In *Re Wilson*, L. R., 1 P. & D. 582, the codicil, though referring to a revoked will by date, went on to refer to certain bequests as contained in that will, which were, in fact, contained in a later will. There was, therefore, a clear case of mistaken description. A testamentary disposition, written at the foot of a will revoked by marriage, and referring to a bequest contained in the will, though not referring to the will in terms or described as a codicil, is sufficient to revive the will. *In re Terrible*, 2 S. & T. 8. The fact that a codicil is found attached by tape to a will which has been revoked by a later will, will not revive the revoked will. *Marsh v. Marsh*, 1 S. & T. 528. A will which has been destroyed and no longer exists in writing cannot be revived by a codicil, though there may be a draft of the will in existence. *Hale v. Tokelove*, 2 Rob. 318; *Newton v. Newton*, 12 Ir. Ch. 118; *Rogers v. Goodenough*, 2 S. & T. 342. A codicil making an alteration in a will, and confirming it in all other respects, does not revive the will so far as it has been altered by intermediate codicils. *Crosbie v. MacDonal*, 4 Ves. Jr. 610; *Green v. Tribe*, 9 Ch. Div. 231. *Theobald on Wills* (2d ed.) 58.

1. *Schouler on Wills* (2d ed.), § 442; 1 *Jarm. on Wills* (Rand. & Talchett) 362, note 2. See *Barker v. Bell*, 46 Ala. 216; *Carey v. Baughn*, 36 Iowa 540; *Love v. Johnston*, 12 Ired. (N. Car.) 355; *Sawyer v. Sawyer*, 7 Jones (N. Car.) 134; *Warner v. Warner*, 37 Vt.

356; *Witter v. Mott*, 2 Conn. 67; *Cogdell v. Widow, etc.*, 3 Desaus. (S. Car.) 346; *Dunlap v. Dunlap*, 4 Desaus. (S. Car.) 321; *Sharp v. Wallace*, 83 Ky. 584; *In re Penniman's Will*, 20 Minn. 245; *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Musser v. Curry*, 3 Wash. (U. S.) 481. But see *Hatch v. Hatch*, 2 Hayw. (N. Car.) 33; *Marsh v. Marsh*, 3 Jones (N. Car.) 77; *Reynolds v. Shirley*, 7 Ohio 39; *Den v. Speight*, 10 Ired. (N. Car.) 459; *Jones v. Hartley*, 2 Whart. (Pa.) 103; *Wallace v. Blair*, 1 Grant Cas. (Pa.) 75; *Matter of Knapp's Will* (Surrogate Ct.), 23 N. Y. Supp. 282.

New York.—Under the *New York* revised statutes, it has been held that a will of personal property may be republished by a parol declaration by the testator before two witnesses, that the instrument is his last will and testament; but devises of realty require re-execution, as under the Statute of Frauds. *Matter of Simpson*, 56 How. Pr. (N. Y. Surrogate Ct.) 142; *Jackson v. Potter*, 9 Johns. (N. Y.) 312.

A will with the name of the maker and the names of all the subscribing witnesses, save one, torn off, cannot be republished without a new signing and attestation, as required by the statute in the case of making a new will, where it appears that the cancellation was committed by the testator himself with the intention to cancel the will; and this, although, after such cancellation, the testator may have spoken of such canceled will as "his will." *Barker v. Bell*, 46 Ala. 216.

Pennsylvania.—In *Jones v. Hartley*, 2 Whart. (Pa.) 110, Sergeant, J., said: "The rule of law is, that the republication of a will must be accomplished by the same solemnities as were necessary to the publication in the first instance (*Havard v. Davis*, 2 Binn. (Pa.) 419); but no others are required. Hence, in *England*, since the Statute of Frauds, requiring a will to be in writing signed by the party, and to be attested and subscribed in his presence by three witnesses, a parol republication is not good; but in *Pennsylvania*, the witnesses to a will need not be subscribing witnesses. If there be a will in writing, signed by the testator, it is

sufficient that it be proved by any two witnesses who can establish the fact, whether they attested as witnesses or not. As, therefore, the original proof of the will may be by parol, so may the proof of republication; but the number of witnesses must be the same. In this respect our law stands on the footing of the English law, under the Statute 32 Hen. VIII., prior to the Statute of Frauds; and under the Statute of Hen. VIII., the decisions in *England* were uniform in favor of receiving parol evidence of the republication of a will in writing; and it was held that anything which expressed the testator's intention that the will should be considered as of a subsequent date, was sufficient. *Barnes v. Crowe*, 1 Ves. Jr. 497; *Hall v. Dench*, 1 Vern. 330; *Alford v. Earle*, 2 Vern. 209; 2 Roll. Abr. 618; 1 Freem. 264; *Belaney v. Belaney*, 2 Ch. Rep. 140. This is, indeed, not an open question now; for those principles were all recognized and acted upon by this court in the case of *Havard v. Davis*, 2 Binn. (Pa.) 406, in which the subject was fully discussed by counsel, and carefully considered by the court. In that case, declarations by a testator, not long before his death, that a will dated in August, 1806, was his last will, were held to be evidence of republication of it, so as to produce a revocation of a will dated in September, 1806, revoking all prior wills, and to set up the first will in its stead. That was a stronger case than the present, for it was to revoke a will deliberately made, and when the intention of the testator to revoke it was undoubted; here the revocation is rather a presumed or implied one. In principle, however, the cases are the same, and I think that decision must be considered as settling the doctrine that parol evidence of republication is proper in *Pennsylvania*, with the requisition, however, that the proof of the republication be by the same number of witnesses, and be as conclusive of the fact as would be required to establish an original will. The *animus republicandi* must be shown, that is, it must be shown that it was the intention of the testator at that time, that the will in question was and should be his will. The identity of the will must be shown, or in other words, that the will produced is the same will to which the testator referred his declarations. The witnesses need not be called for the

purpose, for that is not required in order to establish an original will; nor need the will be present at the time of such declarations. In *Havard v. Davis*, 2 Binn. (Pa.) 406, only one of the two witnesses saw the will, and that not by the testator's directions. Nor need declarations be at the same time to the witnesses; they may be to one on one day, and to another on the next. It is sufficient if they satisfactorily show that after the date of the revocation, the testator declared his intention that the writing was his last will, and that fact is proved by two competent witnesses to the satisfaction of the jury. The evidence, however, ought to be clear and satisfactory, to establish this intention, as well as the identity of the writing referred to; as the fact is to depend on parol evidence, and there is no written evidence to establish the republication."

In *Warner v. Warner*, 37 Vt. 356, it was held that a will could not be republished by parol declarations of such a purpose or desire on the part of the testator.

A testator made his will in 1837, in his own handwriting, unattested, and it was placed among his valuable papers. Subsequently, in 1847, being about to leave the *United States*, he placed this will, together with other papers, in the hands of a friend, for safe keeping. It was held that this did not of itself amount to a republication of the will, and that, therefore, land acquired after 1837 did not pass under it. *Den v. Speight*, 9 Ired. (N. Car.) 288.

See *Musser v. Curry*, 3 Wash. (U. S.) 481; *Campbell v. Jamison*, 8 Pa. St. 499.

Whether this reasoning would be regarded as applicable to wills made since the passage of the Act of 1833 seems very doubtful. *Fransen's Will*, 26 Pa. St. 202; *Broe v. Boyle*, 108 Pa. St. 82; *Gable v. Daub*, 40 Pa. St. 229; *Neff's Appeal*, 48 Pa. St. 509.

Massachusetts.—Declarations of the testator to the effect that he destroyed a later will, intending thereby to revive an earlier one, have been admitted. *Pickens v. Davis*, 134 Mass. 252; *Williams v. Williams*, 142 Mass. 515.

Virginia and Kentucky.—In these states, it is expressly provided by statute that a will or codicil once revoked can only be revived by re-execution thereof, or by a duly executed codicil. *Stimson's Am. Stat. Law*, § 2678, citing *Virginia Code* (1873), ch. 118, § 9;

3. Republication by Codicil.—See CODICIL, vol. 3, p. 301.

4. Wills Revoked by Operation of Law.—A will revoked by operation of law, as by subsequent marriage and birth of children, can only be revived by republication, and where the local statute requires all wills to be formally subscribed and attested, or where publication is subjected to written solemnities, it cannot be revived by parol.¹

5. Consequences of Republication.—Republication brings the will republished down to the date of republishing, and makes it speak, as it were, at that time,² extending its operation to subjects

Kentucky Gen. Stat. (1873), ch. 113, § 11.

Georgia.—It is expressly enacted that a parol republication in the presence of the original witnesses is good. *Georgia* Code (1882), § 2478.

Virginia and West Virginia.—It is expressly enacted, after the analogy of the English Wills Act of Victoria (see preceding note), that a duly executed codicil only revives the will to the extent to which an intent to revive such will is shown. *Stimson's Am. Stat. Law*, § 2678; *Virginia* Code (1873), ch. 118, § 9; *West Virginia* Laws (1882), ch. 84, § 8.

Holographic Wills are within the principle, and cannot be republished by parol. *Sawyer v. Sawyer*, 7 Jones (N. Car.) 134.

Manner of Re-execution.—Generally speaking, it is a good republication for the testator to call witnesses of the required number into his presence and declare the paper to contain his last will, and then cause the witnesses to subscribe their names by way of attestation. *Schouler on Wills* (2d ed.), § 443. See *Dunn v. Dunn*, L. R., 1 P. & D. 277; *Brown v. Clark*, 77 N. Y. 369; *Matter of Simpson*, 56 How. Pr. (N. Y. Surrogate Ct.) 125; *Carey v. Baughn*, 36 Iowa 540.

Resigning.—If the signature remain intact, the instrument need not be resigned. It is sufficient to acknowledge the old signature before the required number of witnesses, with proper formalities. Such acknowledgment is good for either execution or re-execution. *Schouler on Wills* (2d ed.), § 443.

1. *Schouler on Wills* (2d ed.), § 446. See *Long v. Aldred*, 3 Add. 48; *In re Wollaston*, 12 W. R. 18; *Carey v. Baughn*, 36 Iowa 540; *Brown v. Clark*, 77 N. Y. 369; *Brady v. Cubitt*, Doug. 31.

In *James v. Shrimpton*, 1 Prob. Div. 431, the testator having duly executed

a will, afterward married. On the day of, and after, the marriage ceremony, he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will. His wife predeceased him, and on his death the codicil, which had been in his possession, could not be found. Declarations of the testator of a desire to adhere to his will were proved extending up to the latest period of his life. It was held that the testator could not have intended by the destruction of the codicil to render his will inoperative, and that the court would therefore grant probate of the will and of the codicil as contained in a draft from which the original was prepared for execution.

2. *Schouler on Wills* (2d ed.), § 450. See *Brownell v. DeWolf*, 3 Mason (U. S.) 486; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Haven v. Foster*, 14 Pick. (Mass.) 543; *Luce v. Dimock*, 1 Root (Conn.) 82; *Van Kleeck v. Reformed Protestant Dutch Church*, 20 Wend. (N. Y.) 457; *Kip v. Van Cortland*, 7 Hill (N. Y.) 346; *Brown v. Clark*, 77 N. Y. 370; *Gilmore's Estate*, 154 Pa. St. 523; *Den v. Snowhill*, 23 N. J. L. 447; *Davis v. Taul*, 6 Dana (Ky.) 51; *Armstrong v. Armstrong*, 14 B. Mon. (Ky.) 269; *Sharp v. Wallace*, 83 Ky. 587; *Murray v. Oliver*, 6 Ired. Eq. (N. Car.) 55; *Dunlap v. Dunlap*, 4 Desaus. (S. Car.) 305; *In re Murfield's Will*, 74 Iowa 479; *Hawke v. Enyart*, 30 Neb. 149. Compare *Ware v. People*, 19 Ill. App. 196.

A testator bequeathed to his daughter G., wife of the defendant, "exclusive of what he advanced to her and her husband, shortly after their marriage, in money, furniture, etc., and of the money her husband had since received from him, and part of it never refunded, \$3,325, payable in one year from his decease." He made a bequest for

which have arisen between its date and publication,¹ curing

another daughter, exclusive of a similar advance, and of moneys paid her husband on his transferring worthless bonds to the testator. The testator had made advances to G., and lent money to her husband, who had assigned for the benefit of his creditors, compromised at 75 cents on the dollar, and given the testator a bond for this proportion of his debt. He had also paid the other creditors the remaining 25 per cent., and partially paid the testator for that amount. Subsequently to the date of the will, another loan was made to the husband, and the whole amount of this indebtedness was included in a bond given to the testator who subsequently made a codicil altering the provisions made in the will for other legatees. It was held that the estate being solvent, the bond and interest thereon were discharged by the will, which spoke from the date of the codicil. *Goale v. Smith*, 4 Pa. St. 376.

1. 1 Wms. Exrs. *219. See *Neall v. Pickard*, 2 No. Cas. 406; *Monypenny v. Bristow*, 2 R. & M. 117; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 375; *Den v. Maney*, 1 Murph. (N. Car.) 258; *Haven v. Foster*, 14 Pick. (Mass.) 540; *Jones v. Shewmaker*, 35 Ga. 151; *Beall v. Cunningham*, 3 B. Mon. (Ky.) 390; *Jack v. Shoenberger*, 22 Pa. St. 416.

"This consequence of republication was not so important with respect to personalty as it was with regard to realty, before the passing of the new Statute of Wills (1 Vict., ch. 26); because a will of personalty, if it contained prospective words sufficiently comprehensive, would operate on the personal estate of the testator, to which those words applied, although acquired since the making of the will, without any republication of it; whereas no real estate, which the testator had not at the date of the will, would pass by it, however express, comprehensive, and general the words, or however manifest the intention of the testator might be. Consequently, no after purchased lands could pass, nor any lands which did not remain in the same condition from the date of the will to the death of the testator, unless there were a republication, according to the solemnities required by the Statute of Frauds; for any, the least, alteration, or new modeling of the estate after the will, was an actual revocation." Wms. Exrs. *220; 1 Saund. 277-

278e, note to *Duppa v. Mayo*, 1 Saund. 277.

In states in which it is provided by statute that the will shall speak from the death, and after acquired realty pass thereunder, this distinction has ceased to be of importance.

In order that republication may have the effect of extending the operation of the will to after acquired real estate, the words of the will must be of such character, as if used at the date of republication, and include the estate in controversy. *Haven v. Foster*, 14 Pick. (Mass.) 541. See *Monypenny v. Bristow*, 2 R. & M. 117.

Lapsed Bequests Not Revised.—Republication does not revive a devise or bequest which has lapsed by the death of the devisee, a legatee, in the testator's lifetime. Thus, if a testator devises lands to his nephew John, who dies in his lifetime, and he afterward has another nephew of the same name, the republication of the will would be inoperative to carry the property to the second nephew John. 1 Jarm. on Wills (5th ed.) *200, *201; *Drinkwater v. Falconer*, 2 Ves. 626; *Doe v. Kett*, 4 T. R. 601. See *Campbell v. Jamison*, 8 Pa. St. 498. Compare *Perkins v. Micklethwaite*, 1 P. Wms. 275.

Legacies Adeemed or Satisfied.—Legacies which have been adeemed or satisfied will not be revived by republication. *Drinkwater v. Falconer*, 2 Ves. 626; *Powys v. Mansfield*, 3 Myl. & C. 359; *Paine v. Parsons*, 14 Pick. (Mass.) 318; *Langdon v. Astor*, 16 N. Y. 57; *Ware v. People*, 19 Ill. App. 196.

In *Powys v. Mansfield*, 3 Myl. & C. 376, Lord Cottenham said: "It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest, and so revoke any codicil by which a legacy given by the will had been revoked, and undo every act by which it may have been adeemed or satisfied. The cases are consistent with this rule, as

defects in execution,¹ and revoking any will of date prior to that of the republication which is inconsistent with the will republished.² If the will republished has codicils added to it, the *prima facie* presumption is that the testator intended to republish the will as amended by the codicils, and not otherwise.³ Interlineations and alterations inserted in the will at the time of the execution of the

Drinkwater v. Falconer, 2 Ves. 623; *Monck v. Monck*, 1 Ball & B. 298; *Booker v. Allen*, 2 Russ. & M. 270; and the case of *Roome v. Roome*, 3 Atk. 181, is not an authority against these decisions, because the codicil was not considered in that case as reviving an adeemed legacy, it having been decided that there was no ademption; but the codicil was referred to as an additional proof that no ademption was intended."

1. *McCurdy v. Neall*, 42 N. J. Eq. 333; *In re Murfield's Will*, 74 Iowa 479. But see *Sharp v. Wallace*, 83 Ky. 584. See further CODICILS, vol. 3, p. 301.

Republication Does Not Cure Defects of Expression.—"The effect of republication can never extend further than to give the words of the will the same force and operation as they would have had if the will had been executed at the time of republication; it cannot invest with a devising efficacy expressions which originally had none; and, therefore, where (*Lane v. Wilkins*, 10 East 241), a testator, who was devisee in tail of certain lands, in allusion to them, said: 'which, though I could now legally dispose of, I mean fully to confirm to the devisees in remainder,' and afterwards suffered a common recovery of the lands, to the use of himself for life, remainder to such uses as he, by deed, will, or codicil, should appoint. He then executed a codicil, whereby he expressly confirmed the will; and it was contended that the effect of the whole was to pass the estates in question to the remaindermen; but the court of K. B. held that the will contained no devise, the expressions rather importing an intention to leave the property alone, than to dispose of it, and that the codicil could not alter the construction." 1 Jarm. on Wills (5th ed.) *201. See *Campbell v. Jamison*, 8 Pa. St. 499.

2. 1 Wms. Exrs. *217; *Serocold v. Hemming*, 2 Lee Ecc. 490; *Walpole v. Orford*, 3 Ves. Jr. 402; *Walpole v. Cholmondeley*, 7 T. R. 138; *Rogers v. Pittis*, 1 Add. 38. See CODICILS, vol. 3, p. 301.

Revocation of Intermediate Will by Codicil Republishing Former.—In *Rogers v. Pittis*, 1 Add. 38, it was held that a codicil operates as the republication of that will to which it applies; and, consequently, as the revocation of any intermediate will. Sir John Nicholl said: "I apprehend it to be clearly settled that making a codicil to a will republishes that will—that a codicil, even of personalty, if executed so as to act on the subject, that is, if attested by three witnesses, republishes a will of lands; so that a will of personalty *a fortiori*, or a mixed will, so far as respects personalty, is republished by a codicil, whether so attested or not. No evidence of intention to republish is requisite, in either case; the very act of making the codicil, *prima facie* at least, infers the intention. It is true, indeed, that this *prima facie* inference may be rebutted by proof that the act was done by the deceased in error, or obtained from him by fraud. So the cancellation of a will may be shown to have taken place in error, or the execution of a new will to have been procured by fraud. *Prima facie* at least, however, the making of a codicil to a will as much republishes that will as a will is revoked, *prima facie*, by its cancellation, and as a new will, *prima facie*, annuls and makes void any will of a prior date. Secondly, the republication of a will is tantamount to the making of that will *de novo*; it brings down the will to its own date, and makes it speak, as it were, at that time. In short, the will so republished is, to all intents and purposes, a new will. Consequently, upon the ordinary and universal principle, that, of any number of wills, the last and newest is that in force; it revokes any will of a date prior to that of the republication."

3. *Schouler on Wills* (2d ed.), § 450; *Powell on Devises* (Jarman's ed.) 624; *Crosbie v. MacDonald*, 4 Ves. Jr. 610, *per* McAlvanby, M. R. See *Bunny v. Bunny*, 3 Beav. 109; *Cartwright v. Shephard*, 17 Beav. 301; *Grand v. Reeve*, 11 Sim. 66. Compare *Alsop's*

codicil, are confirmed by it, and entitled to probate, and it may be proved by extrinsic evidence that the alterations were made before the execution of the codicil.¹

XIV. GENERAL PRINCIPLES OF INTERPRETATION—(See *INTENT*, vol. 11, p. 372; *INTERPRETATION*, vol. 11, p. 507).—The general rules for the interpretation of wills may be found discussed in the article on interpretation. We purpose, under this head, to present more fully the adjudged cases illustrating these general rules.

1. Intention of the Testator.—The fundamental rule in the construction of wills is, that the intention of the testator, if not inconsistent with some established rule of law, must control.²

Appeal, 9 Pa. St. 374; *Wikoff's Appeal*, 15 Pa. St. 281.

1. *Tyler v. Merchants' Tailor Co.*, 15 Prob. Div. 216; *Burge v. Hamilton*, 72 Ga. 569. And see *Linnard's Appeal*, 93 Pa. St. 313.

2. *Bell v. Hogan*, 1 Stew. (Ala.) 536; *Moore v. Dudley*, 2 Stew. (Ala.) 170; *Capal v. M'Millan*, 8 Port. (Ala.) 197; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Thrasher v. Ingram*, 32 Ala. 646; *Holms v. Williams*, 1 Root (Conn.) 332; *Lutz v. Lutz*, 2 Blackf. (Ind.) 72; *Kelly v. Stinson*, 8 Blackf. (Ind.) 387; *Baker v. Riley*, 16 Ind. 479; *Crerar v. Williams*, 145 Ill. 625; *Johnson v. Mayne*, 4 Iowa 180; *Augustus v. Seabolt*, 3 Metc. (Ky.) 155; *Maupin v. Goodloe*, 6 T. B. Mon. (Ky.) 399; *Atty. Gen'l v. Wallace*, 7 B. Mon. (Ky.) 611; *McBrayer v. McBrayer*, 16 Ky. L. Rep. 18; *Flournoy v. Flournoy*, 4 Bush (Ky.) 519; *Brown v. Brown*, 1 Dana (Ky.) 39; *Armorer v. Case*, 9 La. Ann. 288; *Thorame's Succession*, 12 La. Ann. 384; *Tappan v. Deblois*, 45 Me. 122; *Bowly v. Lammot*, 3 Har. & J. (Md.) 4; *Elder v. Elder*, 50 Me. 535; *Steward v. Pattison*, 8 Gill (Md.) 46; *Smith v. Donnell*, 9 Gill (Md.) 84; *Holmes v. Mitchell*, 4 Md. Ch. 162; *Eliot v. Carter*, 12 Pick. (Mass.) 436; *Malcolm v. Malcolm*, 3 Cush. (Mass.) 472; *Sawyer v. Baldwin*, 20 Pick. (Mass.) 378; *Hayden v. Stoughton*, 5 Pick. (Mass.) 536; *Crocker v. Crocker*, 11 Pick. (Mass.) 257; *Lamb v. Lamb*, 11 Pick. (Mass.) 375; *Wright v. Barrett*, 13 Pick. (Mass.) 41; *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *Richardson v. Noyes*, 2 Mass. 56; *Davis v. Hayden*, 9 Mass. 514; *Allen v. White*, 97 Mass. 504; *Sorsby v. Vance*, 36 Miss. 564; *Lucas v. Lockhart*, 18 Miss. 466; *Austin v. Watts*, 19 Mo. 293; *Hall v. Chaffee*, 14 N. H. 215; *Brearely v. Brearely*, 9 N. J. Eq. 21; *Stokes v. Tilly*, 9 N. J. Eq. 130;

Sims v. Sims, 10 N. J. Eq. 158; *Current v. Current*, 11 N. J. Eq. 186; *Den v. Crawford*, 8 N. J. L. 90; *Den v. Snitcher*, 14 N. J. L. 53; *Mullany v. Mullany*, 4 N. J. Eq. 16; *Olmsted v. Harvey*, 1 Barb. (N. Y.) 102; *Cole v. Cole*, 53 Barb. (N. Y.) 608; *Lasher v. Lasher*, 13 Barb. (N. Y.) 106; *Jackson v. Jansen*, 6 Johns. (N. Y.) 73; *Morton v. Morton*, 2 Edw. Ch. (N. Y.) 457; *Bradhurst v. Bradhurst*, 1 Paige (N. Y.) 331; *Mason v. Mason*, 2 Sandf. Ch. (N. Y.) 433; *Chapin v. Marvin*, 12 Wend. (N. Y.) 538; *Crosby v. Wendell*, 6 Paige (N. Y.) 548; *Winder v. Smith*, 2 Jones (N. Car.) 327; *Gillis v. Harris*, 6 Jones Eq. (N. Car.) 267; *Decker v. Decker*, 3 Ohio 157; *Stevenson v. Evans*, 10 Ohio St. 307; *McKeen's Appeal*, 42 Pa. St. 479; *Bender's Appeal*, 3 Grant Cas. (Pa.) 210; *Christy v. Christy*, 162 Pa. St. 485; *Belshoover v. Brandt*, 18 Pa. St. 473; *Watson v. Woods*, 3 R. I. 226; *Guery v. Vernon*, 1 Nott & M. (S. Car.) 69; *Heyward v. Brailsford*, 2 Bay (S. Car.) 255; *Collin v. Green*, 2 Mill Const. (S. Car.) 346; *McLemore v. Blocker*, 1 Harp. Eq. (S. Car.) 272; *Ellis v. Woods*, 9 Rich. Eq. (S. Car.) 19; *Anderson v. McCullough*, 3 Head (Tenn.) 614; *Philleo v. Holliday*, 24 Tex. 38; *Reno v. Davis*, 4 Hen. & M. (Va.) 283; *Mooberly v. Marye*, 2 Munf. (Va.) 453; *Land v. Otley*, 4 Rand. (Va.) 213; *Wooton v. Redd*, 12 Gratt. (Va.) 196; *Burwell v. Mandeville*, 2 How. (U. S.) 560; *Lane v. Vick*, 3 How. (U. S.) 464; *Inglis v. Sailors' Snug Harbour*, 3 Pet. (U. S.) 113; *Finlay v. King*, 3 Pet. (U. S.) 346; *Smith v. Bell*, 6 Pet. (U. S.) 68; *Zeller v. Eckert*, 4 How. (U. S.) 289.

A testator, several years before making his will, gave to his son B. certain slaves, naming them; and to his son A. certain other slaves, naming them. By his will he gave to his son B. the slaves by name which he had before given to

his son A., and to A. the slaves by name which he had before given to B., stating at the close of each bequest that he had before given the slaves as he gave them by will. The first gifts were admitted. It was held that it must have been the testator's intention to confirm the previous gift, and that the will must be so construed. *Lowe v. Carter*, 2 Jones Eq. (N. Car.) 377.

Where a testator seized of a large real and personal estate made a partial disposition of it to some of his children and to his widow, to the latter of whom he gave household and kitchen furniture, slaves, horses, farming implements, and many other things applicable and necessary for housekeeping and farming operations, leaving out the bulk of his land, and then adds, "I will that all the balance of my estate, real and personal, be disposed of as the law directs," it was held to have been the intention of the testator that the widow should have her dower assigned in the mode directed by law in cases of intestacy. *Bost v. Bost*, 3 Jones Eq. (N. Car.) 484.

A testator, by his will, devised to his wife during her life the use of the homestead at B., except such part as he bequeathed to his son. He then gave to her an annuity of \$400 during life, charged upon certain lots situate in the city of New York, which lots were divided among his children. It was provided that those lots should be held to pay their respective shares of the annuity, in proportion to their assessed valuation in the public inventory of the property. It was further provided that the testator's son M. should never possess the right to sell the house and lot devised to him, but that the same should be held by a trustee to be appointed by the court, and the trust should cease upon the decease of M.; and that M. should not receive any income from the rents or profits of the premises, unless he should become the head of a family, in which case the entire annual income should accrue to him; or if M. should remain single, at the age of forty years and upward, and become infirm or unable to support himself, the trustee was directed to grant him an annuity of \$100 for his support. It was further provided that as there were certain incumbrances upon the New York lots, the proceeds and profits of the estate, after the necessary current expenses were paid therefrom, should be appropriated to pay the annuity.

It was held that the provisions of the will, in behalf of the testator's children, demonstrated that it was not his intention to give the widow both dower and the annuity; and that she was bound to elect between the annuity and her dower. *Dodge v. Dodge*, 31 Barb. (N. Y.) 414.

Where a testator bequeathed slaves to a trustee in trust for his daughter and her children, "free and exclusive of any control of her husband," she having children at the time, it was held to manifest an intention to make special provision for the daughter, and that she, consequently, took an estate for life in the negroes, with a remainder to her children born, or that might be born thereafter. *Faribault v. Taylor*, 5 Jones Eq. (N. Car.) 219.

Where a testator, after devising all his property, real and personal, to his children to be taken possession of by them on their severally coming of age, added a clause declaring his will to be that his wife should hold the entire estate until his children severally came of age, and that they severally, before they took possession of his estate, should give security according to their several proportion of the estate, for and towards a competent maintenance of his wife, during her natural life, it was held that the wife of the testator was entitled to retain possession of the estate, until provision was made for her by her children in the manner directed by the will, it being the evident intention of the testator to put the provision for the wife beyond all hazard. *Jackson v. Wight*, 3 Wend. (N. Y.) 109.

B., by his last will, after ordering his executors to sell his personal estate, authorizes his executors thereafter named, to sell and dispose of his real estate; and directs them, after they have disposed of his real estate, and converted the same into money, to place the same at interest on good security, and to pay the interest annually to his wife; and, "at and after his wife's decease, he gives and bequeaths to his son, an only child, all the principal sums of money and security in the hands of his executors." He then named his wife and two others as executors. One of the executors renounced; and after the decease of the widow the surviving executor sold the real estate. It was held that the object of the testator in creating the power being to make a provision for his wife, it ceased at her death, and the

lands descended to the heir at law. *Jackson v. Jansen*, 6 Johns. (N. Y.) 73.

A testator after disposing of certain portions of his property, devised all the residue of his estate to the complainant, in trust, to hold the income, rents, and profits of one-third part of said residue for the use of his grandson, the defendant, during his life; such income, etc., to be paid to him from time to time, as they might accrue, and after his death to his children in fee; and failing children, to other grandchildren to whom the remaining two-thirds were in like manner devised. At the time of the testator's decease, the grandson was indebted to him in a large sum of money; but it appearing that the testator did not mean to regard him as his debtor in respect thereof, it was held that to enforce the payment of this debt out of the defendant's share of this income and profits, would defeat the clear intention of the testator to provide his grandson a competent support. *Waters v. Waters*, 1 Md. Ch. 196.

A testator, after reciting in his will (which was executed in *Germany*) his intention to depart in a few days for *America*, "for the purpose of seeking his fortune," devised as follows: "He declares his deliberate will to be that, in case he should die unmarried in a foreign country, the small Opeman Cottage, situated at R., should be retained as heritable property, by his near relation F., the eldest daughter of I., farmer at R., whom he hereby constitutes his sole heiress. She and her father, however, shall be held to pay to the three daughters of W. and D." a certain sum, as a legacy. "To his guardian C. he devises the turf moor at," etc. After this the testator came to Baltimore, where he died, unmarried and without issue, leaving personal estate. It was held that upon the true construction of this will F. was entitled to the testator's personal estate, as it was his intention by the words "sole heiress," to give her everything he had, except the property specifically devised, in the event of his dying unmarried in a foreign country. *Siemer v. Siemer*, 2 Gill & J. (Md.) 100.

The testator devised his real property to two of his children, F. and S., and then declared, "that full justice may be done, it is my wish that my son J. may be equal with my other two children in the division of the land, out of money he now owes me." The intention of the testator being to make his children

equal, and the indebtedness of J. to the testator not being equal to the shares of his brother and sister, he was entitled to a sufficiency out of the residue of the estate, after paying the specific legacies, to make his share equal to the portion of land allotted to his brother. *Wirt v. Cannon*, 4 Coldw. (Tenn.) 121.

Where a testator bequeathed property to children, as a class, and ordered the profits to be "applied annually to their use," it was held that it was the intention of the testator, apparent from the words of the will, that, at the division of the property, the surplus rents and profits should be so divided that each child should get only a *pro rata* share of what had accrued since its birth. *Simpson v. Spence*, 5 Jones Eq. (N. Car.) 208.

Where a testator having seven daughters made provision for one by name, and then ordered that the residue of his property should be divided into nine equal parts, three of which were to go to his three sons, and the other six parts to be allotted to his daughters, it was held that the meaning of the testator was that each of the six daughters remaining to be provided for, should have one of the six remaining equal parts. *Shepard v. Wright*, 5 Jones Eq. (N. Car.) 20.

B., in 1819, devised real estate to M., his wife, for life or during her widowhood, to support herself, her three daughters, and one F., and on the decease or marriage of M., the same to go to F. for life to support himself and the daughters; and, after the death or marriage of M. and the death of F., to go to the daughters in fee. Power was given to M. so long as she remained single, and afterward to F., to sell and convey the real estate, provided that S. should in writing, signed with his hand, approve and consent to such sale; but no such sale should be valid without such approbation and consent; and the moneys arising from the sale were directed to be invested as S. should direct. It was held that under the will M. had only a naked power in respect to the disposition of the property, and that the power could be rightfully exercised only by a sale of the estate in fee; and that a lease, as a conveyance under the power of sale in the will, was void, as not fulfilling the intent of the testator. *Waldron v. Chastaney*, 2 Blatchf. (U. S.) 62.

A testator 1, bequeathed to his daughter B. a slave at a fixed valuation;

2, declared that his children should take equal shares in the whole of his estate, the special legacies to them to be taken at the valuations affixed as part of the estate; 3, that the part of his estate which should fall to his daughter B. should be placed in the hands of R. for her special use and benefit, he consenting to act as guardian. B. subsequently married, and the testator, by a codicil to his will, directed that the portion of the property devised to B., if she died before her husband, should be equally divided between her sisters and brother; that the slave should be sold and the proceeds placed in the hands of R. for the benefit of B., and that B. should receive the interest of her portion of the estate, to be paid to her annually by the said R. or his legal representatives. It was held that, to effectuate the intention of the testator, it was necessary that R. should be clothed with the legal title, and that he took B.'s share as her trustee. *Hall v. Howdeshell*, 33 Mo. 475.

Where the Intent Is Illegal.—A testator, having devised his home farm to his wife for life, with remainder in fee to his daughters as tenants in common, and his other property to his son in fee, by a clause in his codicil recited, that since the execution of his will he had purchased a wood lot called "Swanston's Lot" "as a support for" his home farm "and the estate devised to his son," and devised the same as follows: "Now, therefore, I do give and devise and bequeath the said parcel of land to my said wife, and my three daughters" (naming them), "on the express condition that the same is not at any time to be cleared or converted into arable land, but that they are respectively to be allowed to take therefrom as much wood and timber as will be required and necessary with care for the purpose for which it was purchased as aforesaid." It was held that the several devisees took a fee-simple interest in the "Swanston's Lot," and not a mere incorporeal hereditament or easement to cut timber and wood upon it; the attempt to prescribe the mode in which the lot was to be used during all time, was repugnant to the devise and void. *Smith v. Clark*, 10 Md. 186.

Legal Not Actual Intention to Be Considered.—In *Martindale v. Warner*, 15 Pa. St. 471, it was held that it is not the actual intention of the testator, but the legal intention which is the rule by which a will is to be construed. See

Eckford v. Eckford (Iowa, 1892), 53 N. W. Rep. 345; *Hannes' Estate*, 2 Pa. Dist. Ct. Rep. 21. Compare *Worthington v. McPherson*, 5 Gill (Md.) 51.

Express Declaration as to Intent Unnecessary.—In *Hughes v. Hughes*, 14 La. Ann. 85, it was held that an express declaration to effectuate a certain disposition is not necessary where the intention is apparent on the face of the will.

But where there is an express disposition, though it may be the result of oversight or mistake on the part of the testator, it cannot be controlled by inference which is not necessary and indubitable. *Harrison v. Haskins*, 2 Patt. & H. (Va.) 388.

Where No Interpretation Is Needed.—If the language of the will is free from doubt, there is no need to apply the rules of interpretation. *Brasher v. Marsh*, 15 Ohio St. 108; *Carr v. Jeanerett*, 2 McCord (S. Car.) 66; *Still v. Spear*, 45 Pa. St. 170; *Tebbs v. Duval*, 17 Gratt. (Va.) 345.

In *Tebbs v. Duval*, 17 Gratt. (Va.) 349, Joynes, J., in delivering the opinion of the court said: "Where a will affords no satisfactory clue to the intention of the testator, the court must, from the necessity of the case, resort to legal presumptions and the rules of construction. But such rules yield to the intention of the testator apparent in the will, and have no application where the intention thus appears."

In *Still v. Spear*, 45 Pa. St. 170, Strong, J., delivering the opinion of the court, thus comments on the rules which aid in the construction of wills: "There are certain principles, it is admitted, which are intended to assist in ascertaining a testator's intention, and which are controlling when that intention is doubtful. . . . Among them are the maxims that the first taker of a legacy is presumed to be the chief object of a testator's bounty; that in doubtful cases legacies are held to be vested rather than contingent; absolute, rather than defeasible; that the law favors such a construction as will render estates alienable, and that the primary intent is to be regarded rather than the secondary, if both cannot prevail. But these principles . . . are only applicable in cases of doubtful construction. They are never allowed to defeat a plain intent expressed."

Where the Will Is Absurd.—The intention of the testator is to be carried out, though the purposes of the will are

2. Surrounding Circumstances.—In the construction of a will, the court will put themselves as far as possible in the position of the testator by taking into consideration the circumstances surrounding the testator at the time of the execution of the will.¹

unreasonable or absurd. *In re Lewis' Estate*, 152 Pa. St. 477; *Marshall v. Hadley*, 50 N. J. Eq. 547.

1. *Snyder v. Warbasse*, 11 N. J. Eq. 466; *Lawrence v. Mitchell*, 3 Jones (N. Car.) 190; *Barham v. Gregory*, Phill. Eq. (N. Car.) 243; *Mitchener v. Atkinson*, 63 N. Car. 585; *Lassiter v. Wood*, 63 N. Car. 360; *Edens v. Williams*, 3 Murph. (N. Car.) 27; *Wolfe v. Van Nostrand*, 2 N. Y. 436; *White v. Olden*, 4 N. J. Eq. 343; *Leigh v. Savidge*, 14 N. J. Eq. 124; *Boudinot v. Bradford*, 2 Yeates (Pa.) 170; *Eyster v. Young*, 3 Yeates (Pa.) 511; *Hutchinson's Appeal*, 47 Pa. St. 84; *Hooe v. Hooe*, 13 Gratt. (Va.) 245; *Rhett v. Mason*, 18 Gratt. (Va.) 541; *Wells v. Wells*, 37 Vt. 483; *Clark v. Peck*, 41 Vt. 145; *Smith v. Wells*, 7 Met. (Mass.) 240; *Popkin v. Sargent*, 10 Cush. (Mass.) 327; *Perry v. Hunter*, 2 R. I. 80; *Moore v. Moore*, 18 Ala. 242; *Bond's Appeal*, 31 Conn. 183; *Starling v. Price*, 16 Ohio St. 29; *Danbridge v. Washington*, 2 Pet. (U. S.) 370.

A will is to be construed not only by its language, but by the condition of the testator's family and estate. *Lassiter v. Wood*, 63 N. Car. 360.

In construing a will, the court will put themselves in the position of the testator, in reference to the property and the relative claims of his family, the relations subsisting between him and them, and the circumstances which surround him, in order to be enlightened where the provisions are doubtful or may admit of more than one interpretation, but not where the meaning of the language of the will is plain. *Perry v. Hunter*, 2 R. I. 80.

In *Adamson v. Ayres*, 5 N. J. Eq. 353, upon a question of intention, Chancellor Halstead said: "The situation of the estate, as to the comparative amounts of realty and personalty, might certainly be shown. Suppose the estate consisted of \$100 in land and \$10,000 in personalty, the court would not shut its eyes to that fact; and it would have a legitimate influence on the reading of the will."

In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view.

The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of the property, are all entitled to consideration in expounding doubtful words, and ascertaining the meaning in which the testator used them. *Smith v. Bell*, 6 Pet. (U. S.) 68.

A testator, the only son of his mother by her first marriage, who would have been his sole heir at law if he had died intestate, devised to her all his property, "to hold the same to her and her heirs and assigns, to be for the sole use of herself, her heirs, executors, administrators and assigns." The mother was wife of a second husband, but lived separate from him, and had no support from any source besides her own labor, her husband being intemperate, and not of ordinary capacity or prudence in the management of property. It was held that the mother took the estate to her separate use, to the exclusion of her husband and his creditors. *Smith v. Wells*, 7 Met. (Mass.) 240.

A testator left a will containing the following devise: "I give to my wife all my real estate so long as she shall remain my widow, but on her decease or marriage the remainder thereof I give to my children and their heirs respectively, to be divided in equal shares between them." At the date of the will and at his death, the testator had four children living, and four others had previously died, all leaving children. No reason appeared for supposing that the testator had any preference for his surviving children over these grandchildren. It was held that the testator must be understood to have intended these grandchildren by the word "heirs," and that the real estate was to be distributed in equal shares among the surviving children and the representatives of the deceased ones. *Bond's Appeal*, 31 Conn. 183.

Where the testator, at the time of the making of the will, owned a residence in the town of G. which occupied three lots on the plan of said town, and

3. All Parts of a Will Construed Together.—In giving construction to a will all the parts of it should be examined and compared

also owned in said town another house and lot disconnected with the former, besides other real estate without the town, which said town lots he was in the habit of listing for taxes as two lots, and he devised to his wife his dwelling house and lots in said town, with certain other property—and to his son the balance of his property, real and personal, it was held that he intended that his widow should take the dwelling house and three lots upon which it was situated, and that his son should take the other house and lot in said town. *Blackmore v. Blackmore*, 3 Sneed (Tenn.) 365.

A testator made his will in the following words: "That all my property, both real and personal, of which I am now possessed, or may hereafter accrue, be retained and continued together till my youngest child may have arrived at lawful age; at which time, all the above property, with its increase, from now to the time of my youngest child arriving at lawful age, to be equally divided among all my lawful heirs." His estate consisted of lands, slaves, stock, plantation utensils, etc. He died leaving a widow and five infant children. It was held that the testator's intention, to be gathered from the will and these circumstances, was that the family relation should be continued between the widow, children, and slaves, and the plantation be carried on for the benefit of the family until the majority of said youngest child, and that the wife took a vested interest of one-sixth part of the entire estate. *McLeod v. McDonnell*, 6 Ala. 236.

M. made a will directing that all his property, both real and personal, be sold and divided in fourteen shares, and naming the persons who were to take a share. One of the daughters, who was then dead, had married G., by which marriage there were several children. The will contained the following clauses: first, "one share to G. and his children," second, "Be it understood what each legatee has received heretofore, it is to be reduced out of their part." The will, then proceeding to specify what each had received in dollars and cents, whether in money or property, said: "G. and his wife have received \$650, including one negro woman and her children, by the name of

Amy, that they received at ten years old, of their part." M., at the time of his death, owned the slaves but let G. have the use of them, taking his notes for their hire as it became due. It was held that the title to the slaves vested by the will, by implication, in G. and his children, and not in G. alone, as did also the one-fourteenth, minus the \$650. *Gannaway v. Tarpley*, 1 Coldw. (Tenn.) 572. In delivering the opinion of the court in this case, Caruthers, J., said: "The rule that the intention of the testator must be collected from the will itself, and not elsewhere, or by parol evidence, except in cases of latent ambiguity, does not forbid a reference to the state of facts under which the will was made; but an investigation of the surrounding circumstances, often tends to illustrate the true intention and meaning of the testator. 'To this end, it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret; and guided by the light thus thrown on the testamentary scheme, he may find himself justified in departing from the strict construction of the testator's language.' 1 Jarm. on Wills 363, and notes. Thus facts may be proved to show the state of the testator's property, or such facts as were known to him, that may have influenced the disposition of his property in a particular way. *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243. According to these rules and authorities, we may, in this case, look to the facts, that the daughter of the testator was dead; that complainants were his grandchildren, and that the woman, Amy, and her children had been claimed by him up to the time of making his will; and that this claim had always been admitted by his son-in-law, Tarpley, in executing his notes for nominal hire, and permitting him to pay taxes, doctors' bills, etc., for them. We may also take into consideration the speaking fact that these slaves were of three or four times the value of the one-fourteenth part of the estate given to Tarpley and his children. In view of these facts, it could hardly be supposed that it was the intention of the testator to give all these slaves to the son-in-law, and still make him equal with his children in the one-fourteenth."

and the intention of the testator ascertained, not from a part alone, but from the whole instrument.¹

1. *Strong v. Cummin*, 2 Burr. 770; *Lane v. Vick*, 3 How. (U. S.) 464; *Cook v. Weaver*, 12 Ga. 47; *Hunter v. Stembridge*, 12 Ga. 192; *Bivins v. Crawford*, 26 Ga. 227; *Jackson v. Hoover*, 26 Ind. 511; *Baker v. Riley*, 16 Ind. 479; *Baker v. Reilly*, 16 Ind. 475; *Wing v. Mix*, 17 Ind. 344; *Clark v. Preston*, 2 La. Ann. 581; *Boone's Succession*, 7 La. Ann. 127; *Lebeau v. Trudeau*, 10 La. Ann. 164; *Parker v. Wasley*, 9 Gratt. (Va.) 477; *Cheshire v. Purcell*, 11 Gratt. (Va.) 571; *Selden v. King*, 2 Call (Va.) 73; *Stevenson v. Evans*, 10 Ohio St. 307; *Mutter's Estate*, 38 Pa. St. 314; *Bowly v. Lamont*, 3 Har. & J. (Md.) 4; *Shreiner's Appeal*, 53 Pa. St. 106; *Zimmerman v. Anders*, 6 W. & S. (Pa.) 220; *Grove's Estate*, 58 Pa. St. 429; *Ewing v. Ewing*, 2 Desaus. (S. Car.) 451; *Orr v. Moses*, 52 Me. 287; *Dill v. Dill*, 1 Desaus. (S. Car.) 241; *Garrett v. Garrett*, 1 Strobb. Eq. (S. Car.) 96; *Sawyer v. Baldwin*, 20 Pick. (Mass.) 378; *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *Cook v. Holmes*, 11 Mass. 528; *Quincy v. Atty. Gen'l*, 160 Mass. 431; *Tuttle v. Howell*, 17 N. J. Eq. 176; *Campbell v. Campbell*, 13 Ark. 513; *Alston v. Branch*, 1 Murph. (N. Car.) 356; *Alexander v. Alexander*, 6 Ired. Eq. (N. Car.) 229; *Mitchener v. Atkinson*, 63 N. Car. 585; *Lawrence v. Mitchell*, 3 Jones (N. Car.) 190; *Patton v. Patton*, 2 Jones Eq. (N. Car.) 494; *Coakley v. Daniel*, 4 Jones Eq. (N. Car.) 89; *Jenkins v. Hall*, 4 Jones Eq. (N. Car.) 334; *Scales v. Scales*, 6 Jones Eq. (N. Car.) 163; *Benjamin v. Welch*, 73 Hun (N. Y.) 371; *Bundy v. Bundy*, 47 Barb. (N. Y.) 135; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Hoxie v. Hoxie*, 7 Paige (N. Y.) 187; *Starling v. Price*, 16 Ohio St. 29; *Turner v. Patterson*, 5 Dana (Ky.) 292; *Logan v. Moore*, 7 Dana (Ky.) 80; *Milner v. Calvert*, 1 Metc. (Ky.) 472; *Dunlap v. Shreve*, 2 Duv. (Ky.) 334; *Levering v. Levering*, 14 Md. 30; *Jarnagin v. Conway*, 2 Humph. (Tenn.) 50; *Palmer v. Benson*, 19 Ala. 594; *Thrasher v. Ingram*, 32 Ala. 646; *Coleman v. Camp*, 36 Ala. 159; *Young v. McIntire*, 3 Ohio 502; *Gold v. Judson*, 21 Conn. 616; *Minor v. Ferris*, 22 Conn. 371.

In the case of *Cook v. Holmes*, 11 Mass. 528, which was a case of construction of a will, in which the language of the testator was susceptible of

two constructions, it was said to be the sole duty of the court, in giving a construction, to ascertain the real intent and meaning of the testator, which could only be gathered by adverting to the whole scope of the provisions made by him for the objects of his bounty, and not by confining the attention to one isolated paragraph, which might have been drawn up without a knowledge of technical words.

"The testator's meaning," said Lord Mansfield, in *Strong v. Cummin*, 2 Burr. 770, "must be collected from the will itself, by attending to the several parts of it, and comparing and considering them together."

In *Dill v. Dill*, 1 Desaus. (S. Car.) 241, Rutledge, Ch., delivering the opinion of the court said: "It is a rule that the construction must be of what appears on the face of the will; that no technical form is necessary to convey the testator's meaning, which must be collected by attending to the several parts of it, and considering and comparing them together; not by an arbitrary construction, but by a violent and strong presumption arising from the several parts of it, compared and taken together."

In *Shreiner's Appeal*, 53 Pa. St. 106, it was maintained that it was of particular importance in the interpretation of wills, even more than in the case of other instruments, that the various parts should be treated as a whole, all be construed together.

Thus, where a testator evinced, by the context of his will, a clear intention to divide an estate equally between two of his sons, and a daughter and her children, the following devise, to wit, "all the property to be divided between A. and S. and M., share and share alike,—to S. and M. and their heirs and assigns as gifts—to A. as a loan for the benefit of her and her children," it was held to mean a limitation to A. for her life, remainder to her children, as well those in being, as those that might be born thereafter. *Coakley v. Daniel*, 4 Jones Eq. (N. Car.) 89.

Children is a term of purchase, not of limitation; and being used in a will, with nothing indicating that heirs were meant by it—thus: "To my daughter C. P., I give, to her and her children, the fifty acres, etc., to each an equal

part," imports that they are to take equal shares as tenants in common—the mother and seven children eight shares. And no time being fixed by the will, for enjoyment by the children, or for partition, the estate vests, at the testator's death, in the mother and children then living. But the terms, "C. P. is to have no more than the fifty acres of land above stated"—that being all devised to C. P. and her children—explain the devise, *supra*, and show that the intention of the testator was that his daughter (C. P.) should have the whole for life—her children the remainder; which is, therefore, the true construction of the will. *Turner v. Patterson*, 5 Dana (Ky.) 292.

Where a testator, in one clause of his will, limits a use in property on event of survivorship between his daughters upon the decease of his widow, but in a subsequent clause gives the use of the property to the survivor upon the death of the other without leaving a child or children, it appearing from the context that he wished to make the bulk of his estate unalienable as long as possible, it was held that the latter disposition should prevail over the former, and that the contingency was open until the death of one of the daughters without leaving a child. *Jenkins v. Hall*, 4 Jones Eq. (N. Car.) 334.

The last will and testament of W. provided as follows: "Eighth.—After the payment of all my debts, and taking out the expenses of administration, and all legacies provided for and set apart so as to ascertain the net balance of estate, etc., I give and bequeath to my daughter S. one entire tenth part of such entire balance so ascertained,"—by the third clause one-fifteenth of such balance had been bequeathed to his granddaughter, R. "Ninth.—I give, devise and bequeath all the rest and residue of estate, real, personal, and mixed, to my three sons, A., W. and R., to them and their heirs and assigns forever, to be equally divided between them, share and share alike. Tenth.—It is my will and desire, and I hereby direct and empower my executors hereinafter named, to sell and dispose of all my real estate at public sale, and on such terms as they in their discretion may think most conducive to the interests of all those interested therein." It was held that the intention of the testator must be gathered from the whole will; from a consideration of all the provisions contained in it, without

regard to the order in which those provisions occur, and that the intention of the testator, as gathered from the whole will, was that his real estate should be converted into money, and constitute, with his personal estate, a common fund, out of which should be first paid debts, legacies, and expenses, and the net balance thereof divided amongst the parties named in said third, eighth, and ninth clauses, as therein provided. *Smithers v. Jackson*, 23 Md. 273.

A. by his will gave to his widow the use of his farm and dwelling house, and farming utensils and stock on the farm, and his family of colored people, and his household and kitchen furniture, until his son B. (an only child of three years old) should arrive at the age of twenty-one years; and gave his widow three hundred dollars a year out of his estate during her natural life; all of which was in lieu of her dower. He next gave certain pecuniary legacies. And then gave all the residue of his property, real and personal, to his son B., to him, his heirs and assigns forever; and directed his executors to rent out his houses and lots in Paterson, and to put out the proceeds thereof, together with the moneys and securities for money, to interest, for the benefit of his son until he should arrive at the age of twenty-one years; and to give his said son, out of his estate, a college education, and a decent support until he should arrive at the age of twenty-one years. And then made provision as follows: "But if my said son B. should die having no children, then my will is, and I do dispose of my property in the following manner:" (giving the said residue of his real and personal estate, so devised and bequeathed to his said son, to other persons.) The son B. attained twenty-one, and afterward died without having a child. It was held that on B.'s attaining twenty-one, his estate was absolute and unqualified; the clause giving the property over being held to mean the death of B. under twenty-one, having no children. *Pennington v. Van Houten*, 8 N. J. Eq. 272.

A testator devised to his wife, during her life or widowhood, all his estate except what he should by his will otherwise dispose of. He then gave certain property to his children to be theirs at his decease. Then came this clause: "Also, at the decease of my wife, I give to my son G., my man Stephen, and to my son L., my man Charles. Also, I

General Principles of Interpretation. WILLS. All Parts of a Will Construed Together.

give and bequeath to my son L. W., all my lands, etc." (on which he had previously given his wife a life estate.) "Also, to my son L. W., I give my two boys Dick and David with their mother." It was held that these negroes did not pass immediately to L. W., but only in remainder after the death or marriage of the widow. *Sherrill v. Echard*, 7 Ired. (N. Car.) 161.

Introductory Words to Be Considered.—A testator ordered as follows: "As to such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner, to wit: Item—It is my will, and I order and direct, that all my just debts and funeral expenses shall be first paid and satisfied. Item—It is my will, and I give, devise, and bequeath, unto my beloved wife Elizabeth, eighty-five acres and allowance of land of my dwelling plantation, whereon I now live, situate in Spring Garden township, in the county aforesaid, she to have the choice of the same wherever she thinks proper; and, further, I do give and bequeath unto my said wife all my movable property or personal estate, of what kind or nature the same may be, together with all the moneys due me, by bond, note, or book account, to and for her only proper use and behoof whatever. Item—It is further my will, that my brother and sisters divide the residue of my said plantation amongst themselves, share and share alike." He left no other real property. It was held that the introductory words in the will were to be considered in order to ascertain the intention of the testator, and that the widow took a fee in the land devised to her. *Schrivver v. Meyer*, 19 Pa. St. 87.

Clause Inoperative as Devise to be Considered.—Where, by a will made in 1722, real estate was devised to a religious corporation, and the will contained a devise to residuary devisees, it was held that though the devise to the corporation was void *ab initio* for the purpose of passing the estate, still it was operative as showing the intent of the testator, and that the devise to the corporation indicating the testator's intention not to give the property to the residuary devisees, it did not pass to them, but descended to the heir at law. *Van Kleeck v. Reformed Protestant Dutch Church*, 20 Wend. (N. Y.) 457. See *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 591. Compare *Warley v. Warley*, 1 Bailey Eq. (S. Car.) 397, in

which case it was held that if a will devising both real and personal estate be not duly executed to pass real estate, the portion relating to real estate cannot be regarded to ascertain the intent of the testator.

Revoked Clauses to Be Considered.—Though a devising clause in a will be afterward annulled by a codicil, yet it may operate as a declaration of intent to prevent the property passing to the residuary devisee. *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 591.

And in *Colt v. Colt*, 32 Conn. 432, it was held that while it is a rule that a will and codicil are to be read as of the date of the codicil, yet where legacies have been revoked by the codicil, it does not follow that the will is to be read as if they had never been in it; the revoked clauses may be read for the purpose of understanding better the meaning of the clauses which remain.

Will and Codicil Construed Together.—A will and its codicil are to be construed together as parts of the same instrument. *Boyle v. Parker*, 3 Md. Ch. 42; *Gray v. Sherman*, 5 Allen (Mass.) 198; *Ward v. Saunders*, 2 Swan (Tenn.) 174; *Negley v. Gard*, 20 Ohio 310; *Howland v. Union Theological Seminary*, 5 N. Y. 193; *Collier v. Collier*, 3 Ohio St. 373.

In *Westcott v. Cody*, 5 Johns. Ch. (N. Y.) 343, Chancellor Kent, lays it down "as a clear and settled rule that a will and codicil are to be taken and construed together, in connection with each other, as parts of one and the same instrument."

A codicil is a part of a will, and is to be construed with it; and may as a context confirm, vary, or altogether change an intention expressed in the body of the will. *Leavens v. Butler*, 8 Port. (Ala.) 380.

The testatrix made the following devise: "I will that all my estate, both real and personal, which may come to the hands of my executors for the use and benefit of my daughters, Levisa Saunders, Catherine Campbell, and Celia Stone, remain in the hands of my executors, in trust for my said daughters during their natural lives, and to the heirs of their body forever." To which there was this codicil. "In pursuance of my last will and testament, it is my desire that my young negroes already devised by will be divided as follows, to wit: To my daughter Levisa Saunders and heirs of her body, negro

4. In What Sense Words Are to Be Understood.—In the construction of wills, words, in general, are to be understood in their plain and usual sense, in the absence of a manifest intention to the contrary.¹ Where, however, the testator uses technical words, he is

girl, Polly," etc. It was held that the clause of the will above quoted fixed and controlled the rights of Levisa Saunders and the other legatees, and that the codicil only designated what particular property each legatee should take under the restrictions and limitations of the will, and that Levisa Saunders took only a life estate in the property. *Ward v. Saunders*, 2 Swan (Tenn.) 174.

A testator, in the body of his will, gave one-half of the residue of his property to his daughter, and the other half to certain of the children of a deceased daughter, some of whom were minors, "to be divided in equal shares between them," and appointed certain persons "to be trustees to my grandchildren above-named." By a codicil he gave to another child of his deceased daughter, who had been omitted in the former enumeration, "such an amount of my property as shall make him an equal heir with his brothers and sisters" mentioned in the will. It was held that one-half of the residue should go to the daughter of the testator and the other half to all of his grandchildren named in the will and codicil, to be divided equally between them; the legal title being vested in the first instance in the trustees, for the immediate distribution of their respective shares to those of the grandchildren who had become of age, and to the others when they should become of age. *Gray v. Sherman*, 5 Allen (Mass.) 198.

1. *Harrison v. Ward*, 5 Jones Eq. (N. Car.) 236; *Logan's Appeal*, 39 Pa. St. 237; *Bedford's Appeal*, 40 Pa. St. 18; *Soohan v. Philadelphia*, 33 Pa. St. 9; *Gable's Appeal*, 40 Pa. St. 231; *Ketchin v. Beatty*, 5 Rich. Eq. (S. Car.) 83; *Nash v. Savage*, 2 Hill Eq. (S. Car.) 50; *Seibels v. Whateley*, 2 Hill Eq. (S. Car.) 605; *Atty. Gen'l v. Jolly*, 2 Strobb. Eq. (S. Car.) 379; *Murphey v. Murphey*, 20 Ga. 549; *Hunter v. Stembridge*, 12 Ga. 192; *Robertson v. Johnston*, 24 Ga. 102; *Brearely v. Lalor*, 15 N. J. Eq. 108; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Crosby v. Mason*, 32 Conn. 482; *Hemingway v. Hemingway*, 22 Conn. 462; *Lord v. Lord*, 22 Conn. 595; *Birney v. Richardson*, 5 Dana

(Ky.) 424; *Griffith v. Coleman*, 5 J. J. Marsh. (Ky.) 600; *Smith v. Gage*, 41 Barb. (N. Y.) 60; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Hone v. Van Schaick*, 3 N. Y. 538; *Harvey v. Olmsted*, 1 N. Y. 483; *Roosevelt v. Thurman*, 1 Johns. Ch. (N. Y.) 220; *Roy v. Latiolas*, 5 La. Ann. 557; *Michel v. Beale*, 10 La. Ann. 352; *Leonora v. Scott*, 10 La. Ann. 651; *Hart v. White*, 26 Vt. 260; *Vannerson v. Culberston*, 18 Miss. 150; *Danbridge v. Washington*, 2 Pet. (U. S.) 370; *Wright v. Denn*, 10 Wheat. (U. S.) 239.

Where J. made his will as follows: "All my estate, both real and personal, to me belonging, and which I shall die possessed of, after the payment of my personal charges, and the expenses of settling my estate, I give and bequeath to my two nephews, I. and H.;" it was held that the word "possessed," as used by the testator, denoted ownership, and not merely personal and corporal occupation; and consequently that such a portion of the land devised to J. as aforesaid, by his father, as was retained until his death, and the proceeds of such part thereof as had been sold, under a resolution of the general assembly, on condition that the avails should be invested in other real estate, to be conveyed to J. on the same terms, limitations, and restrictions as the estate so sold, passed, by such will, to the devisees of J. *Hemingway v. Hemingway*, 22 Conn. 463.

"Children."—The word "children" does not, ordinarily and properly speaking, comprehend grandchildren or issue generally. Their being included in that term is permitted in two cases only, viz., from necessity, which occurs when the will would remain inoperative unless the sense of the word "children" were extended beyond its natural import, and where the testator has already shown by other words that he did not intend to use the term "children" in its proper actual meaning, but in a more extensive sense. *Brokaw v. Peterson*, 15 N. J. Eq. 194; *Churchill v. Churchill*, 2 Metc. (Ky.) 466; *Mowatt v. Carow*, 7 Paige (N. Y.) 328; *Phillips v. Beall*, 9 Dana (Ky.) 1; *Ward v. Cooper*, 69 Miss. 789; *Marsh v. Hague*, 1 Edw. Ch. (N. Y.)

174; *Tier v. Pennell*, 1 Edw. Ch. (N. Y.) 354; *Walker v. Williamson*, 25 Ga. 549; *Willis v. Jenkins*, 30 Ga. 167; *Ruff v. Rutherford*, 1 Bailey Eq. (S. Car.) 7; *Ward v. Sutton*, 5 Ired. Eq. (N. Car.) 421; *Mordecai v. Boylan*, 6 Jones Eq. (N. Car.) 365; *Jarden's Estate*, 3 Phila. (Pa.) 438; *Tipton v. Tipton*, 1 Coldw. (Tenn.) 252; *Izard v. Izard*, 2 Desaus. (S. Car.) 308; *Osgood v. Lovering*, 33 Me. 464; *Hughes v. Hughes*, 12 B. Mon. (Ky.) 121; *Merryman v. Merryman*, 5 Munf. (Va.) 440; *Boylan v. Boylan*, Phill. Eq. (N. Car.) 160; *Schoonmaker v. Sheely*, 3 Den. (N. Y.) 490; *Tayloe v. Gould*, 10 Barb. (N. Y.) 388; *Sheets v. Grubbs*, 4 Metc. (Ky.) 339; *Tayloe v. Mosher*, 29 Md. 443; *Cutter v. Doughty*, 7 Hill (N. Y.) 305.

A testatrix made bequests of personal property to H. and to O., with a proviso in a subsequent part of the will that if either should die without children, the bequests made to either of them should "fall back to the survivor." On an application by A. to the orphans' court, for the absolute payment of the bequest, and without security for those to whom it was to fall back, it was held that although in a will the word "children" (which is ordinarily a word of personal description) may be construed to mean issue (which *ex proprio vigore* indicates succession), where the context affirmatively shows that the testator intended so to use it, it must be held to its ordinary and usual meaning when no such intention is manifest. *Bedford's Appeal*, 40 Pa. St. 18.

A testatrix by a will divided the residue of her estate into two parts, giving one-half to her brothers and sisters of the whole blood, and the children of such of them as were deceased, share and share alike, the children of each deceased brother or sister to take together for their share, an amount equal to the share of a surviving brother or sister, and no more; the other half of her estate was given to the brothers and sisters of her deceased husband and their children, in similar terms. It was held that under the will "grandchildren" were excluded and not entitled to any portion of the estate, as the word "children" in itself did not include "grandchildren" or "issue,"—therefore it was error in the orphans' court to award any portion of the estate to the grandchildren of the deceased brothers and sisters of her

deceased husband. *Gable's Appeal*, 40 Pa. St. 231.

Under a devise or bequest to "children" as a class, natural children are not included unless the intention of the testator to include them is plain, either by express designation or necessary implication. *Heater v. Van Auker*, 14 N. J. Eq. 159. Compare *In re Gray's Trusts* (1892), 3 Ch. 88.

It was held, in *Thompson v. McDonald*, 2 Dev. B. Eq. (N. Car.) 463, that the rule, that a limitation in a will, upon the decease of a legatee leaving no "children" living, at his death, has reference to legitimate children only, is not affected by the statute enabling illegitimate children to inherit.

A testator, who was one of two illegitimate children of the same parent, devised certain land to his "mother," naming her, and "her children forever." By a later clause he made certain bequests to his sister, the other illegitimate child, by name. It was held that the term "children" in the will did not include the illegitimate child. *Shearman v. Angel*, 1 Bailey Eq. (S. Car.) 351.

Where a testator bequeathed a slave to his daughter, Ellenore, for life, with remainder to his granddaughter Harriet, having two granddaughters of that name, one of whom was illegitimate, and the daughter of Ellenore, and the other legitimate, it was held that the remainder went to the legitimate granddaughter, and that the term "grandchildren," in its established sense, applied strictly to the one and not to the other. *Ferguson v. Mason*, 2 Sneed (Tenn.) 618.

Nor does the term "children" apply to any persons who are not of the blood of the testator or person designated as the parent. *Barnes v. Greenzebach*, 1 Edw. Ch. (N. Y.) 41; *Cutter v. Doughty*, 7 Hill (N. Y.) 305.

The legal signification of children, grandchildren, or of issue, and every word of like species, when used in a will as descriptive of persons who are to take as devisees or legatees, applies to those only who are of the blood of the testator or person designated as the parent, and does not include those who may have acquired the name or character of children by marriage. *Barnes v. Greenzebach*, 1 Edw. Ch. (N. Y.) 41.

But a different intent may be manifest from the will. Thus, where a testator gave certain property to his "children," to be equally divided between

them, such as had received advancements to account therefor, and among them naming D. as having "in his lifetime" received a specified sum, it was held that the term "children" included his grandson B., the son of D. *Scott v. Nelson*, 3 Port (Ala.) 452.

"**Orphan.**"—Stephen Girard devised certain portions of his estate to the city of Philadelphia, in trust, to found a college for white orphans. It was held that according to popular acceptation a fatherless child was an orphan. *Soohan v. Philadelphia*, 33 Pa. St. 9.

"**Descendants.**"—The word "descendants" in a will cannot be construed to include any but lineal heirs, without clear indication, in the will, of the testator's intent to extend its meaning. *Baker v. Baker*, 8 Gray (Mass.) 101; *Barstow v. Goodwin*, 2 Bradf. (N. Y.) 413. *Matter of Collins*, 70 Hun (N. Y.) 273.

Thus, a sister's child is not a descendant of the testator. *Armstrong v. Moran*, 1 Bradf. (N. Y.) 314.

"**Nephews and Nieces.**"—A testator by will made a residuary bequest to "all my nephews and nieces." It was held that only her own nephews and nieces were included, not those of her husband. *Green's Appeal*, 42 Pa. St. 25.

"**Estate.**"—The word "estate," used in a will in its application to real property, may be used to express either the quantity of interest devised, or to designate the thing devised, or both, and the sense in which it is used must be determined from the will itself. *Hart v. White*, 26 Vt. 267; *Hammond v. Hammond*, 8 Gill & J. (Md.) 436. When used to designate the thing devised, the word "estate" is, in its ordinary sense, sufficiently comprehensive to embrace every description of property. *Archer v. Deneale*, 1 Pet. (U. S.) 585. See *Thornton v. Burch*, 20 Ga. 791.

"**Property.**"—The word "property," in its ordinary sense, includes everything which may be the subject of ownership; as money and securities. *Pell v. Ball*, Spears Eq. (S. Car.) 48.

A bequest of "movable property" or "movables," when there is nothing in the will to restrict the meaning of those terms, includes slaves and every other specie of personal property. *Whitehurst v. Harker*, 2 Ired. Eq. (N. Car.) 292.

But the word "property" will not be used in this unrestricted sense when the context will not allow such a construction. *Alexander v. Alexander*, 6

Ired. Eq. (N. Car.) 229; *Young v. M'Intire*, 3 Ohio 499.

Thus a direction in a will to sell the testator's personal as well as real property, and divide the income among his five children, was held to mean the proceeds of the sale of the property, and not to include notes, bonds, and mortgages. *Bredlinger's Appeal*, 2 Grant Cas. (Pa.) 461. See *Scales v. Scales*, 6 Jones Eq. (N. Car.) 163; *Pippin v. Ellison*, 12 Ired. (N. Car.) 61. *Compare Hogan v. Hogan*, 63 N. Car. 222; *Thornton v. Burch*, 20 Ga. 791.

"**Money.**"—The word "money" in a will may be constructed to mean cash, or may stand for the entire personal estate; and is to be received in the one or the other sense, as will best effectuate the general intention of the testator, deduced from every part of the will. Where a testator bequeathed to his daughter household goods, a horse and a cow, "and also one-third of the remainder or balance of money that may be left after paying all my just debts and funeral expenses," and his intention was manifestly to divide his personal estate equally between his two children, it was held that the nature of his personal property rendering such a construction necessary to effectuate his intention, the word "money" must be construed to mean "personalty." *Smith v. Davis*, 1 Grant's Cas. (Pa.) 158.

But it was held in *Re Carr's Estate*, 13 Pa. Co. Ct. 643, that the word "money" can only be used in a will to pass the whole personal estate, when the purpose of the testator is unmistakable. See *In re Levy's Estate*, 3 Pa. Dist. Rep. 36; *Sweet v. Burnett* (Ct. of App.), 49 N. Y. St. Rep. 113.

In *Brearily v. Lalor*, 15 N. J. Eq. 108, it was held that "moneys" must be understood in its legal and popular sense, and will not include bonds, mortgages, promissory notes, or other securities for the payment of money, unless it appears by the will or from the condition and circumstances of the testator's estate that it was the intention to pass them. *Compare Fulkerson v. Chitty*, 4 Jones Eq. (N. Car.) 244.

General Terms Restricted by Enumeration of Particulars.—General and comprehensive terms may be restrained in sense to less than their natural import by the context, as where they are coupled with an enumeration of things. *Perry v. High*, 3 Head (Tenn.) 349; *Delamater's Estate*, 1 Whart. (Pa.) 362; *Allen v. White*, 97 Mass. 504;

presumed to employ them in a technical sense, unless a clear intention to use them in another is apparent from the context.¹

Ulrich's Appeal, 86 Pa. St. 386; Freeman v. Coit, 96 N. Y. 63; Webster v. Wiers, 51 Conn. 569. Compare Jarnagin v. Conway, 2 Humph. (Tenn.) 50.

In the following cases it was held that where devises or bequests are made by words of enumeration, which are coupled in the same clause with collective words, or words of general description, the latter may be confined to matters *ejusdem generis*. Given v. Hilton, 95 U. S. 591; Dole v. Johnson, 3 Allen (Mass.) 364; Jameson, Appellants, 1 Mich. 99; Funchess v. Seibe, 27 Miss. 26; Lock v. Noyes, 9 N. H. 430.

1. Grandy v. Sawyer, Phill. Eq. (N. Car.) 8; Hawley v. Northampton, 8 Mass. 37; Smith v. Gage, 41 Barb. (N. Y.) 60; Heuser v. Harris, 42 Ill. 425; Dean v. Lyon, 8 Ind. 71; Johnson v. Johnson, 2 Metc. (Ky.) 331; Evans v. Godbold, 6 Rich. Eq. (S. Car.) 26; Petrow's Estate, 58 Pa. St. 424. See Marshall v. Hodley, 50 N. J. Eq. 547.

Effect of Precedent.—In Hawley v. Northampton, 8 Mass. 3, it is said to be an important rule in the construction of wills, to give to specific words of the testator that technical effect which has been derived from usage and sanctioned by a series of decisions. Henderson v. Rost, 11 La. Ann. 541. See Annable v. Patch, 3 Pick. (Mass.) 360.

In Smith v. Bell, 6 Pet. (U. S.) 68, it is said: "The construction put upon words in one will, has been supposed to furnish a rule for construing the same words in other wills; and thereby to furnish some settled and fixed rules of construction, which ought to be respected. We cannot say this principle ought to be totally disregarded; but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly that cases on wills may guide us to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills."

"Heirs."—The word "heirs," in its technical sense, includes all persons who take real estate by operation of law, upon the death of the person last

seised. Seabrook v. Seabrook, 1 McMull. Eq. (S. Car.) 201; Eby's Appeal, 50 Pa. St. 311; Porter's Appeal, 45 Pa. St. 201; Rogers v. Brickhouse, 5 Jones Eq. (N. Car.) 301; Sharp v. Kleinpeter, 7 La. Ann. 264; Aspden's Estate, 2 Wall. Jr. (C. C.) 368; Croom v. Her-ring, 4 Hawks (N. Car.) 398.

If, however, a testator uses an expression that clearly indicates that he did not intend to use the word "heir" in its legal acceptance, that intention must prevail. Williamson v. Williamson, 18 B. Mon. (Ky.) 329; Love v. Buchanan, 40 Miss. 758; Den v. Zabriskie, 15 N. J. L. 404; Bailly v. Patterson, 3 Rich. Eq. (S. Car.) 156; Gold v. Judson, 21 Conn. 616.

Thus, to effectuate the intention of the testator, the term "heirs" may be construed to mean "children." Van-norsdall v. Vandeventer, 51 Barb. (N. Y.) 137; Shepard v. Nabors, 6 Ala. 631; King v. Beck, 15 Ohio 559; Eby v. Eby, 5 Pa. St. 461; Braden v. Cannon, 1 Grant Cas. (Pa.) 60; Blair v. Snodgrass, 1 Sneed (Tenn.) 1; Boyd v. Robinson, 93 (Tenn.) 1; Cruger v. Heyward, 2 Desaus. (S. Car.) 94; Moore v. Henderson, 4 Desaus. (S. Car.) 459; Harper v. Wilson, 2 A. K. Marsh. (Ky.) 465; Thomas v. White, 3 Litt. (Ky.) 177; Harris v. Philpot, 5 Ired. Eq. (N. Car.) 324; Trexler v. Miller, 6 Ired. Eq. (N. Car.) 248; Bryant v. Deberry, 2 Hayw. (N. Car.) 356; Knight v. Knight, 3 Jones Eq. (N. Car.) 167; Bowers v. Porter, 4 Pick. (Mass.) 198; Ellis v. Essex Merrimack Bridge, 2 Pick. (Mass.) 243; Den v. Wortendyk, 7 N. J. L. 363.

The word "heirs" may also be construed to mean legatees, if the testator's intention is manifest. Collier v. Collier, 3 Ohio St. 369. It has also been construed to mean devisee. Weir's Will, 9 Dana (Ky.) 434.

When the term "heirs" is used in reference to personal estate, it has been held to be equivalent to distributees. McCabe v. Spruill, 1 Dev. Eq. (N. Car.) 189; Corbitt v. Corbitt, 1 Jones Eq. (N. Car.) 114; Kiser v. Kiser, 2 Jones Eq. (N. Car.) 28; Freeman v. Knight, 2 Ired. Eq. (N. Car.) 72; Lombard v. Boyden, 5 Allen (Mass.) 249; Loring v. Thorndike, 5 Allen (Mass.) 257.

If it clearly appears from the will

Words occurring more than once in a will are presumed to be used always in the same sense when the context does not show a contrary intention.¹ The rules of grammar will be upheld and applied, unless the testator clearly uses the words or expressions incorrectly.²

that the word "heirs," as used therein, means "heir" apparent, it will be so considered in giving construction to it. *Morton v. Barrett*, 22 Me. 257. Also, to give effect to the intention of the testator, "heirs" may be construed to mean lineal descendants only. *Bundy v. Bundy*, 38 N. Y. 410.

A by his will devised his real estate to his wife during life and after her death to his heirs. At his death A. left no child nor the descendants of any, and no father, mother, brother, or sister surviving him. It was held that the words "my heirs," as used in the will, must be construed to mean the next of kin and not the widow, who, under the law, would have been the sole heir. *Rusing v. Rusing*, 25 Ind. 63. See *Reen v. Wagner*, 51 N. J. Eq. 1.

"Heirs of the Body."—It is a well settled rule that the words, "the heirs of the body," "heirs lawfully begotten of the body," and other similar expressions, are appropriate words of limitation, and must be construed as creating an estate tail (which, by our statute, is converted into a fee simple), unless there be something else in the deed or will from which a reasonable inference can be drawn that the words were used in a sense different from their legal and technical signification. (*Lackland v. Downing*, 11 B. Mon. (Ky.) 33; *Richardson v. Scobee*, 10 B. Mon. (Ky.) 58; *Western v. Sharp*, 14 B. Mon. (Ky.) 144, and other subsequent cases.) *Johnson v. Johnson*, 2 Metc. (Ky.) 331.

"Executor."—It is always intended that an executor takes under a bequest to him as a trustee, unless the intention to give him a beneficial interest is clearly expressed. *Chestnut v. Strong*, 1 Hill Eq. (S. Car.) 122.

"Dower."—Where one devised to his wife "her full and reasonable dower in all his estate, according to the laws of this state," it was held that the term "dower" must be taken in its legal acceptation and be limited exclusively to the realty. *Brackett v. Leighton*, 7 Me. 383.

"Inherit."—Though the term "in-

herit" is technical, yet, to effectuate the intention of the testator, it was held applicable to lands devised or conveyed by a parent or ancestor to a child or descendant. *DeKay v. Irving*, 5 Den. (N. Y.) 646.

"Devise," "Legacy," "Bequest."—Though the words "devise," "legacy," and "bequest" are technical words, they may be applied indifferently to real or personal property, if such appears from the context of the will to have been the testator's intention. *Ladd v. Harvey*, 21 N. H. 514; *Williams v. McComb*, 3 Ired. Eq. (N. Car.) 450.

The word "bequeath," though not in its primary and legal acceptation synonymous with "devise," may be so construed if the context requires it. *Dow v. Dow*, 36 Me. 211.

"Legatee."—The court will apply the popular rather than the technical meaning of the term "legatee" in a will, and read it as if it was distributee, when, after looking at all the circumstances and all the clauses of the will, the alternative is between this disposition and a total failure of the dispositive scheme for want of certainty, and what seems to have been the testator's meaning. *Lallerstedt v. Jennings*, 23 Ga. 571.

Technical Language Unnecessary.—"The rule of construction of wills is, that no technical form is necessary to convey the testator's meaning." *Mansfield, J.*, in *Strong v. Cummin*, 2 Burr. 770. See *Annabel v. Patch*, 3 Pick. (Mass.) 360.

1. 1 Jarm. on Wills (5th ed.) 842; 2 Ch. Cas. 169; 3 Drew. 472; *Eliot v. Carter*, 12 Pick. (Mass.) 436; *Varrell v. Wendell*, 20 N. H. 431.

2. *Den v. Posten*, 1 Ired. (N. Car.) 166; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *McGinnis v. Harris*, 7 Jones (N. Car.) 213.

In delivering the opinion of the court, in *Hart v. White*, 26 Vt. 269, *Bennett, J.*, said: "In the construction of a will the grammatical one, if obvious, should not be departed from, unless it would lead to absurdity or unless there is

5. Some Effect Given to a Will Rather Than None.—Some effect should be given to a will, if possible, and hence, where two constructions are possible, one of which will sustain, and the other defeat, the will, the one sustaining it should be preferred.¹

6. Effect Given to Every Part of a Will if Possible.—A will should be so construed as to give effect to every part thereof without change or rejection, provided an effect can be given to it not inconsistent with the general intent as gathered from the entire will.² Where, however, effect cannot be given to a whole will, or to an entire provision thereof, consistently with the rules of law,

enough in the will to satisfy the mind that it was not the intention of the testator to have it construed according to its grammatical construction." See *Putnam v. American Bible Soc.*, 37 Vt. 271.

Interpretation by Means of Punctuation.—In the interpretation of a will, punctuation may be resorted to perhaps, when no other means can be found absolving an ambiguity, but not in cases where no real ambiguity exists except what punctuation creates. *Arclarius v. Sweet*, 25 Barb. (N. Y.) 403. See *Napier v. Davis*, 7 J. J. Marsh. (Ky.) 282.

Ignorance of the Testator to Be Considered.—In *Delph v. Delph*, 2 Bush (Ky.) 171, it was observed that the fact that the testamentary document was unskillfully written by the testator himself, must be considered in the judicial interpretation of his pervading intent, and Lord Mansfield, in *Strong v. Cummin*, 2 Burr. 770, seems to have been of the same opinion. Commenting upon the will, he said: "It is very plain from the spelling and phraseology of this will that it is of a rough draft of the testator's own making or dictating, without assistance from any person capable of advising him." See *Wooton v. Redd*, 12 Gratt. (Va.) 196.

In *Brasher v. Marsh*, 15 Ohio St. 108, it was said that the rule for construing the language of a will was less rigid than it was in regard to any other instrument.

In *Re Shrie's Estate*, 35 W. N. C. (Pa.) 60, it was held, however, that mere illiteracy of the testator raises no presumption of an incorrect use of words in his will.

1. 1 Jarm. on Wills 156; *Chapman v. Brown*, 3 Burr. 1626; *Banning v. Banning*, 12 Ohio St. 437.

In *Den v. Crawford*, 8 N. J. L. 97, *Ewing, C. J.*, in giving the opinion of the court said: "It is only when a reasonable construction and the discovery of

the intent of the testator are utterly hopeless that all effect should be denied to a will."

Where a spoliated will, as admitted to probate, devises a tract of land by a name, such as "Click farm," the boundaries of which farm, as existing at the time the will was made, are well known and capable of easy ascertainment, and this description by name is followed by an incorrect designation of the specific limits of the land, which erroneous limits are ambiguous, and may or may not include after acquired lands not intended to be included in the devise of the farm, such inaccurate designation of boundaries will not vitiate the devise, which ought to be so construed as to sustain the will. *Banning v. Banning*, 12 Ohio St. 437. The court, in delivering the opinion in the above case, said: "When the description in a deed or will is so ambiguous in its terms as to render it impossible to identify the property intended to be passed thereby, to that extent such deed or will, will be inoperative and void for uncertainty; but when a description is to some extent ambiguous, but is reasonably and fairly susceptible of two constructions, one of which would sustain and the other destroy the instrument, it is the duty of the jury to adopt such construction as will sustain, rather than that which will destroy, it; and in the present case if they find there is some degree of ambiguity in the description of the Click farm devised by the will, as found by the probate judge, but this description when fairly construed is susceptible of two constructions, one of which would render it invalid and the other give effect to it, it is their duty to adopt the latter construction."

2. *Pue v. Pue*, 1 Md. Ch. 382; *Strong v. Cummin*, 2 Burr. 770; *James v. Pruden*, 14 Ohio St. 254; *Duncan v. Phillips*, 3 Head (Tenn.) 415; *Winder*

any part of it which is conformable to such rules will be upheld, if it can be separated from the rest of the will without violating the testator's general intent.¹

v. Smith, 2 Jones (N. Car.) 331; *Jones v. Doe*, 2 Ill. 276; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Dill v. Dill*, 1 Desaus. (S. Car.) 237; *McCasland v. Martin*, 4 Bush (Ky.) 198; *Bowly v. Lammot*, 3 Har. & J. (Md.) 4; *Owen v. Owen*, Busb. (N. Car.) Eq. 121; *Cheeves v. Bell*, 1 Jones Eq. (N. Car.) 234; *Edens v. Williams*, 3 Murph. (N. Car.) 27; *Per Sedgwick, J.*, in *Parsons v. Winslow*, 6 Mass. 169; *Per Gaston, J.*, in *Dalton v. Scales*, 2 Ired. Eq. (N. Car.) 523; *Mutter's Estate*, 38 Pa. St. 315; *Shreiner's Appeal*, 53 Pa. St. 106; *Wright v. Denn*, 10 Wheat. (U. S.) 239.

In the construction of a will the court will give effect to all the words without rejecting or controlling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intention of the testator. *Dawes v. Swan*, 4 Mass. 208.

In *Jones v. Doe*, 2 Ill. 276, *Smith, J.*, delivering the opinion of the court, said, that it was a settled maxim of interpretation, that when the court can fairly ascertain the real intent of the testator, and give effect to the several parts of the will without rendering any component part inoperative, it is bound to do so.

1. *Parks v. Parks*, 9 Paige (N. Y.) 107; *DeKay v. Irving*, 5 Den. (N. Y.) 646; *Lang v. Ropke*, 5 Sandf. (N. Y.) 363; *Williams v. Williams*, 8 N. Y. 525; *Savage v. Burnham*, 17 N. Y. 561; *Tucker v. Tucker*, 5 Barb. (N. Y.) 99; *Harris v. Clark*, 7 N. Y. 242; *Miller v. Chittenden*, 4 Iowa 252; *Lepage v. McNamara*, 5 Iowa 124; *Cobb v. Battle*, 34 Ga. 458.

In *Oxley v. Lane*, 35 N. Y. 340, where the general and primary intention of the testator was in conformity with the rules of law, ulterior limitations by which a perpetuity was sought to be established were held to be void, and were disregarded, not being allowed to affect the validity of the primary disposition of the estate.

Where a will contains different trusts, some of which are valid and others void or unauthorized by law, or where there are distinct provisions as to different portions of the testator's property, some of which by law are valid and others invalid, those which are valid will be preserved unless those which

are valid and those which are invalid are so dependent upon each other that they cannot be separated without defeating the general intent of the testator. *Haxtum v. Corse*, 2 Barb. Ch. (N. Y.) 506.

A testator devised to his wife his dwelling house and furniture, and ordered the sum of \$3,000 to be left or put at interest by his executor, and the interest thereof to be paid to his widow annually during her widowhood; and as to the said three thousand dollars he further directed, that at the marriage or decease of his widow, the same was to be put to interest by his executor for his son J. during his lifetime, and at his decease the principle to be paid to his sons C. and H.; and if one of them should die before his father, the survivor to take the whole. The widow refused to take under the will. It was held that as the said sum of \$3,000 was to be invested for the use of J. only on the marriage or decease of the widow, that J. was not entitled to have the amount invested for his use on the refusal of the widow to take under the will; but it was directed that the balance in the hands of the administrator, which was less than \$3,000, be invested, and allowed to accumulate until the marriage or decease of the widow, when the sum of \$3,000 may be required to be invested for the benefit of J. if living, and if not, then to be paid to his sons as directed by the will. *Knepley's Appeal*, 17 Pa. St. 19.

All the parts of a will relating to the emancipation of negro slaves are void, although the rest may be valid. *Pickard v. McCoy*, 22 Ga. 28; *Jolliffe v. Fanning*, 10 Rich. (S. Car.) 186. Compare *Bivins v. Crawford*, 26 Ga. 225. In this case a testator bequeaths a life estate in his slaves to his widow, with directions to his executors to remove them at her death to a free country. And further, that if funds cannot be raised from the sale of his other estate, sufficient to cover the expenses of their transportation, that the negroes be hired out until money enough can be raised for that purpose. It was held that the will is void under the anti-manumission acts. And further, that in order to legalize the

7. Presumption in Favor of Construction Consistent with Law.—Where the language of a will is capable of two constructions, one of which is consistent and the other inconsistent with the law, the former must prevail.¹

8. Favor Shown by Law to Heir or Next of Kin.—In the construction of wills, it is a well established rule that the law favors the heir.² Thus, heirs at law are not to be disinherited by conjecture, but only by express words or necessary implication.³

will, it is not competent for the court to strike out one of the provisions of the instrument.

1. *James v. Pruden*, 14 Ohio St. 254; *Thompson v. Newlin*, 8 Ired. Eq. (N. Car.) 32; *Burke v. Valentine*, 52 Barb. (N. Y.) 412; *Butler v. Butler*, 3 Barb. Ch. (N. Y.) 304; *DuBois v. Ray*, 35 N. Y. 162; *Quincy v. Atty. Gen'l*, 160 Mass. 431; *In re McBride's Estate*, 152 Pa. St. 192.

In giving the opinion of the court in *Reilly v. Fowler*, *Wilmot's Opinions* 298, *Wilmot, C. J.*, said: "As the law has been now settled about a century and universally known, it ought to appear clearly and explicitly that the testator meant an illegal limitation. The proof of such an intention lies upon the party who asserts it. If that intention does not appear, if there is the least doubt about it, the presumption would be that he meant a disposition he was unable to make by the rules of law, and not a disposition condemned by the law."

Ranney, J., in delivering the opinion of the court in *James v. Pruden*, 14 Ohio St. 254, said: "When an instrument of any kind is open to two constructions, the one consistent and the other repugnant to the law, or the one will give effect to the whole, and the other will destroy a part, the former must always be adopted."

A general direction in a will as to a trust will be taken as intended to be consistent with law, and the subsequent acts of the trustee cannot affect such intention. *Thompson v. Newlin*, 8 Ired. Eq. (N. Car.) 32.

2. *Biddle's estate*, 28 Pa. St. 59; *Walker v. Parker*, 13 Pet. (U. S.) 166; *Mullarky v. Sullivan*, 136 N. Y. 227; *Pendleton v. Larrabee*, 62 Conn. 393.

It not being clear from the language of the will that the testator, in devising a balance, intended to devise the balance of a particular fund or of his whole estate, the court of equity will give the will such a construction as

will be most favorable to the heir at law. *Bane v. Wick*, 19 Ohio 328.

3. *McIntire v. Ramsey*, 23 Pa. St. 321; *Bane v. Wick*, 19 Ohio 328; *Wright v. Hicks*, 12 Ga. 155; *Woolton v. Redd*, 12 Gratt. (Va.) 196; *Crane v. Doty*, 1 Ohio St. 279; *Wilkins v. Allen*, 18 How. (U. S.) 385; *Howard v. American Peace Soc.*, 49 Me. 288; *Bender v. Dietrick*, 7 W. & S. (Pa.) 287; *Hitchcock v. Hitchcock*, 35 Pa. St. 397; *Stewart v. Pattison*, 8 Gill. (Md.) 46; *Hoover v. Gregory*, 10 Yerg. (Tenn.) 444; *Thomas v. Thomas*, 6 T. R. 671.

In *Wright v. Hicks*, 12 Ga. 155, *Lumpkin, J.*, in delivering the opinion of the court, said: "In the absence of anything in the will to the contrary, the presumption is, that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interrupt or disturb this descent, or direct it in a different course, should require plain words to that effect."

In *Bender v. Dietrick*, 7 W. & S. (Pa.) 287, *Rogers, J.*, said "It is a maxim which applies here as well as in *England*, that an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability, that an intention to the contrary cannot be supposed."

Of two equally probable interpretations of a will, that one is to be adopted which prefers the relatives of the testators to strangers. *Downing v. Bain*, 24 Ga. 372.

In *Vail v. Vail*, 10 Barb. (N. Y.) 69, *Mitchell, J.*, said: "It is the legal duty of a father to support his children during their infancy, according to his ability; and although the legal obligation is not continued upon his estate after his death, yet every parent recognizes the moral obligation, and so natural is this feeling that, in any ambiguous case, it may be presumed that the parent was acting under its influence."

Instance of Devise Inoperative to Divest the Heir.—A will executed by the testator resident in *Pennsylvania*, after providing an annuity for the testator's wife, to be secured on his real and personal estate, and bequeathing different legacies, contained the following clause: "As to my debts, they will amount to very little; but, and after paying all claims and bequests, there will remain a considerable surplus which I give and bequeath in trust to my executors, be the same more or less" (to be applied to certain charities). It was held that the will did not give to the executors the testator's real estate, so as to disinherit his heirs, and that extrinsic evidence was not admissible to show, from the actual condition of his property, his own declaration and memoranda, that he must have meant to give the real estate. *Wilkins v. Allen*, 18 How. (U. S.) 385.

Instance of Devise Operating to Divest the Heir.—The testator gave all the rest and residue and remainder of his estate, real and personal, comprehending a large real estate in the city of New York, to the chancellor of the State of *New York*, and recorder of the city of New York, etc. (naming several other persons by their official description), to have and to hold the same unto them and their respective successors in office, to the uses and trusts, subject to the conditions and appointments declared in the will; which were, out of the rents, issues, and profits thereof, to erect and build upon the land upon which he resided, which was given by the will, an asylum, or marine hospital, to be called "The Sailor's Snug Harbor," for the purpose of maintaining and supporting aged, decrepit, and worn-out sailors, etc. And after giving directions as to the management of the fund by his trustees, and declaring that the institution created by his will should be perpetual, and that those officers and their successors should forever continue the governors thereof, etc., he adds, "it is my will and desire that if it cannot legally be done according to my above intention, by them, without an act of the legislature, it is my will and desire that they will, as soon as possible, apply for an act of the legislature to incorporate them for the purpose above specified; and I do further declare it to be my will and intention, that the said rest, residue, etc., of my estate should be, at all events, applied for the uses and purposes above set forth; and that it is my

desire all courts of law and equity will so construe this, my said last will, as to have the said estate appropriated to the above uses, and the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess, or enjoy my property, except in the manner and for the uses herein above specified." It was held that this was a valid devise to divest the heir of his legal estate, or, at all events, to affect the lands in his hands with the trust declared in the will. *Inglis v. Sailor's Snug Harbor*, 3 Pet. (U. S.) 99.

Statutory Provision in Favor of Pretermitted Children.—Many of the states have statutes to the effect that any child for whom a testator has failed to provide in his will shall take a share of his property as if he had died intestate, unless it shall appear that such omission was intentional. See, on this point, *Wilson v. Fosket*, 6 Met. (Mass.) 400; *Prentiss v. Prentiss*, 11 Allen (Mass.) 47; *Church v. Crocker*, 3 Mass. 17; *Wilder v. Goss*, 14 Mass. 357; *Blagge v. Miles*, 1 Story (U. S.) 426; *Loringa v. Marsh*, 6 Wall. (U. S.) 337; *Hargadine v. Pulte*, 27 Mo. 423; *Jourden v. Meier*, 31 Mo. 40; *Block v. Block*, 3 Mo. 594; *Bradley v. Bradley*, 24 Mo. 311; *Thomas v. Black*, 113 Mo. 66; *Case v. Young*, 3 Minn. 209; *Parker v. Parker*, 10 Tex. 83; *Rhoton v. Blevin*, 99 Cal. 645; *Mason v. McLean*, 6 Wash. 31; *Bower v. Bower*, 5 Wash. 225; *Hill v. Hill*, 7 Wash. 409; *In re Barker's Estate*, 5 Wash. 390; *Forbes v. Darling*, 94 Mich. 621; *In re Stebbins*, 94 Mich. 304.

Presumption of Equality Among Children.—Where the meaning of a will is doubtful, the rule of equality among children may be taken as a guide of the interpretation. Thus, where a testator gave to his son J. \$500, as an advancement, and afterward made his will devising all his estate equally among his seven children, in which he refers to the fact of the advancement and then says, "further I will that, if my estate amounts to more than seven times five hundred dollars, my son J. is to have a proportional part of it," it was held that J. was entitled to nothing until the other children received \$500 each, and that in all beyond that, he was entitled to share equally with them. *Malone v. Dobbins*, 23 Pa. St. 296. See also *Willcox v. Beecher*, 27 Conn. 135.

A clause in the testator's will was as

Nor will mere negative words suffice; there must be an actual disposition of the estate to some other person.¹ And words equally plain are requisite to charge the estate of an heir, for a charge is *pro tanto* a disinheritance.²

9. Presumption Against Partial Intestacy.—The natural and reasonable presumption is, that when a will is executed, the testator does not intend to die intestate as to any part of his property.³

follows: "And whereas my wife has by will given her property to my said daughters, my will is, that the property of my said wife shall be estimated at its fair value, and the share of my son Edward, and the share given to the children of my son Seymour, and the share given to the children of my son George, shall, each share, be three hundred dollars more than the share each, given to my said daughters, after the estimated value of my wife's property is added to their respective shares." It was held that it was not the testator's intention that a son should receive a larger inheritance from both parents than a daughter, but that a son's proportion of the father's property should be large enough to counterbalance the disparity created by the mother's disposition of her estate, thereby securing to all his children an equal inheritance. *Taylor v. Taylor*, 23 Conn. 579.

Presumption in Favor of the Statutory Form of Distribution.—Where a testator gives the whole or a part of his property to his next of kin, and leaves the proportion doubtful, it is natural to suppose that he intended the statutory form of distribution to prevail. *Dunlap's Appeal*, 116 Pa. St. 500; *Geery v. Skelding*, 62 Conn. 499.

1. *Den v. Gaskin*, Cowp. 657; *Howell v. Barnes*, Cro. Car. 382; *Schauber v. Jackson*, 2 Wend. (N. Y.) 13; *Wright v. Hicks*, 12 Ga. 163; *Gordon v. Blackman*, 1 Rich. Eq. (S. Car.) 61; *Hitchcock v. Hitchcock*, 35 Pa. St. 393.

Where a will directed the executors to sell the lands to pay legacies and distribute the residue, and expressly disinherited the heir at law and declared that he should take nothing as heir, it was held that the direction to the executors to sell, conveyed merely a naked power without interest, and that until the power was executed, the fee of the land and the right to receive the profits was vested in the heir at law. *Jackson v. Schaubert*, 7 Cow. (N. Y.) 187.

A testator devised real and personal

property to be divided between a widow and her children, designating them, each child to have his or her share as he or she should arrive at maturity or marry, and the widow to have her portion for her natural life and to give or will to any of her children she might think proper; and in another clause of the will he declared it to be his will that "those of my children that I have heretofore given portions to, shall have no part nor portion in the estate that I may die possessed of" (naming them). The wife died intestate. It was held that the wife took an estate for life only, and that the share allotted to her should be divided among all the children of the testator. *Haralson v. Redd*, 15 Ga. 148.

But it has been held where there is a provision in a will that the share therein bequeathed to one of the next of kin is all that the testator intends he shall have, it will exclude him from the distribution of an undisposed of residue. *Ford v. Whedbee*, 1 Dev. & B. Eq. (N. Car.) 16.

2. *Davis v. Gardiner*, 2 P. Wms. 188; *Leigh v. Savidge*, 14 N. J. Eq. 134.

3. *Leigh v. Savidge*, 14 N. J. Eq. 124; *Doe v. Latham*, Busb. (N. Car.) 365; *Apple v. Allen*, 3 Jones Eq. (N. Car.) 120; *Foust v. Ireland*, 1 Jones (N. Car.) 184; *Robertson v. Roberts*, 1 Jones (N. Car.) 74; *Gilpin v. Williams*, 17 Ohio St. 396; *Jarnagin v. Conway*, 2 Humph. (Tenn.) 50; *Deadrick v. Armour*, 10 Humph. (Tenn.) 588; *Gourley v. Thompson*, 2 Sneed (Tenn.) 387; *Dole v. Johnson*, 3 Allen (Mass.) 364; *Dill v. Dill*, 1 Desaus. (S. Car.) 241; *Saxton v. Webber*, 83 Wis. 619. *Compare Reimer's Estate*, 23 Pitts. L. J. N. S. (Pa.) 452.

In *James v. Pruden*, 14 Ohio St. 253, *Ranney, J.*, said: "It very seldom happens that a man who goes to the trouble of making a will intends to die intestate as to any part of the property that he may own at the time of his death."

In *Jarnagin v. Conway*, 2 Humph.

XV. ADMISSIBILITY OF EXTRINSIC EVIDENCE.—See AMBIGUITY, vol. 1, p. 525; EVIDENCE, vol. 7, p. 92.

XVI. DETAILS OF TESTAMENTARY CONSTRUCTION—1. **Words Descriptive of the Objects of the Gift—To What Period Referred.**—In the absence of a contrary intent, words descriptive of the objects of a gift refer to the death of the testator, and not to the date of the will or period of execution.¹ Thus, under a gift to fluctuating

(Tenn.) 50, this rule of construction is laid down in almost the exact words of our text. It was here held to be a principle, sanctioned by reason and authority, that when one engages in an act so solemn and important as the execution and publication of a last will and testament, he is not to be presumed as intending, with reference to any portion of his property, to die intestate.

In *Doe v. Latham*, Busb. (N. Car.) 365, Pearson, J., delivering the opinion of the court, said: "The rule, *ut res magis valeat quam pereat*, comes in aid of the general presumption that one who makes a will intends to dispose of all his property."

On account of this presumption a will will be so construed as to embrace all the testator's property, if the words used, by any fair interpretation, or allowable implication, will embrace it. *Gourley v. Thompson*, 2 Sneed (Tenn.) 387.

Where a testator, by his will, gave a tract of land and a slave to his wife for life, the balance of his estate, both real and personal, to his daughter for life, with remainder to her children, it was held that it was not to be presumed that he intended to die intestate as to any portion of his estate, and therefore, at the death of his wife, the tract of land and slave went to his daughter for life, with remainder to her children. *Deadrick v. Armour*, 10 Humph. (Tenn.) 588.

A provision in a will that "all the money that I have on hand, or loaned out," shall accumulate for ten years, will embrace all the funds of the testator, from whatever source arising, especially where such a construction is necessary to prevent an intestacy as to a part of the estate. *Apple v. Allen*, 3 Jones Eq. (N. Car.) 120.

A present bequest of a slave or money is not to be postponed till the expiration of a life estate, although connected by the word "also" with a devise of an estate thus postponed, where the effect of such a construction would be

an intestacy, as to this property, for the *interim*. *Robertson v. Roberts*, 1 Jones (N. Car.) 74.

But this rule applies only in the construction of a will the language of which is of equivocal import.

Thus, where a testator devised to his "daughter R. during her natural life, and to her children after her death forever," one-eighth part of his real estate, and there is no provision in the will in respect to a disposition of the remainder in case R. should die without having had issue, and there is nothing in the will showing a contrary intention on the part of the testator, R. takes a life estate only; although on the death of R. without having had issue, the testator will have died intestate as to the contingent reversion of her share, and the same will revert to his heirs general. *Gilpin v. Williams*, 17 Ohio St. 397. See also *Given v. Hilton*, 95 U. S. 591; *Leigh v. Savidge*, 14 N. J. Eq. 124; *Doe v. Latham*, Busb. (N. Car.) 365; *Gourley v. Thompson*, 2 Sneed (Tenn.) 387; *Randenbach's Appeal*, 87 Pa. St. 51; *Daman v. Bibber*, 135 Mass. 458.

1. *Meares v. Meares*, 4 Ired. (N. Car.) 192; *Shinn v. Motley*, 3 Jones. Eq. (N. Car.) 490; *Lynes v. Townsend*, 33 N. Y. 564; *Van Alstyne v. Van Alstyne*, 28 N. Y. 377; *Goodall v. McLean*, 2 Bradf. (N. Y.) 306; *Cherbonnier v. Goodwin* (Md. 1894), 28 Atl. Rep. 894; *In re Swenson's Estate*, 55 Minn. 300; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Turner v. Patterson*, 5 Dana (Ky.) 292; *Wood v. McGuire*, 15 Ga. 202; *Arnold v. Arnold*, 11 B. Mon. (Ky.) 81; *Abbott v. Essex Co.*, 18 How. (U. S.) 202; *Trustees v. Sturgeon*, 9 Pa. St. 321; *Stook's Appeal*, 20 Pa. St. 349. Compare *Cowan v. Epes*, 2 Patt. & H. (Va.) 520; *Bullock v. Bullock*, 2 Dev. Eq. (N. Car.) 307.

Where Date and Time of Actual Execution Differ.—As between the date of the will, and the time of its actual execution, if they differ, it seems that the will is to be construed with reference

to the law in force at the time it was actually executed. *Randfield v. Randfield*, 8 H. L. Cas. 225. In this case, the testator prepared and dated a will in 1837 (before the Wills Act), but did not execute it till 1844, by which he devised all his freehold and copyhold estates to his son "when he have obtained the age of twenty-one years, upon the following conditions," etc., and directed that his own widow should receive an annuity out of these rents; he then gave to his son all his personal estates, consisting of ships, bonds, and funded stock, etc., "but should the hand of death fall upon my widow and son, and my having no other children, or my son any issue, my will is then that should he leave a widow, she shall receive an annuity out of my real estates as before mentioned, the residue then to be equally divided, share and share alike, after paying such legacies as I may hereafter name, the division to be" between certain persons specifically mentioned "(they paying all my son's debts, funeral expenses, and demands, or my wife's, should she be the longest liver)." The son became twenty-one some years before the will was executed; he married, but died without ever having had issue. It was held, varying the decree of the court below, that the gift over affected only the real estate; also, that the will must be read as if made in 1844; that the contingency of attaining twenty-one was to be disregarded, and that the gift over took effect on the son dying without issue. In this case Lord Kingsdown said: "If the testator in this case had executed his will at the time at which he prepared and dated it, October, 1837, it appears to me that none of the questions now raised at the bar could have arisen. At that time the Wills Act had not come into operation. All wills made before January, 1838, are expressly excluded from its operation. The will, therefore, would have been interpreted according to the rules of construction which then prevailed, and the testator's son being, at the date of the will, under twenty-one, the construction would have been reasonably clear. As regards the real estate, the first devise to the son would have given him an estate for life at twenty-one, and the subsequent words would either have enlarged that interest to an estate tail, with remainder to the nephews and nieces, or would have con-

tained a contingent remainder to the nephews and nieces, to take effect if the son died without ever having had any issue. In either construction there would have been no previous estate in fee to be cut down by a subsequent executory devise. The gift of the personal estate to the son was absolute, without any contingency, and no question could have arisen with respect to it.

"When the will was actually executed in 1844, the son had long attained twenty-one, and the legislature had declared that the words which the testator had used originally to give, and which would have given only a life estate, should give a fee; that the words which he had used with respect to issue should not mean an indefinite failure of issue, and should not create, therefore, an estate tail. In what sense, then, are we to read the testator's will? I apprehend we must understand him as declaring: 'This instrument, in the new sense given to the words by the legislature, contains my intentions, and those I mean to be carried out as far as the altered circumstances of my family will allow.' If this be so, the testator, knowing that his son had attained twenty-one, must have considered, of course, that the gift which had been previously contingent on that event could no longer be subject to that contingency, and that what he had previously meant to be a life estate should be an estate in fee."

R. makes a will bequeathing legacies "to the two oldest children" of G. One of the two oldest at the date of the will died. R. afterward, by a codicil, confirmed the will except in some particulars, saying nothing of these bequests. It was held that the two oldest children living at the testator's death were entitled to the legacies. *Miles v. Boyden*, 3 Pick. (Mass.) 213.

Though, for some purposes, a will is considered as speaking from its execution, the time of its inception, and for others, from the death of the testator, the time of its consummation; yet the general rule is that it speaks from the death of the testator, where there is nothing in its language indicating a different intention. Where the testator, after giving different portions of his estate to each of his brothers and sisters, and a nephew, or to the representatives of such as were deceased, devised to the heirs of each of his brothers and sisters, including the heirs of his sister N., the residue of the

classes, as children or descendants, all who answer the description at the death of the testator are entitled, irrespectively of those to whom the description was applicable at the date of the will, but who subsequently died in the testator's lifetime.¹ But when the gift is to persons actually existing, as to descendants of A *now living*, or to his servants simply, as distinguished from those who "shall be in his service at his decease," the language is referred to the date of the will and not to the death, as the latter is a prospective event, and those only are entitled who answer the description at that time.² So a gift to a particular individual living at the date of the will, as to "my son," or "my son John," will take effect in favor of the person answering the description

estate, to be equally divided between said heirs, each individual having an equal portion of the same; N. died before the death of the testator, leaving a son who died before the execution of the will, and he left a daughter, C., who is a party to the present suit; on an appeal from the decree of probate, it was held, first, that the will spoke from the death of the testator; second, that as N. and her son the father of C., were dead at the time of that event, C. was the heir of N., both in its technical and its popular sense. *Gold v. Judson*, 21 Conn. 616.

A testator made his will, giving all the residue of his estate to be equally divided between the children of M. and N. When the will was made, M. had six children, of whom D., the mother of the plaintiff, died before the testator, her father. It was held that the terms "the children of M.," being predicable not less truly of the children only who should be living at the time when the testator should die, than of the children who were living when he made his testament, neither exposition being decisively favored by the other clauses of the testament, the former was to be preferred. *Pendleton v. Hoomes*, Wythe (Va.) 4.

1. 1 Jarm. on Wills (5th ed.) *326; *Ringrose v. Bramham*, 2 Cox 384. See *Sharpe v. Allen*, 5 Lea (Tenn.) 81; *Udike v. Tompkins*, 100 Ill. 406; *Cannfield v. Bostwick*, 21 Conn. 553; *Meares v. Meares*, 4 Ired. (N. Car.) 192; *Shinn v. Motley*, 3 Jones Eq. (N. Car.) 490; *Petway v. Powell*, 2 Dev. & B. Eq. (N. Car.) 308; *Robinson v. McDiarmid*, 87 N. Car. 455; *Joundan v. Green*, 1 Dev. Eq. (N. Car.) 270; *Den v. Sayre*, 3 N. J. L. 183; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185; *Conn v. Conn*, 1 Md. Ch. 212; *Myers v. Myers*, 2 Mc-

Cord Eq. (S. Car.) 214; *Walker v. Williamson*, 25 Ga. 549; *State v. Raughley*, 1 Houst. (Del.) 561; *Lorillard v. Coster*, 5 Paige (N. Y.) 172; *Jenkins v. Freyer*, 4 Paige (N. Y.) 47; *Merriam v. Wolcott*, 61 How. Pr. (N. Y. Supreme Ct.) 380; *Van Vechten v. Van Veghten*, 8 Paige (N. Y.) 104; *Campbell v. Rawdon*, 19 Barb. (N. Y.) 494. Compare *Lewis v. Lewis*, 62 Ga. 265; *Matter of Green's Estate* (Supreme Ct.), 15 N. Y. Supp. 240; *M'Lemore v. Blocker*, 1 Harp. Eq. (S. Car.) 272.

Gifts to Children.—"In regard to gifts to children, indeed, an anxiety to include as wide a range of objects as possible has so powerfully influenced the construction that such cases are to be regarded as *sui generis*. To this anxiety is also to be ascribed the rule, which constitutes another exception to the doctrine under consideration, that a gift to children 'begotten' extends to children born after the date of the will; and a gift to children 'to be begotten,' includes those antecedently in existence." 1 Jarm. on Wills (5th ed.) *320. See "Gifts to Children," Post. Co. Litt. 20 b.

2. 1 Jarm. on Wills (5th ed.) *318, 326; *Merriam v. Wolcott*, 61 How. Pr. (N. Y. Supreme Ct.) 380. See *McNaughton v. McNaughton*, 41 Barb. (N. Y.) 50. As to gifts to descendants now living, see *Crossly v. Clare*, Ambli. 397; *Abney v. Miller*, 2 Atk. 593; *All Soul's College v. Coddington*, 1 P. Wms. 597; *Ellis v. Ellis*, 2 Desaus. (S. Car.) 556; *Starling v. Price*, 16 Ohio St. 29. Compare *Rowland v. Gorsuch*, 2 Cox 187; *Gold v. Judson*, 21 Conn. 616; *Mackie v. Alston*, 2 Desaus. (S. Car.) 362.

A testator bequeathed legacies to "each of the daughters that is now living of my niece G., as follows: To

at the date of the will, and of him only. If, therefore, such son should die in the testator's lifetime, and he should afterwards have another son of the same name, who survived him, such after-born son would not be an object of the gift.¹ A gift to the wife of A,

her eldest daughter," specified sums at certain intervals; "and to the remaining daughters each now living," certain other sums payable at fixed intervals; and at the expiration of the tenth year after his decease \$6,000 to be paid "to each of said remaining daughters respectively." It was held that the intention to be gathered from the whole will, and the circumstances in which the testator was placed, was that the words "remaining daughters now living," and the like, were descriptive of persons known to the testator, and did not designate a class; so that a daughter of G. who was living *en ventre sa mère* when the will was made, and was born afterward, was not included. *Starling v. Price*, 16 Ohio St. 29.

So a gift to "my present attending physician," refers to the date of the will. *Everett v. Carr*, 59 Me. 325.

As to gifts to servants, see *Parker v. Marchant*, 1 Y. & C. C. 290; *Darlow v. Edwards*, 1 H. & C. 547.

1. 1 Jarm. on Wills (5th ed.) *323. See *Morse v. Mason*, 11 Allen (Mass.) 37; *Everett v. Carr*, 59 Me. 325; *Board of Education v. Ladd*, 26 Ohio St. 213; *Butler v. Butler*, 3 Barb. Ch. (N. Y.) 309; *Eells v. Lynch*, 8 Bosw. (N. Y.) 481; *Anshutz v. Miller*, 81 Pa. St. 212.

Reference to Existing State of Affairs.—It may be laid down as a general rule, that wherever a testator refers to an actually existing state of things, his language is referential to the date of the will and not to his death, as this is then a prospective event. 1 Jarm. on Wills (5th ed.) *318.

In *Board of Education v. Ladd*, 26 Ohio St. 213, White, J., said: "It is true that as a general rule a will speaks from the death of the testator, and not from its date, unless its language, by fair construction, indicates the contrary intention." To the same effect, see *Sharpe v. Allen*, 5 Lea (Tenn.) 81.

In *Morse v. Mason*, 11 Allen (Mass.) 36, a devise to the "surviving children, not knowing all their names, of my late sister A., they living in the State of Maine, to be divided equally between them all," was construed as a devise to all those children surviving at the date of the will; and one

of the children, having afterward died in the testator's lifetime, leaving issue who survived the testatrix, such issue were allowed to take the share of their deceased parent. It was observed by Gray, J., who delivered the opinion of the court, that the presumption, that as a will speaks from the death of the testator it refers to the state of things then existing, that such presumption must yield when the will manifests the testator's intention to refer to the state of things existing at the time of making it. See also *Simms v. Garrot*, 1 Dev. & B. Eq. (N. Car.) 393. *Infra*, this title, *Survivorship*.

Gift to Unborn Child.—"A gift to the child with which the testator's wife was pregnant, which child was still-born, was held not to take effect in favor of another child of which the testator's wife was pregnant at the time of his death, though the result was that all the testator's property was devised away, and the last-mentioned child left unprovided for." *Foster v. Cook*, 3 Bro. C. C. 346.

In *Hawkins v. Garland*, 76 Va. 155, the facts were these: Samuel Garland, Sr., departed this life in November, 1861. He left a will wholly written by himself, which bore date December 7, 1857. He left a very large estate valued at nearly \$800,000, a widow, but no issue surviving him. His next of kin consisted of a number of nephews and nieces, to all of whom he left liberal bequests. The fifteenth clause of his will was in these words: "I give to each of my namesakes, Samuel G. Slaughter, son of Chas. R. Slaughter, Samuel G. White, son of Samuel G. White, Samuel, son of S. Garland, Jr., and Samuel G., son of Capt. Jno. F. Slaughter, a bond of one thousand dollars of the S. S. Railroad." At the date of the will there was no such person in existence as Samuel G., son of Capt. Jno. F. Slaughter, and no such person came into existence until three or four years after the date of said will. Then there was born to Jno. F. Slaughter a son whom he named Samuel G. The testator, however, had a namesake, Samuel G., son of Capt. Jno. F. Hawkins, who was an intimate friend of the

who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and by parity of reasoning is under all circumstances confined to her; but if A have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator; if there be no such person, either at the date of the will or at the death of the testator, it applies to the woman who shall first answer the description of wife, at any subsequent period.¹

2. Words Descriptive of Property—To What Period Referred.—At common law, a general bequest of all the testator's personal estate, or all the residue of his personal estate, carries all his personal estate existing at the time of his death,² and the better

testator. In a controversy between Samuel G., son of Capt. Jno. F. Hawkins, and Samuel G., son of Jno. F. Slaughter, it was held by the court that parol evidence was admissible to show the facts above, and that the testator never knew or called Jno. F. Slaughter "Captain," but that he was known to the testator as, and was called by him, "Jack" Slaughter, and that Jno. F. Slaughter had no such title as "Captain," and was never known as "Captain," or called such by anyone else, and the court decided in favor of Samuel G. Hawkins, son of Capt. Jno. F. Hawkins.

1. 1 Jarm. on Wills (5th ed.) *324; Niblock v. Garrett, 1 Ry. & M. 629; Bryan's Trust, 2 Sim. N. S. 103; Franks v. Brooker, 27 Beav. 635; Anshutz v. Miller, 81 Pa. St. 212. See Lloyd v. Davis, 14 C. B. 76; 80 E. C. L. 75; Beers v. Narramore, 61 Conn. 13; Humphrey v. Winship, 28 Hun (N. Y.) 33.

As to where a gift to a wife is by way of remainder after the death of the husband, see Radford v. Willis, L. R., 7 Ch. 7; Boreham v. Bignall, 8 Hare 131; Driver v. Frank, 3 M. & S. 25.

2. 1 Jarm. on Wills (5th ed.) *326; Hawkins on Wills *17; Wilde v. Holtz-meyer, 5 Ves. Jr. 816; Donaugher's Estate, 2 Pars. Sel. Cas. (Pa.) 164; Philadelphia v. Davis, 1 Whart. (Pa.) 509; Walton v. Walton, 7 J. J. Marsh. (Ky.) 59; Marshall v. Porter, 10 B. Mon. (Ky.) 2; Curling v. Curling, 8 Dana (Ky.) 38; Warner v. Swearingen, 6 Dana (Ky.) 196; Atwood v. Beck, 21 Ala. 625; Canfield v. Bostwick, 21 Conn. 554; Gold v. Judson, 21 Conn. 616; Dennis v. Dennis, 5 Rich. (S. Car.) 468; Garrett v. Garrett, 2 Strobb. Eq.

(S. Car.) 283; Dalrymple v. Gamble, 68 Md. 523; Nichols v. Allen, 87 Tenn. 131. See also Cairns v. Chanbert, 9 Paige (N. Y.) 160.

What Passes Under a Bequest of Personality.—In the case of Kinsman v. Kinsman, 1 Root (Conn.) 180, it was decided that growing crops did not pass under a bequest of personality. The controversy arose over the action of the testator's executor, in entering and cutting rye growing on the testator's leaseholds at his death, notwithstanding a bequest of all his personality to the wife of the testator. The executor's action was approved by the court, who held that the rye was the property of the said testator, but that as it was not severed from the land, it did not pass by the bequest of personal estate.

Possession of Chattel.—It is not indispensable to the valid bequest of a chattel, that the testator should have had actual possession of it. Puryear v. Beard, 14 Ala. 121.

Effect of the Word "Now" Upon the Construction.—"For some purposes, a will is considered to speak from its execution, and for others, from the death of the testator; the former being the period of inception, and the latter that of the consummation of the instrument. To determine to which of these the language points, is not generally attended with difficulty, and certainly not, where the language used, is, as in this case, general, and not limited, and is broad enough, in describing the subject-matter of the bequest, to embrace all the *residuum*, and as to the devisees, all the persons who claim to take. Wherever a testator refers to an actually existing state of things, his language should be held as referring to

opinion is that, upon the same principle, a bequest of all the property of a particular kind or description, as "all household goods," carries property of this description belonging to him at his death.¹ But where a testator refers to a specific subject of gift, he is considered as pointing at the state of facts existing

the date of the will, and not to his death, as this is then a prospective event. Such, it is clear, is the construction of the word 'now.' Thus, to the descendants now living of a person, means those living at the date of the will, exclusive of such as come into being between that period and the death of the testator. *Crossly v. Clare*, *Ambl.* 397; *Abney v. Miller*, 2 *Atk.* 593; *Blundell v. Dunn*, 1 *Madd.* 433; *All Soul's College v. Coddington*, 1 *P. Wms.* 597. And the same is true where the word 'now' is combined with a term which could not have full effect according to its technical import, unless used prospectively, as in the case of a devise to the heir male of the body of A, now living; under which the heir apparent of A, living at the date of the will, has been held to be entitled. 1 *Eq. Ca. Abr.* 214; 1 *Vent.* 334. So words in the present tense have a similar effect; thus, all the property I am possessed of at this date (*Wilde v. Holtzmeier*, 5 *Ves. Jr.* 816), the devisee takes only what the testator then had. So in *Bridgman v. Dove*, 3 *Atk.* 201, it was held that a charge of all the debts I have contracted since 1735, extended to all debts owing by the testatrix at her decease, including those she contracted after the period referred to. So in the description of the thing given, and the person or persons to whom given, it may be such as to embrace only the specific thing or persons described; as thus, the stock I now hold in Hartford bank, or the children of my brother, already born. But if the language is general, not specific, and not limited, the will speaks from the testator's death, and of course disposes of whatever property the testator had at the time, or to such persons as answer the description. So a general bequest of any particular species of personal property, as 'my furniture and effects,' has been held to embrace property of this description belonging to the testator at his death." *Ellsworth, J.*, in *Gold v. Judson*, 21 *Conn.* 622.

A devise of "all the real estate I 'now' possess" will not carry after ac-

quired realty, under a statute providing that after acquired realty shall pass by a general devise. *Quinn v. Hardenbrook*, 54 *N. Y.* 88.

1. 1 *Jarm.* on Wills (5th ed.) *326; *Masters v. Masters*, 11 *P. Wms.* 424; *Banks v. Thornton*, 11 *Hare* 176; *Gold v. Judson*, 21 *Conn.* 623; *Van Vechten v. Van Veghten*, 8 *Paige* (N. Y.) 118. See *Bridgman v. Dove*, 3 *Atk.* 201; *Gilmer v. Gilmer*, 42 *Ala.* 9.

In *Hawkins on Wills* *17, it is said that the principle in the text is confined to bequests of household goods. But in one of the two cases relied upon, the bequest was specific. In *Miller v. Little* 2 *Beav.* 259; and in the other, the subject of the gift was "all the property that I possess in the public funds," which was held to mean "all I now possess." *Cockran v. Cockran*, 14 *Sim.* 248.

The tendency of American authority sustains the text. See cases in preceding note. In *Van Vechten v. Van Veghten*, 8 *Paige* (N. Y.) 105, the testator directed in his will that his son should be discharged from all notes which he held against him, and from all charges made against him by the testator for loans or advances, and all claims against him for the occupation or rents of certain premises specified. It was held that the son was entitled to a discharge from all such claims which existed at the death of the testator, and not merely those which were in existence at the date of the will. *Walworth, Ch.*, said: "Although, as a general rule, it is well settled that a will of personal property relates to the time of the death of the testator, both as to the legatees and the subjects of the bequests mentioned in the will, yet in the case of specific legacies, it is sometimes very difficult to ascertain whether he intended to confine the bequests to the subject-matter thereof as it existed at the time of making the will, or as it might exist at the time when such will should take effect by his death. But to take the case out of the general rule, that in a will of personal estate, the testator is presumed to speak with reference to the time of his

while penning the instrument, and not that existing at his decease.¹ Upon the same principle, it has been held that verbs in the present tense, as where the bequest is of "all property that I possess in the public funds," have the effect of restricting a bequest of property of a particular description to objects existing at the date of the will.² At common law, after acquired lands could not be devised, and hence, every devise of freehold lands

death, there must be something in the nature of the property or thing bequeathed, or in the language used by the testator in making the bequest thereof, to show that he intended to confine his gift to the property, or subject of the bequest, as it existed at the time of the making of the will."

Leaseholds.—In *James v. Dean*, 11 Ves. Jr. 390, Lord Eldon said: "Where there is a general bequest, in the terms 'all my leasehold estates,' and the testator afterwards surrenders and takes a new lease, that is a revocation. But it depends upon the context of the whole will, whether that general doctrine is to be applied. A leasehold interest for years may be disposed of by a will, made before the testator acquired that interest. But the general doctrine is, that you must show that intention." *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hone v. Medcraft*, 1 Bro. C. C. 266.

1. 1 Jarm. on Wills (5th ed.) *320; *Pattison v. Pattison*, 1 Myl. & K. 12; *Cockran v. Cockran*, 14 Sim. 248; *Miller v. Little*, 2 Beav. 259; *Quinn v. Hardenbrook*, 54 N. Y. 89; *Phillipsburgh v. Bruch*, 37 N. J. Eq. 482; *Farish v. Cook*, 78 Mo. 212; *Sharpe v. Allen*, 5 Lea (Tenn.) 81. As to nature of specific legacies and devises, see **LEGACIES AND DEVISES**, vol. 13, p. 10 *et seq.*; *Evertson v. Tappen*, 5 Johns. Ch. (N. Y.) 497.

Effect of Renewal Upon Bequests of Leaseholds.—"A new estate in leasehold property, acquired by a subsequent renewal of the lease or otherwise, is no less out of the reach of a specific disposition of such property, as ordinarily expressed, than an interest in any other property answering to the same locality; it being considered that the testator, when referring to the property in question, had in his contemplation exclusively the specific interest in it of which he was possessed when he made his will, though he has not in terms referred to such interest, but has used expressions descriptive of the *corpus* of the property; as in the case of a bequest

of 'all my tithes and ecclesiastical dues at W.' (*Rudstone v. Anderson*, 2 Ves. 418); or 'the perpetual advowson and disposal of the living or rectory of W. forever, together with the tithes of all sorts thereof' (*Hone v. Medcraft*, 1 Bro. C. C. 261); or 'all my leasehold estates in the parish of C.' (*Coppin v. Fernyhough*, 2 Bro. C. C. 291). In all such cases the renewal of the lease under the old law revoked the bequest, or rather, to speak more accurately, withdrew from its operation the property which was the subject of disposition; in short, effected what is technically called an *ademption*. But though the general principle has long been settled, yet questions often arose in consequence of the context of the will affording ground to contend that the testator intended any after acquired interest, of which he might become possessed by renewal, to pass under the bequest. The renewed lease will pass where the testator includes in the bequest the right of renewal as an accessory to the immediate subject of disposition. And where the lease of which a bequest is made is vested in a trustee for the testator, and is renewed by the trustee, the gift of the property comprised in the lease being in fact a gift of the equitable interest which includes the benefit of renewal, the trust of any renewed term granted to the trustee would pass under such bequest. And the same principle applies to the case of a lease for lives with a covenant for perpetual renewal." 1 Jarm. on Wills (5th ed.) *321. See *Poole v. Coates*, 2 D. & W. 493; *Colegrave v. Manby*, 2 Russ. 238; *Carte v. Carte*, 3 Atk. 174; *Slatter v. Norton*, 16 Ves. Jr. 197.

2. 1 Jarm. on Wills (5th ed.) *319; *Cockran v. Cockran*, 14 Sim. 248; *Sharpe v. Allen*, 5 Lea (Tenn.) 81; *Urdike v. Tomkins*, 100 Ill. 409. Compare *Wagstaff v. Wagstaff*, L. R., 8 Eq. 229. But a bequest of "all the property I am possessed of" would speak from the death. *Wilde v. Holtzmeier*, 5 Ves. Jr. 816. See also *Bridgman v. Dove*,

was construed to speak from the date of the will, and described only the land then belonging to the testator.¹

At the present time, statutes exist in nearly all the *United States* which enable a testator to devise his after acquired real estate;² and in *England*, and some states it is expressly provided that a will is to be construed, both as to real and personal estate, unless a contrary intention appear, as if made immediately before the death of the testator.³

3 Atk. 201; *Bland v. Lamb*, 2 J. & W. 399.

1. 1 Jarm. on Wills (5th ed.) *326; *Hawkins on Wills* *14; *Brouncker v. Colbe*, Holt 248. See *Delacherois v. Delacherois*, 11 H. L. Cas. 62.

For instances in which the common-law doctrine has been recognized in the *United States*, before the introduction of the changes in the statutes referred to in the text, see *Smith v. Edrington*, 8 Cranch (U. S.) 66; *Canfield v. Bostwick*, 21 Conn. 554; *Brewster v. McCall*, 15 Conn. 284; *Blaney v. Blaney*, 1 Cush. (Mass.) 107; *Hays v. Jackson*, 6 Mass. 149; *Wait v. Belding*, 24 Pick. (Mass.) 129; *George v. Green*, 13 N. H. 521; *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312; *Parker v. Bogardus*, 5 N. Y. 309; *Green v. Dikeman*, 18 Barb. (N. Y.) 537; *McNaughton v. McNaughton*, 34 N. Y. 201; *Quinn v. Hardenbrook*, 54 N. Y. 83; *Borden v. Borden*, 2 R. I. 94.

Lanning v. Cole, 6 N. J. Eq. 102; *Van Wagnen v. Brown*, 26 N. J. L. 196; *Bruen v. Bragaw*, 4 N. J. Eq. 261; *Gardner v. Gardner*, 37 N. J. Eq. 487; *Philadelphia v. Davis*, 1 Whart. (Pa.) 509; *Girard v. Philadelphia*, 4 Rawle (Pa.) 323; *Donaugher's Estate*, 2 Pars. Sel. Cas. (Pa.) 164; *Allen v. Harrison*, 3 Call (Va.) 289; *Raines v. Barker*, 13 Gratt. (Va.) 128; *Gibson v. Carrell*, 13 Gratt. (Va.) 136; *Clements v. Kyles*, 13 Gratt. (Va.) 468; *Atwood v. Beck*, 21 Ala. 625; *Beall v. Schley*, 2 Gill (Md.) 198; *Jones v. Shewmaker*, 35 Ga. 153; *Den v. Maney*, 1 Murph. (N. Car.) 264; *Drayton v. Rose*, 7 Rich. Eq. (S. Car.) 328; *Ross v. Ross*, 12 B. Mon. (Ky.) 438; *Halloway v. Doe*, 4 Litt. (Ky.) 294; *Roberts v. Elliott*, 3 T. B. Mon. (Ky.) 396; *McGavock v. Pugsley*, 12 Heisk. (Tenn.) 689; *Bowen v. Johnson*, 6 Ind. 110.

2. LEGACIES AND DEVISES, vol. 13, p. 9, note 2; *Stimson's Am. Stat. Law*, § 2809, and Supp. See *Church v. Warren Mfg. Co.*, 14 R. I. 539; *James v.*

Pruden, 14 Ohio St. 251; *Briggs v. Briggs*, 69 Iowa 617; *Lent v. Lent*, 24 Hun (N. Y.) 436; *Green v. Dikeman*, 18 Barb. (N. Y.) 535; *Winchester v. Forster*, 3 Cush. (Mass.) 366; *Cushing v. Aylwin*, 12 Met. (Mass.) 169; *Pray v. Waterston*, 12 Met. (Mass.) 262; *Magruder v. Carroll*, 4 Md. 335.

As these statutes differ slightly in the several states, the practitioner should consult the local code. Authorities upon construction will be found in LEGACIES AND DEVISES, vol. 13, p. 9, note 2.

3. *Stimson's Am. Stat. Law*, § 2806. For references to codes, see LEGACIES AND DEVISES, vol. 13, p. 9, note 2. See *Edwards v. Warren*, 90 N. Car. 604; *Rogers v. Brickhouse*, 5 Jones Eq. (N. Car.) 301; *Turnage v. Turnage*, 7 Ired. Eq. (N. Car.) 127; *Watson v. Butler*, 26 Miss. 178; *Doe v. Wynne*, 23 Miss. 251; *Henderem v. Ryan*, 27 Tex. 670; *Overten v. Mahen*, 10 Leigh (Va.) 639; *Donaugher's Estate*, 2 Pars. Sel. Cas. (Pa.) 164. In these states, the construction placed upon the corresponding provision of the English Wills Act, 1 Vict., ch. 26, § 24, which reads, "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will," is of interest. Under this act, "descriptions of real or personal estate, the subject of gift, *prima facie*, refer to and comprise the property answering to the description at the death of the testator."

"Thus, a devise of 'all my freehold lands,' or 'all my leasehold estates' (*Langdale v. Briggs*, 3 Sm. & G. 246; 2 Jur. N. S. 982), passes after acquired freeholds or leaseholds. So a bequest of 'my new $\frac{3}{4}$ per cent. annuities' passes all the stock of that description possessed by the testator at his death (*Goodlad v. Burnett*, 1 K. & J. 341)." *Hawkins on Wills* *18.

3. Inconsistency and Repugnance.—If possible, the court will reconcile two dispositions apparently inconsistent, and in so doing will endeavor not to disturb the first further than is absolutely necessary to give effect to the second.¹ But if they are absolutely

A devise was made in the following words: "I give to my much beloved wife, M., all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others." It was held to convey to the devisee all real estate held by the testator at his death. *Wynne v. Wynne*, 2 Swan (Tenn.) 405.

Intent of Testator.—It seems that the enactment of statutes allowing the testamentary disposition of after acquired lands, renders the construction of a will, as far as this question is concerned (as indeed is the case in all others), a mere question of intention proved or presumed. See *Peters v. Spillman*, 18 Ill. 370; *Flournoy v. Flournoy*, 1 Bush (Ky.) 515; *O'Brien v. Heeney*, 2 Edw. Ch. (N. Y.) 242. Thus, the words "all my wagons" and "all my stock" have been held sufficient to pass after acquired horses and a road wagon. *Dennis v. Dennis*, 5 Rich. (S. Car.) 468.

See also *Decker v. Decker*, 121 Ill. 341; *Roney v. Stiltz*, 5 Whart. (Pa.) 381; *Dickerson's Appeal*, 55 Conn. 223; *Kimball v. Ellison*, 128 Mass. 41.

What Is a Contrary Intent—Words in Present Tense—Now.—"A contrary intention is not sufficiently manifested by a gift of the freeholds 'to which I am entitled,' though there may be a subsequent devise of copyholds 'to which I am or at the time of my death shall be entitled.' *Lilford v. Powys Keck*, 30 Beav. 300. The fact that the testator gives property he 'now' possesses, or that the property is described as 'now' charged with certain sums, will not exclude after acquired property. *Wagstaff v. Wagstaff*, L. R., 8 Eq. 229; *Hepburn v. Skirving*, 4 Jur. N. S. 651; *In re Ord*, 12 Ch. Div. 22. But if the testator expressly distinguishes between the two periods, by giving such freeholds and leaseholds as are 'now vested in me,' 'or as to the said leasehold premises as shall be vested in me at the time of my death,' the word 'now' must be referred to the date of the will. *Cole v. Scott*, 1 Mac. & G. 518." *Theobald on Wills* (2d ed.) 162. *Compare Hutchinson v. Barron*, 6 H. & N. 583; *Jepson v. Key*, 10 Jur.

N. S. 392; *Williams v. Owen*, 2 W. R. 585; *Everett v. Everett*, 7 Ch. Div. 428.

Specific Description.—"The operation of the rule will be excluded by a sufficient particularity in the description of the specific subject of gift, showing that an object in existence at the date of the will was intended. If the thing intended be individualized by a special description, as if the gift be of 'my brown horse,' or 'that freehold estate which I purchased of Mr. B.' (*Emuss v. Smith*, 2 De G. & S. 722), the description shows that it must have been intended to refer to the state of things existing at the date of the will, and not at the death of the testator. But the word 'my' alone, is insufficient to show a contrary intention; for a gift of 'my 3 per cent. consols' may mean 'the 3 per cent. consols which I may possess at my death.' When a bequest is of that which is generic, of that which may be increased or diminished, then I apprehend the Wills Act requires something more on the face of the will, for the purpose of indicating a contrary intention, than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.' (*Per Wood, V. C.*, *Goodlad v. Burnett*, 1 K. & J. 341.) In *Webb v. Byng*, 1 K. & J. 580, the devise was of 'my Quendon-Hall estates in Essex,' which was held to be 'an arbitrary designation which had acquired a particular meaning in the mind of the testatrix,' and, for that reason not to include certain small properties acquired after the date of the will, though merely additions to the main subject of the devise. But it would seem that the meaning attached to the term, 'my Quendon-Hall estates,' by the testatrix, might well include, prospectively, such additions as might afterwards be made by her to the subject of the devise, as in the case of any collective bequest, *e. g.*, of 'my household goods,' or 'my furniture.'" *Hawkins on Wills* *20.

1. 1 Jarm. on Wills (5th ed.), *475; *Doe v. Davies*, 4 M. & W. 599; *Langham v. Sandford*, 19 Ves. Jr. 647; *Briggs v. Penny*, 3 De G. & S. 539; *Brocklebank v. Johnson*, 20 Beav. 205;

Shipperdson v. Tower, 1 Y. & C. C. C. 459; Jackson v. Forbes, Tyrw. 88; Kerr v. Baroness Clinton, L. R., 8 Eq. 462; Crossman v. Bevan, 27 Beav. 502. See Smith v. Bell, 6 Pet. (U. S.) 74; Tiers v. Tiers, 98 N. Y. 568; Sweet v. Chase, 2 N. Y. 73; Van Vechten v. Keator, 63 N. Y. 52; Wager v. Wager, 96 N. Y. 164; Harrison v. Jewell, 2 Dem. (N. Y.) 37; Matter of Van Beur-en's Estate (Surrogate Ct.), 13 N. Y. Supp. 261; Covenhoven v. Shuler, 2 Paige (N. Y.) 122; M'Donald v. Wal-grove, 1 Sandf. Ch. (N. Y.) 274; West-cott v. Cady, 5 Johns. Ch. (N. Y.) 334; Kane v. Astor, 5 Sandf. (N. Y.) 467; Sweet v. Geisenhainer, 3 Bradf. (N. Y.) 114; Tyson v. Blake, 22 N. Y. 558; Crozier v. Bray, 120 N. Y. 374. See Parks v. Parks, 9 Paige (N. Y.) 107; Henning v. Varner, 34 Md. 106; Igle-hart v. Kirwan, 10 Md. 559; Pue v. Pue, 1 Md. Ch. 382; Chase v. Lockerman, 11 Gill & J. (Md.) 185; Boyle v. Par-ker, 3 Md. Ch. 42; Pue v. Pue, 1 Md. Ch. 382; Lee v. Pindle, 12 Gill & J. (Md.) 289; Davis v. Hoover, 112 Ind. 423; Parks v. Kimes, 100 Ind. 151; White v. Allen, 81 Ind. 224; Anderegg v. Ross, 13 Ind. 413; Jenks v. Jackson, 127 Ill. 342; Brownfield v. Wilson, 78 Ill. 467; Rountree v. Talbot, 89 Ill. 246; Doe v. Crissman, 5 Ired. (N. Car.) 498; Baird v. Baird, 7 Ired. Eq. (N. Car.) 265; Jones v. Paschall, 1 Ired. Eq. (N. Car.) 430; Jenkins v. Maxwell, 7 Jones (N. Car.) 612; Bradley v. Gibbs, 2 Jones Eq. (N. Car.) 13; Biddle v. Car-raway, 6 Jones Eq. (N. Car.) 95; Payne v. Sale, 2 Dev. & B. Eq. (N. Car.) 455; Dalton v. Houston, 5 Jones Eq. (N. Car.) 401; Dalton v. Scales, 2 Ired. Eq. (N. Car.) 521; Weathers v. Patterson, 30 Ala. 404; Walker v. Walker, 17 Ala. 396; Leavens v. Butler, 8 Port. (Ala.) 396; Wynne v. Walthall, 1 Ala. Sel. Cas. 273; Stallsworth v. Stallsworth, 5 Ala. 143; Miller v. Flourney, 26 Ala. 724; Pace v. Bonner, 27 Ala. 307; Thrasher v. Ingram, 32 Ala. 646; Petters v. Pet-ters, 4 McCord (S. Car.) 151; Fraser v. Boone, 1 Hill Eq. (S. Car.) 360; Sea-brook v. Seabrook, 1 McMull. Eq. (S. Car.) 201; Tisdale v. Mitchell, 12 Rich. Eq. (S. Car.) 263; Dawes v. Swan, 4 Mass. 215; Cushing v. Burrell, 137 Mass. 21; Chaffin v. Ashton, 128 Mass. 443; Gray v. Sherman, 5 Allen (Mass.) 198; Lamb v. Lamb, 11 Pick. (Mass.) 371; Hibbard v. Hurlburt, 10 Vt. 173; Conant v. Palmer, 63 Vt. 310; Car-ter v. Alexander, 71 Mo. 585; Prosser v. Hardesty, 101 Mo. 593; Austin v.

Watts, 19 Mc. 293; Young v. M'Intire, 3 Ohio 499; Baxter v. Bowyer, 19 Ohio St. 490; Jones v. Strong, 142 Pa. St. 496; Shreiner's Appeal, 53 Pa. St. 106; Sheetz's Appeal, 82 Pa. St. 213; Fahr-ney v. Holsinger, 65 Pa. St. 388; Fin-ney's Appeal, 113 Pa. St. 11; McDe-vitt's Appeal, 113 Pa. St. 103; Newbold v. Boone, 52 Pa. St. 167; Mutter's Es-tate, 38 Pa. St. 314; Sullivan v. Strauss, 161 Pa. St. 145; Stebbins v. Stebbins, 86 Mich. 474; Houser v. Ruffner, 18 W. Va. 245; Warner v. Willard, 54 Conn. 470; Heidlebaugh v. Wagner, 72 Iowa 601; Rayfield v. Gaines, 17 Gratt. (Va.) 1; Hooe v. Hooe, 13 Gratt. (Va.) 245; Ward v. Amory, 1 Curt. 419; Jones v. Creveling, 19 N. J. L. 127; Robert v. West, 15 Ga. 122; Hunt v. Johnson, 10 B. Mon. (Ky.) 342; Jacob v. Jacob, 4 Bush (Ky.) 110; Proctor v. Duncan, 1 Duv. (Ky.) 318; Delph v. Delph, 2 Bush (Ky.) 171; Hickman v. Holliday, 6 T. B. Mon. (Ky.) 582; Ives v. Harris, 7 R. I. 413; Lyon v. Fisk, 1 La. Ann. 444; Vancil v. Evans, 4 Coldw. (Tenn.) 340; Dean v. Nunnally, 36 Miss. 358; Lane v. Vick, 3 How. (U. S.) 464; Wal-ker v. Parker, 13 Pet. (U. S.) 166.

Reconciliation of Inconsistencies.—

"The rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every at-tempt to give to the whole such a con-struction as will render every part of it effective. In the attainment of this object, the local order of the limitations is disregarded, if it be possible, by the transposition of them, to deduce a con-sistent disposition from the entire will. Thus, if a man, in the first instance, devise lands to A in fee, and in a sub-sequent clause give the same lands to B for life, both parts of the will shall stand, and, in the construction of law, the devise to B shall be first, the will being read as if the lands had been de-vised to B for life, with remainder to A in fee. Per Anderson, Anonymous, Cro. Eliz. 9. See also Ridout v. Dowd-ing, 1 Atk. 419; Plenty v. West, 6 C. B. 201; 60 E. C. L. 199; Ustick v. Peters, 4 K. & J. 437. . . . By parity of reason, where a testator gives to B a specific fund or property at the death of A, and in a subsequent clause disposes of the whole of his prop-erty to A, the combined effect of the several clauses, as to such fund or property, is to vest it in A for life, and after his decease, in B. Blamire v. Geldart, 16 Ves. Jr. 314. Again, where a testator gave his real and personal

estate to A, his heirs, executors, and administrators, and in a subsequent part of his will gave all his property to A and B, upon trust for sale, and to pay the interest of the proceeds to A for life, and at her decease, upon trust to pay certain legacies, leaving the residue undisposed of, A was held to be entitled, under the first devise, to the beneficial interest in reversion, not exhausted by the trust for the payment of legacies created by the second. *Brine v. Ferrier*, 7 Sim. 549." 1 Jarm. on Wills (5th ed.) *475, *476.

The following illustrations of the doctrine are given by Mr. Theobald: "If the same property is given to two persons in fee, in two different parts of the will, they will take as joint tenants. *Paramour v. Yardley*, Plow. 541; *Bennett's Case*, Cro. Eliz. 9; *Sherratt v. Bentley*, 2 Myl. & K. 162. This does not, however, apply as between will and codicil. *In re Hough's Will*, 15 Jur. 943; 20 L. J. Ch. 422; *Evans v. Evans*, 17 Sim. 107. So, too, if land is given to one person without, and to another person with, words of limitation, the latter will take a fee in remainder. *Gravenor v. Watkins*, L. R., 6 C. P. 500. Similarly, where immediate interests in fee and in tail, or in fee and for life, are given in the same lands, the devise of the fee will be construed as a remainder, whether the devise of particular estate precedes the devise of the fee or not. *Wallop v. Darby*, Yelv. 209; *Conquest v. Conquest*, 16 W. R. 453. In cases where the whole personality is given to a person absolutely, and then there is a gift of the residue at her decease, the earlier gift has been held to be for life only. *Sherratt v. Bentley*, 2 Myl. & K. 149; *In re Brook's Will*, 13 W. R. 573; *Hare v. Westropp*, 2 W. R. 689. And the same construction has been adopted where there were no words referring to the death of the first legatee, but the gift was to her children. *In re Bageshaw's Trusts*, 24 W. R. 875; 46 L. J. Ch. 567. So, if a testator gives the remainder of his property to A, and makes B his residuary legatee, B. will take only lapsed legacies. *In re Jessop*, 11 Ir. Ch. Rep. 424; *Davis v. Bennett*, 30 Beav. 226; *Kelvington v. Parker*, 21 W. R. 121. But a residuary gift by codicil revokes a residuary gift by will. *Hardwicke v. Douglas*, 7 Cl. & F. 795. Similarly a gift of all the testator's property, followed by gifts of specific portions of it or *vice versa*, may both

take effect. *Cuthbert v. Lempriere*, 3 M. & S. 158; *Roe v. Neville*, 11 Q. B. 466; 63 E. C. L. 465; *Blamire v. Geldart*, 16 Ves. Jr. 314; *In re Arrow-smith's Trusts*, 8 W. R. 555; 2 De G. F. & J. 474; *Robertson v. Powell*, 3 N. R. 433. Where, however, all the testator's personal property was given to his widow for life, subsequent legacies were held to be not payable till after her death. *Burdett v. Young*, 9 Madd. 93; 5 Bro. P. C. 54. As between a will and codicil, however, the argument is much stronger in favor of revocation. At any rate, where a testator by his will distinguishes between specific legacies and residue, and by a codicil gives all his personal property, the codicil revokes the specific legacies as well as the residuary gift. *Kermode v. Macdonald*, L. R., 1 Eq. 457; L. R., 3 Ch. 584." Theobald on Wills 578.

To render a subsequent provision in a will repugnant to a previous one, the last provision must be absolutely incompatible with the first, so that, if effect be given to the last, the other must entirely fail; but no such incompatibility exists where a testator, by one clause of his will, gives in absolute terms a legacy to his wife, to be paid out of the proceeds of the sale of his real estate, and by a subsequent clause orders his executors to sell such real estate after the decease of his wife; because under such will, the legacy becomes vested on the death of the testator, although not payable until after the death of the legatee, and the legatee has the same right to dispose of it, that she has in respect to any other property, and on her death, if undisposed of, it goes to her personal representatives, who may enforce the payment against the executors. *Sweet v. Chase*, 2 N. Y. 73.

A testator gave "the use and profits of all my estate, real and personal, to my daughters who may remain single. Should they all marry, or when they die, then it is my will that my property shall be equally divided among my surviving children. My land in the county of F., called M., I give to my son R." On considering the circumstances of the family and the property, as they appeared in proof, it was held that an estate for life was given to the daughters in all the estate, real and personal, determinable as to each on her marriage or death; that the devise of the land to R. in the third clause of the will, was not an

irreconcilable, the posterior in local position is to be preferred.¹

exception out of the general devise to the daughters, nor a revocation of said devise *pro tanto*, upon the ground of its being repugnant thereto; and that, accordingly, the estate given to R. in M. would not become vested in possession as long as either of the daughters should remain in life and unmarried. *Hooe v. Hooe*, 13 Gratt. (Va.) 245.

M., being the owner of two adjoining surveys of land, devised to his children different quantities, to be taken out of those surveys, without describing the boundary. The aggregate of these quantities fell short of the amount called for in the two surveys only one and a half acres. He then gave to F. all the surplus in two said surveys, "and also all land that I may obtain, to be equally divided among all my children." In various codicils he described the boundaries to each lot devised, and finally ordered that "the land that has been sold for my use is to be equally taken out of each legatee's part;" "and all other lands not particularly pointed out, to be equally divided amongst my children, and to pass in the same way and manner as above specified, to each of said legatees." Two hundred and fifty acres of the land contained in the two surveys were sold in the life of the testator, and those surveys were found to contain six hundred and fifty acres more than the nominal quantity of four thousand acres. It was held that F. should hold the surplus, and that it was not included in the expression, "all other lands and estate not particularly pointed out," and that the devises of particular tracts should be diminished proportionally by the sales made by the testator. *Hickman v. Holliday*, 6 T. B. Mon. (Ky.) 582.

A testator, in the first testamentary disposition of his estate, gave to his wife, with the exception of one bequest, all he possessed of every description, and afterwards settled another disposition of it, made to provide for the contingency that he should survive his wife, but by which, in the event of his non-survivorship, he gave her the use of his estate for life, and in fee to will at her death, subject to the payment of four certain legacies at her death. It was held that she took a fee in the entire estate, subject to the payment of the legacies at her decease,

the interest of which was adjudged to her for life; and that the legacies were vested in the legatees living at the death of the testator. *Mütter's Estate*, 38 Pa. St. 314.

A testator by his will made provision that certain property should be kept on interest, and the interest added to the principal, until the decease of R., and that at R.'s death the principal and accumulated interest should be paid to R.'s children; and in a subsequent clause provided, that, if M. should outlive R., the interest of the principal should be paid to M. annually during his life, and at his decease the principal should be disposed of as above directed. M. outlived R. It was held that, on the decease of R., the interest which had accumulated during his life should be distributed among his children, and that M. was entitled only to the interest on the original principal during his life. *Lillie v. Pierce*, 8 Cush. (Mass.) 566.

1. 1 Jarm. on Wills (5th ed.) *472; 1 Redfield on Wills (4th ed.) *443; Theobald on Wills (2d ed.) 578; *Crone v. Odell*, 1 Ball & B. 449; *Ulrich v. Litchfield*, 2 Atk. 372; *Paice v. Canterbury*, 14 Ves. Jr. 366; *Morrall v. Sutton*, 1 Ph. 533. See also *Roe v. Avis*, 4 T. R. 605; *Sherratt v. Bentley*, 2 Myl. & K. 149; *Gravenor v. Watkins*, L. R., 6 C. P. 500; *In re Brook's Will*, D. & S. 362; *Wykham v. Wykham*, 18 Ves. 421; *Doe v. Biggs*, 2 Taunt. 109; *Sims v. Doughty*, 5 Ves. Jr. 243; *Constantine v. Constantine*, 6 Ves. Jr. 100; *Smith v. Bell*, 6 Pet. (U. S.) 74; *Marks v. Solomon*, 19 L. J. Ohio 555; *Sheets' Appeal*, 82 Pa. St. 213; *Stickles' Appeal*, 29 Pa. St. 234; *Seibert v. Wise*, 70 Pa. St. 147; *Snively v. Storer*, 78 Pa. St. 484; *Newbold v. Boone*, 52 Pa. St. 167; *Stickle's Appeal*, 29 Pa. St. 324; *Lewis' Estate*, 3 Whart. (Pa.) 162; *Ulrich's Appeal*, 86 Pa. St. 386; *Drinker's Estate*, 13 Phila. (Pa.) 330; *Dawes v. Swan*, 4 Mass. 215; *Pratt v. Rice*, 7 Cush. (Mass.) 209; *Homer v. Shelton*, 2 Met. (Mass.) 104; *Pace v. Bonner*, 27 Ala. 307; *Thrasher v. Ingram*, 32 Ala. 646; *Griffin v. Pringle*, 56 Ala. 486; *Parks v. Kimes*, 100 Ind. 151; *Evans v. Hudson*, 6 Ind. 293; *Holdefer v. Teifel*, 51 Ind. 343; *Covert v. Sebern*, 73 Iowa 564; *Hendershot v. Shields*, 42 N. J. Eq. 317;

4. Rule as to the General and Particular Intent.—If the general intention of the testator can be collected upon the whole will, particular terms used which are inconsistent with that intention may be rejected, as introduced by mistake or ignorance on the part of the testator, as to the force of the words used.¹

Lippincott v. Davis (N. J. 1894), 28 Atl. Rep. 587; *Carter v. Lowell*, 76 Me. 342; *Woodbury v. Woodbury*, 74 Me. 413; *Orr v. Moses*, 52 Me. 287; *Ramsdell v. Ramsdell*, 21 Me. 287; *Pickering v. Langdon*, 22 Me. 413; *M'Donald v. Walgrove*, 1 Sandf. Ch. (N. Y.) 274; *Van Vechten v. Keator*, 63 N. Y. 52; *Van Nostrand v. Moore*, 52 N. Y. 12; *Parks v. Parks*, 9 Paige (N. Y.) 107; *Covenhoven v. Shuler*, 2 Paige (N. Y.) 122; *Matter of Manice*, 31 Hun (N. Y.) 119; *Waljor v. Hemmer* (Ill. 1891), 28 N. E. Rep. 806; *Brownfield v. Wilson*, 78 Ill. 467; *Ives v. Doe*, 2 Ill. 276; *Hollins v. Coonan*, 9 Gill (Md.) 62; *Lee v. Puel*, 12 Gill & J. (Md.) 288; *Pue v. Pue*, 1 Md. Ch. 382; *Boyle v. Parker*, 3 Md. Ch. 42; *McKenzie v. Roleson*, 23 Ark. 102; *Jones v. Paschall*, 1 Ired. Eq. (N. Car.) 430; *Warner v. Howell*, 3 Wash. (U. S.) 12; *Fraser v. Boone*, 1 Hill Eq. (S. Car.) 360; *Hayes v. Davenport*, 25 Vt. 109; *Robert v. West*, 15 Ga. 122; *Lyon v. Fisk*, 1 La. Ann. 444; *Flinn v. Davis*, 18 Ala. 132; *Miller v. Flournoy*, 26 Ala. 724; *Hunt v. Johnson*, 10 B. Mon. (Ky.) 342; *Adie v. Cornwell*, 3 T. B. Mon. (Ky.) 279; *Howard v. Howard*, 4 Bush (Ky.) 495; *Mancil v. Evans*, 4 Coldw. (Tenn.) 340; *Rona v. Meier*, 47 Iowa 607; *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602; *Davis v. Boggs*, 20 Ohio St. 550; *Petters v. Petters*, 4 McCord (S. Car.) 151; *Mandlebaum v. McDonell*, 29 Mich. 78; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Heidlebaugh v. Wagner*, 72 Iowa 601; *Hitchcock v. U. S. Bank*, 7 Ala. 386; *Armstrong v. Armstrong*, 14 B. Mon. (Ky.) 269; *Hendershot v. Shields*, 42 N. J. Eq. 317; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Carter v. Alexander*, 71 Mo. 585; *Baird v. Baird*, 7 Ired. Eq. (N. Car.) 265; *Iglehart v. Kirwan*, 10 Md. 559; *Lamb v. Lamb*, 11 Pick. (Mass.) 371; *Mutter's Estate*, 38 Pa. St. 314; *Jacob v. Jacob*, 4 Bush (Ky.) 110; *Hunter v. Green*, 22 Ala. 329; *Bosley v. Wyatt*, 14 How. (U. S.) 390; *Sweet v. Chase*, 2 N. Y. 73.

A testator directed that his wife should have, during life, the annual interest, or income, arising from the rents

and sales of one equal third part of his whole estate, lands and tenements, whether the same consisted of legal or equitable titles, after all necessary expenses, etc., in recovering the same and completing the titles thereof, etc., were first deducted. In a subsequent clause, he directed that his personal estate, after certain deductions, "and also deducting thereout so much as may be necessary for discharging my just debts and completing my titles to my *Kentucky* lands," should be divided among certain persons. It was held that the cost and charges of completing the titles to the *Kentucky* lands were to be paid out of the general estate. *Lewis' Estate*, 3 Whart. (Pa.) 162.

Two clauses of a devise were as follows: "First. Devise of all testator's property to his wife during her natural life, if she remained unmarried; a portion of it to her, if she married again, for her life, balance to be divided among his children." Second clause was to "the creditors of M., deceased, a sum of money sufficient to make up their loss in his final account, as passed by his executor." After payment of debts, it appeared that the testator's property (personal) would be more than enough to pay the legacies to the creditors and leave the widow as large a share as she would have had if he had died intestate. It was held that M.'s creditors were entitled to the payment of their legacies, before payment to the wife, whether the two clauses were regarded as inconsistent dispositions, or the last a revocation *pro tanto* of the first; that the creditors' legacies could not be postponed till the termination of the wife's estate in the property, the presumption being, no time being fixed for such payment by the testator, that they were intended to be payable at the time limited by law. *Iglehart v. Kirwan*, 10 Md. 559.

Will and Codicil.—Where a will and codicil are irreconcilable, the codicil, as the last indication of the testator's mind, must prevail. *Boyle v. Parker*, 3 Md. Ch. 42; *Gray v. Sherman*, 5 Allen (Mass.) 198.

1. Sir J. Leach, M. R., in *Sherratt v.*

Bentley, 2 Myl. & K. 157. See *St. John's Mite Assoc. v. Buchly*, 5 Mackey (D. C.) 406; *Dawes v. Swan*, 4 Mass. 208; *Cook v. Holmes*, 11 Mass. 528; *Urich's Appeal*, 86 Pa. St. 390; *Shreiner's Appeal*, 53 Pa. St. 106; *Schott's Estate*, 78 Pa. St. 40; *Hitchcock v. Hitchcock*, 35 Pa. St. 393; *Jones' Appeal*, 3 Grant Cas. (Pa.) 169; *Roe v. Vingut*, 117 N. Y. 204; *Earl v. Grim*, 1 Johns. Ch. (N. Y.) 494; *Parks v. Parks*, 9 Paige (N. Y.) 107; *Kane v. Astor*, 5 Sandf. (N. Y.) 467; *Barheydt v. Barheydt*, 20 Wend. (N. Y.) 576; *Hoppock v. Tucker*, 1 Hun (N. Y.) 132; *Stimson v. Vroman*, 99 N. Y. 74; *Wasser v. Wasser*, 96 N. Y. 164; *Phillips v. Davies*, 92 N. Y. 199; *Haxtun v. Corse*, 2 Barb. Ch. (N. Y.) 506; *Georgia Code*, § 2248; *Robert v. West*, 15 Ga. 122; *Nussbaum v. Evans*, 71 Ga. 753; *Hollingsworth v. Hollingsworth*, 65 Ala. 321; *Thrasher v. Ingram*, 32 Ala. 645; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Stallsworth v. Stallsworth*, 5 Ala. 143; *Watson v. Blackwood*, 50 Miss. 15; *Den v. Wortendyk*, 7 N. J. L. 363; *Den v. McMurtrie*, 15 N. J. L. 276; *Baldwin v. Taylor*, 37 N. J. Eq. 78; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185; *Pue v. Pue*, 1 Md. Ch. 382; *Bivens v. Phifer*, 2 Jones (N. Car.) 436; *Adie v. Cornwell*, 3 T. B. Mon. (Ky.) 279; *Houser v. Ruffner*, 18 W. Va. 245; *Bell v. Humphrey*, 8 W. Va. 1; *McMurry v. Stanley*, 69 Tex. 230; *Cooper v. Horner*, 62 Tex. 357; *Price v. Cole*, 83 Va. 343; *Hart v. Brooks*, 16 Va. L. J. 654; *Purnell v. Dudley*, 4 Jones Eq. (N. Car.) 203; *Clark v. Preston*, 2 La. Ann. 580; *Lassiter v. Wood*, 63 N. Car. 360; *Peters v. Carr*, 16 Mo. 54; *Workman v. Cannon*, 5 Harr. (Del.) 91; *Pickering v. Langdon*, 22 Me. 413; *Rose v. McHose*, 26 Mo. 590; *Smith v. Bell*, 6 Pet. (U. S.) 68. See also *Van Vechten v. Van Vechten*, 8 Paige (N. Y.) 104; *Sorsby v. Vance*, 36 Miss. 564. Compare *Allen v. White*, 97 Mass. 504; *Lucas v. Lockhart*, 18 Miss. 466.

Sherratt v. Bentley, 2 Myl. & K. 149, stated 1 Jarm. on Wills 473, is a good illustration of the way in which this principle, and that discussed in the last section, may be applied together. In this case, "a testator, after bequeathing several legacies, devised unto his wife a certain messuage and all other his real estates, and his household goods and all other his personal estate, to hold to his said wife, her heirs, executors, administrators and assigns forever.

The testator then directed that none of the legatees should be entitled until twelve months after his wife's decease; and, in case his wife should happen to die in his lifetime, and the before-mentioned devises and bequest to her should thereby lapse, the testator gave the estate and effects, as well real as personal comprised therein, to S., his heirs, executors, administrators, and assigns, to the use of such persons as his wife should, in her lifetime, by writing under her hand, appoint. The testator then gave some pecuniary legacies, and proceeded to devise and bequeath to W. A., and his (the testator's) brother-in-law's children, the residue of his real and personal estates, to be equally divided amongst them, share and share alike, at the decease of his said wife. The heir at law contended that the will was void for uncertainty, on account of the repugnance between the gift to the wife, her heirs, executors, administrators, and assigns, and the subsequent gift of the residue to others, to be divided at her decease. The person claiming under the wife contended that the pecuniary legacies and the gift of the residue were only to take effect in the event of her decease in the testator's lifetime." It was held that the wife took for life only. In this case Sir. J. Leach, Master of the Rolls said as to the rules governing: "In this most inaccurate will it is impossible to give effect to every expression used by the testator, several of those expressions being necessarily inconsistent with each other. There are, however, two principles of construction upon which it appears to me that a court may come to a conclusion without the necessity, which, if possible, is always to be avoided, of declaring void for uncertainty. First, if the general intention of the testator can be collected upon the whole will, particular terms used which are consistent with that intention may be rejected, as introduced by mistake or ignorance, on the part of the testator, as to the force of the words used; secondly, where the latter part of the will is inconsistent with a prior part, the latter part of the will must prevail. . . . Although the terms of the first gift to the wife would give her the whole real and personal estate, it appears to me that it is to be intended that the testator did not understand the force of the words used; that his general intention was to give to the wife the full enjoyment of all his prop-

5. A Clear Gift Not to Be Cut Down by Doubtful Expressions.—It has become a rule of construction that a clear gift is not to be cut down by any subsequent provision, unless the latter is equally clear; but perhaps the better statement is that a clear gift is not to be cut down by anything which does not, with reasonable certainty, indicate an intention to cut it down. Whichever form be adopted, the plain intention of the testator, and not the comparative lucidity of the two parts of the will, is to be regarded.¹

erty during her life, and to give it over to the persons named in the latter part of his will, after her decease. To give effect to that general intention, I reject the words 'heirs, executors, administrators, and assigns forever,' as used by the testator without full knowledge of their force; and I call in aid the second rule to which I have referred, that, if there be doubts as to the general intention, the latter part of a will shall prevail against inconsistent expressions in the prior part of it." And this was affirmed by Lord Brougham on appeal. The general intent, if clear, must prevail over the rule that of two inconsistent clauses the last must prevail. *Price v. Cole*, 83 Va. 343.

1. *Randfield v. Randfield*, 8 H. L. Cas. 225; *Davis v. Bennett*, 30 Beav. 226; *Crozier v. Crozier*, L. R., 15 Eq. 282; *Kern v. Clinton*, L. R., 8 Eq. 462; *Goods of Larkin*, 2 Jur. N. S. 229; *Clavering v. Ellison*, 3 Drew. 451; *Schmaunz v. Goss*, 132 Mass. 141; *Martin v. Smith*, 124 Mass. 111; *Rhodes v. Rhodes*, 137 Mass. 343; *Damrell v. Hartt*, 137 Mass. 218; *Parker v. Iasigi*, 138 Mass. 416. See *Freeman v. Coit*, 96 N. Y. 67; *Temple v. Sammis*, 48 N. Y. Super. Ct. 324; 97 N. Y. 526; *Roseboom v. Roseboom*, 81 N. Y. 356; *Field v. New York*, 38 Hun (N. Y.) 590; *Oathout v. Rogers* (Supreme Ct.), 13 N. Y. 120; *Casper v. Walker*, 33 N. J. Eq. 36; *Kendall v. Kendall*, 36 N. J. Eq. 91; *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21; *Collins v. Collins*, 40 Ohio St. 364; *Bills v. Bills*, 80 Iowa 269; *Alden v. Johnson*, 63 Iowa 127; *Judevine v. Judevine*, 61 Vt. 587; *Biddle's Estate*, 28 Pa. St. 59; *Urich's Appeal*, 86 Pa. St. 386; *Hopkins v. Ghent*, 111 Pa. St. 287; *Gillmer v. Daix*, 141 Pa. St. 507; *Good v. Fichthorn*, 144 Pa. St. 287; *Commons v. Commons*, 115 Ind. 162; *Hochstetler v. Hochstetler*, 108 Ind. 510; *Potter v. Merrill*, 143 Mass. 189; *Olney v. Balch*, 154 Mass. 318; *Conant v. Palmer*, 63 Vt. 310; *Wicker v. Ray*, 118 Ill. 472;

Rountree v. Talbot, 89 Ill. 250; *Seigwald v. Seigwald*, 37 Ill. 430; *Wilmoth v. Wilmoth*, 34 W. Va. 426; *Bowen v. Bowen*, 87 Va. 438; *Barksdale v. White*, 28 Gratt. (Va.) 224; *Hall v. Palmer*, 87 Va. 354; *Cole v. Cole*, 79 Va. 251; *Hodges v. Potter*, 12 R. I. 245; *McMurry v. Stanley*, 69 Tex. 233; *Webb v. Lines*, 57 Conn. 154; *Weatherhead v. Baskerville*, 11 How. (U. S.) 329; *Dean v. Munnally*, 56 Miss. 358; *In re Veller's Estate*, 11 Lanc. L. Rev. 185.

"If there be a clear gift, it is not to be cut down by anything subsequent which does not, with reasonable certainty, indicate the intention of the testator, to cut it down; but the maxim cannot mean that you are to institute a comparison between the two clauses as to lucidity." Lord Campbell, in *Randfield v. Randfield*, 8 H. L. Cas. 235.

Revocation by Construction—Inconsistent Provisions.—"The cases upon revocation as a question of construction are so special that they are of little use as general authorities, and hardly admit of a satisfactory classification. The following general rules may, however, be laid down with regard to revocation: First. To cut down a previous gift it must be reasonably clear that it was meant to be cut down. The rule is not that the words of revocation must be as clear as the words of original gift. See *Randfield v. Randfield*, 8 H. L. Cas. 225; *Wallace v. Seymour*, 20 W. R. 334; *Beamish v. Beamish*, L. R., 1 Ir. 501. Thus, if property is given to A for life, with remainder for her children, and by a codicil all gifts in favor of A are revoked, the remainder to the children remains. *Green v. Tribe*, 27 W. R. 39. On the other hand, where property is given to A for life, with remainders over, and the gift to A only is revoked, but the property is given absolutely to B, the whole original gift is revoked. *Murray v. Johnston*, 3 D. & W. 143; *Fry v. Fry*, 9 Jur. 894. See *Wells v. Wells*, 2 W. R. 6; 17 Jur. 1020; *Hargreaves v. Pennington*, 12 W.

R. 1047. So, when there is a gift to A, with executory limitations over, and the trusts of the will as regards the gift to A are revoked, the gifts over are revoked as well. *Boulcott v. Boulcott*, 2 Drew. 25. Second. The disposition of the will will not be disturbed more than is necessary to give effect to a revocation by codicil. Thus, where a legacy is charged on real and personal estate, and the charge on the personal estate is revoked by a codicil, the charge on the realty remains. *Kermod v. Macdonald*, L. R., 3 Ch. 585; *Leese v. Knight*, 12 W. R. 1097. Where a legacy is charged on two funds, one of which is afterwards by a codicil given free from the charge, the charge remains on the other fund and does not abate in the proportion of the two funds. *Tatlock v. Jenkins*, Kay. 654. So, too, when land is given subject to a charge to A, and the devise is afterwards revoked, the charge remains. *Beckett v. Harden*, 4 M. & S. 1. See *Grice v. Funnell*, 1 S. & G. 130. A legacy which is revoked is not set up again because the disposition in favor of which the revocation is made is incomplete, or incapable of taking effect. *Tupper v. Tupper*, 1 K. & J. 665; *Nevill v. Boddam*, 28 Beav. 584; *Quinn v. Butler*, L. R., 6 Eq. 225. See *Onions v. Tyrer*, 1 P. Wms. 343; 2 Vern. 741; *Baker v. Story*, 23 W. R. 147. When personalty is directed to go upon the same trusts as realty, and the trusts of the realty are afterwards revoked, the gift of the personalty remains. *Beauclerk v. Mead*, 2 Atk. 167; *Darley v. Longworth*, 3 Bro. P. C. 359; *Agnew v. Pope*, 1 De G. & J. 49; *Martineau v. Briggs*, 23 W. R. 889; *Bridges v. Strachan*, 26 W. R. 691; *Carrington v. Payne*, 5 Ves. Jr. 404, would probably not be followed. See *In re Gibson*, 2 J. & H. 656. But if the gift is of money to be laid out in repairing certain premises, and the surplus is given to the same persons to whom the premises are devised, and this latter devise is revoked, the gift of personalty also fails. *White-way v. Fisher*, 9 W. R. 433. Third. A gift by will is not revoked by an erroneous recital of it by a codicil. *In re Smith*, 2 J. & H. 594; *Mann v. Fuller*, Kay 624. Fourth. An alteration or an addition to a gift in a will, expressed to be made upon an assumption of fact, which turns out to be erroneous, does not take effect. *Campbell v. French*, 3 Ves. Jr. 321;

Doe v. Evans, 2 P. & D. 378; 10 Ad. & El. 228; 37 E. C. L. 102; *Barclay v. Maskelyne*, Johns. 124. But if the alteration or addition is made because the testator is doubtful whether some fact is true or not, the alteration takes effect. *Atty. Gen'l v. Lloyd*, 3 Atk. 552; 1 Ves. 32; *Atty. Gen'l v. Ward*, 3 Ves. Jr. 327. The distinction seems to be, not between the fact and the testator's belief in the fact, but between a fact and a possibility which the testator is unable to verify, and, therefore, an additional gift founded upon an erroneous belief, would fall under the former head. *Thomas v. Howell*, L. R., 18 Eq. 198." *Theobald on Wills* (2d ed.) 576.

Instances Illustrating the Rule.—A devise was in the following words: "I give to my daughter A everything of which I die possessed. In the event of my daughter's death without children:" then specifying subsequent dispositions to be made. It was held that the devise to A was absolute, and that the subsequent dispositions were intended to take effect only in the event of A's death in the lifetime of testator. *Biddle's Estate*, 28 Pa. St. 59. *Lowrie, J.*, in giving the opinion in the above case, said: "If the intention of the substitutionary clauses is truly uncertain—in one sense leaving the estate of Anne absolute, and in another taking it away—it is a mere matter of logic that what is expressly given must stand. The first gift is absolute, and the subsequent clauses make no profession of reducing it, and must therefore be taken as intended to provide for its failure to take effect by Anne's death before her mother."

The testator desired that his wife should have his entire estate, "to have and to hold, and to sell any part thereof she may think best for her interest and that of the children, during her natural life or widowhood;" that the estate should be kept together during her life or widowhood; that, if the children married or came of age during her life, she should give them such property as she should think best; that the children should be educated out of the estate, and should have the whole on the widow's death; he requested B and A to "take his entire business in hand, and act as executors." It was held that the first clause clearly gave the widow a legal estate until death or marriage; that the power of sale did not enlarge that estate; that the request to B and

6. Rejecting Words.—Words and passages absolutely irreconcilable with the general context may be rejected,¹ but not upon mere conjecture, nor unless absolutely irreconcilable with the context, even though their intention may sometimes produce rather absurd consequences.²

A was to act as executors, and that it was the widow, not B and A as executors or trustees, who was to keep the property together and divide it, and therefore that these clauses confirmed in her the legal estate and right of possession as well as the beneficial life estate, both of which the first clause gave her. *Dean v. Nunnally*, 36 Miss. 358.

For further discussion see *supra*, this title, *Revocation*.

1. 1 Jarm. on Wills (5th ed.) *480; *Boon v. Conforth*, 2 Ves. 277; *Coryton v. Helyar*, 2 Cox 340; *Doe v. Stinlake*, 12 East 515; *Doe v. Thomas*, 3 Ad. & El. 123; *Smith v. Pybus*, 9 Ves. Jr. 566. See further *Smith v. Crabtree*, 6 Ch. Div. 591; *Hanbury v. Tyrell*, 21 Beav. 322; *Campbell v. Bonskell*, 27 Beav. 325; *Jones v. Price*, 11 Sim. 557; *Aspinall v. Andus*, 7 M. & G. 912; *Lunn v. Osborne*, 7 Sim. 56; *Towns v. Wentworth*, 11 Moo. P. C. C. 545; *Hugo v. Williams*, L. R., 14 Eq. 224; *McKeehan v. Wilson*, 53 Pa. St. 74; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Phillips v. Davies*, 92 N. Y. 109; *Mason v. Jones*, 2 Barb. (N. Y.) 229; *Lottimer v. Blumenthal*, 61 How. Pr. (N. Y. Supreme Ct.) 360; *Den v. Young*, 24 N. J. L. 775; *Hendershot v. Shields*, 42 N. J. Eq. 317; *Newburyport Bank v. Stone*, 13 Pick. (Mass.) 420; *Needham v. Ide*, 5 Pick. (Mass.) 510; *Duncan v. Philips*, 3 Head (Tenn.) 415; *Hamilton v. Boyles*, 1 Brev. (S. Car.) 414; *Jackson v. Hoover*, 26 Ind. 511; *Wright v. Denn*, 18 Wheat. (U. S.) 239; *Wright v. Denn*, 10 Wheat. (U. S.) 239; *McBride v. Smyth*, 54 Pa. St. 248; *Burke v. Chamberlain*, 22 Md. 298; *Davis v. Boggs*, 20 Ohio St. 550; *Hall v. Hall*, 123 Miss. 120; *Wootten v. Redd*, 12 Gratt. (Va.) 196; *Prosser v. Hardesty*, 101 Mo. 596; *In re Wood's Estate*, 36 Cal. 81; *Jameson, Appellants*, 1 Mich. 99; *McMurry v. Stanley*, 69 Tex. 227; *Drew v. Drew*, 28 N. H. 489; *East v. Garrett*, 84 Va. 523. Mere surplusage may be rejected. *Wright v. Denn*, 10 Wheat. (U. S.) 239; *Bartlet v. King*, 12 Mass. 542.

If the contents of a will show that a word has been undesignedly omitted or inserted, and demonstrate what addition by construction or what rejection by construction will fulfill the intention with which the document was written, the addition or rejection will, by construction, be made. *Knight v. Bruce*, in *Pride v. Fooks*, 3 De G. & J. 266.

Thus a will made by a woman after marriage, bequeathing "all my estate, real and personal, meaning all the estate and property secured, etc., to me, etc., by certain articles of agreement" (referring to the marriage contract), was held to be a valid appointment under such contract, the intent of disposing of all her personal estate being manifest, the term "real estate," although inoperative, because there was no real estate, did not invalidate the appointment, as far as it was pursuant to the power. *Newburyport Bank v. Stone*, 13 Pick. (Mass.) 420.

2. 1 Jarm. on Wills (5th ed.) *483; *Chambers v. Brailsford*, 18 Ves. Jr. 368. See *Goodright v. Hall*, 1 Wills. 148; *Mellish v. Mellish*, 4 Ves. Jr. 48; *Roe v. Foster*, 9 East 405; *Ridgeway v. Munkittrick*, 1 D. & W. 91; *Langley v. Thomas*, 6 De G. M. & G. 645; *Ridout v. Pain*, 3 Atk. 493; *Greenwood v. Greenwood*, 5 Ch. Div. 954; *Daniel's Settlement Trusts*, 1 Ch. Div. 375; *Sweeting v. Prideaux*, 2 Ch. Div. 413; *Graham v. Graham*, 23 W. Va. 36; *Caldwell v. Willis*, 57 Miss. 555; *Baxter v. Bowyer*, 19 Ohio St. 490.

The rejection of one clause to uphold another is a desperate remedy, to be resorted to only in case of necessity. *Jenks v. Jackson*, 127 Ill. 350.

Thus in *Chambers v. Brailsford*, 18 Ves. Jr. 368 (cited 1 Jarm. on Wills (5th ed.) 483); affirmed on appeal 19 Ves. Jr. 652. "A testator, after bequeathing certain property to Thomas Brailsford, son of his nephew Samuel Brailsford, devised his real estate to the use of the said Thomas Brailsford and his assigns, for and during the term of his natural life, and after his decease, to the use of the said Thomas

7. Supplying Words.—Where it is clear on the face of the will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention as collected from the context.¹

Brailsford, son of my nephew Samuel Brailsford, his heirs and assigns forever.' The only Thomas Brailsford mentioned in the will was the son of Samuel, but the testator had another nephew of that name (who was uncle of the legatee), to whom, therefore, it was contended that the devise to 'the said Thomas Brailsford,' applied, though he was not before named, according to the case in *Hawkins*, 2 Hawk. P. C. 271, § 106, that father and son having the same name, the son, not the father, is distinguished by an addition. The words 'the said,' it was observed, might be considered surplusage; and that the devise was either void for uncertainty, or, there must be an inquiry. It was held that by the words, 'the said Thomas Brailsford,' the Thomas Brailsford who had been before mentioned was intended. Sir W. Grant, M. R., said: "The argument on the other side 'rests chiefly on the inconsistency of giving to the same person, in the same sentence, an estate for life and also an estate in fee; there is certainly a particularity in that, but the devise as it stands is not so insensible or contradictory as to drive the court to the necessity of expunging or adding words to give it a meaning.'"

Devise Not Controlled by Reason Assigned.—Thus where testator stated that he vested a general power to distribute his property in his trustees, by reason of his personal confidence in them, and then conferred the power upon them, and the heirs, executors, and administrators of the survivor of them, Sir W. Grant said: "Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet I am not authorized to strike these words out of the will, upon the supposition, though not improbable, that they were introduced in this part by inadvertence and mistake. I do not apprehend that a bequest actually made or a power given can be controlled by the

reason assigned. The assigned reason may aid in the construction of doubtful words, but cannot warrant the rejection of words that are clear." *Cole v. Wade*, 16 Ves. Jr. 46. See *Thompson v. Whitelock*, 5 Jur. N. S. 991.

1. 1 Jarm. on Wills (5th ed.) *486; *Goods of Morony*, L. R., 1 Ir. 483; *Doe v. Turner*, 2 D. & R. 398; *Abbot v. Middleton*, 7 H. L. Cas. 68; *Atkins v. Atkins*, Cro. El. 248; *Spalding v. Spalding*, Cro. Car. 185; *Sheppard v. Lessingham*, Amb. 122; *Radford v. Radford*, 1 Keen 486; *Jackson v. Hoover*, 26 Ind. 511; *Lang v. Pugh*, 1 Y. & C. C. 718; *McKeehan v. Wilson*, 53 Pa. St. 74; *Den v. McMurtrie*, 15 N. J. L. 276; *Sessoms v. Sessoms*, 2 Dev. & B. Eq. (N. Car.) 453; *Jameson*, Appellant, 1 Mich. 99; *Creswell v. Lawson*, 7 Gill & J. (Md.) 227; *Lynch v. Hill*, 6 Munf. (Va.) 114. See *Heald v. Heald*, 56 Md. 300; *Greenough v. Cass*, 64 N. H. 327; *Aulick v. Wallace*, 12 Bush (Ky.) 531; *Patterson v. Read*, 42 N. J. Eq. 149; *Den v. Young*, 24 N. J. L. 775; *Mumford v. Rochester*, 4 Redf. (N. Y.) 451; *East v. Garrett*, 84 Va. 523; *Thompson v. Thompson*, 115 Mo. 56; *In re Keller's Estate*, 11 Lanc. L. Rev. (Pa.) 185; *Selden v. King*, 2 Call (Va.) 73; *Duncan v. Phillips*, 3 Head (Tenn.) 415; *Cleland v. Waters*, 16 Ga. 496; *Howerton v. Henderson*, 88 N. Car. 597; *Dew v. Barnes*, 1 Jones Eq. (N. Car.) 149.

The statement of the doctrine in the text is taken from Mr. Jarman's work on Wills, vol. 1, p. 486, and is probably more widely accepted than any other. In *Re Morony*, L. R., 1 Ir. 483, *Warren, J.*, said there could be no doubt as to its accuracy. In *Pride v. Fooks*, 3 De G. & J. 266, *Knight Bruce, L. J.*, substantially announced the same proposition, in another form, by saying that if the contents of a will showed that a word had been undesignedly omitted, and demonstrated what addition by construction would fulfill the intention with which the document was written, the addition would be made. In *Hope v. Potter*, 3 K. & J. 209, *Sir W. Pagewood, V. C.*, said: "With regard to the discretion of the court to supply

words in a will, the cases are very numerous, but I think they may be classed under two heads. The first is, when the will is in itself incapable of bearing any meaning unless some words are supplied, so that the only choice is between an intestacy and supplying some words; but even there, as in every case, the court can only supply words if it sees on the face of the will itself, clearly and precisely, what are the omitted words, which may then be supplied upon what is called a necessary implication from the terms of the will, and in order to prevent an intestacy. The second class of cases is like *Spalding v. Spalding*, Cro. Car. 185, where there is a clear and precise gift and a contingent limitation over, which is clearly expressed, but is not commensurate with the previous gift, the contingency being either in excess, as in many cases where the gift over has been upon a death without issue, and the court has thought itself at liberty to curtail that gift over by introducing the words 'such' issue, or where there has been a defect, as in *Spalding v. Spalding*, Cro. Car. 185; *Abbot v. Middleton*, 1 Jur. N. S. 1126, where the limitation has been to one for life, with remainder to his children, or to one in tail, with a limitation over on a contingency, and the court has held the gift over to be by way of substitution for the original gift in the event of the original gift failing, and has found the contingency too narrow to fit that event and has thought itself at liberty, from the whole context of the will, to supply words, there being a necessary implication that the gift over was intended to be reduced so as to suit the previous gift."

Hence, it was held that where there was a devise of a particular property to the testator's daughter A, her heirs and assigns, and if she should die under the age of twenty-five years, "without having left any child or children," over, and subsequently, a devise of other real estate to trustees in fee, in trust for A, for her separate use; and after her death, in trust to convey the same "unto and equally amongst such children of A as tenants in common, the rents and profits in the meantime to be applied for their maintenance; and in case A should die without leaving any child or children, or, leaving such child or children, all should die under twenty-one," over, the court could not, after "such children of A,"

supply the words "as should attain twenty-one," but was at liberty, as against the testator's heir, to construe the word "such" as relating to all children of A, as they had been mentioned in the previous limitation. *Hope v. Potter*, 3 K. & J. 206.

In *Theobald on Wills* (2d ed.) 582, the doctrine is stated as follows: "With regard to supplying words in a will, the rule seems to be that where the will as it stands is clearly inconsistent, so that the choice lies between rejecting some portion of it or supplying some word, while, at the same time, the latter course will make the will consistent, the court will be justified in making the necessary addition. See *Hope v. Potter*, 3 K. & J. 206; *In re Morony*, L. R., 1 Ir. 483. Thus, in a devise to A for life, remainder 'to the first son of A, severally and successively in tail, male,' the devise will be construed as to the first and other sons of A. *Parker v. Tootal*, 11 H. L. Cas. 143. See *Newburgh v. Newburgh*, Lord St. Leonards' Law of Property 367. Under a bequest in trust for the testator's widow for her life, in trust for his children, followed by power of maintenance and advancement after the widow's death, with an ultimate gift over after her death, in default of children attaining vested interests, the court supplied the words 'and after her death' after the words 'for her left.' *Greenwood v. Greenwood*, 5 Ch. Div. 954. So, too, where there was a limitation in a settlement to the children of the marriage, who, being a son or sons, should attain twenty-one years; and if there should be but one such child, the whole to be in trust for such one child, his or her executors or administrators, and there were powers of applying the presumptive share of every such child for his or her maintenance until his or her share should become vested, the court held daughters to be included in the gifts. *In re Daniel's Settlement Trusts*, 1 Ch. Div. 375. In a somewhat similar case, where there were limitations to daughters for life, with remainders to their children, and the limitation to the children of one daughter was omitted, it was supplied upon the general intention of the will. *In re Redfern*, 6 Ch. Div. 133. So, when there is a gift to A in tail, and, if he die, over, the words without issue will be supplied in the gift over to satisfy the implied contingency. *Anonymous*, 1 And. 33. And in a similar case, where there

were devised to several in tail, and the interest of one of the tenants in tail was given over to another 'if he died living Alice,' the words 'without issue' were supplied, there being a gift over of the whole upon death of all the tenants in tail without issue. *Spalding v. Spalding*, Cro. Car. 185. The extreme limit to which the court will go, in supplying words in such cases, is probably marked by *Abbott v. Middleton*, 7 H. L. Cas. 68. The gift there was of personalty to the testator's wife for life, and then to his son for life, with remainder to the son's children and 'in case of my son dying before his mother,' over. The son died, leaving a child, and the House of Lords held (*Lords Cranworth and Wensleydale dissenting*) that the words 'without children' must be supplied in the gift over, so as to leave the child of A in possession of the property. However, if the testator expressly distinguishes death in the lifetime of a tenant for life from death without issue; if, for instance, the gift over is either in the event of death before the tenant in tail, or in the event of death without issue at any time, the gift over must be literally construed. *Eastwood v. Lockwood*, L. R., 3 Eq. 487. Where a testator bequeathed the remainder of his property 'and any other property of which I may die possessed, and I nominate my son my executor,' it was held that the residue was undisposed of. *Driver v. Driver*, 43 L. J. Ch. 279."

See also the following cases, in which the doctrine was examined: *Pickering v. Langdon*, 22 Me. 413; *Boston Safe Deposit, etc., Co. v. Coffin*, 152 Mass. 98; *Metcalf v. First Parish*, 128 Mass. 375; *Couch v. Gorham*, 1 Conn. 39; *Kellogg v. Mix*, 37 Conn. 243; *Heald v. Heald*, 56 Md. 300; *Creswell v. Lawson*, 7 Gill & J. (Md.) 227; *Jackson v. Hoover*, 26 Ind. 511; *Grimes v. Harmon*, 35 Ind. 198; *State v. Joyce*, 48 Ind. 310; *Bishop v. Morgan*, 82 Ill. 354; *Covenhoven v. Shuler*, 2 Paige (N. Y.) 122; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Drake v. Pell*, 3 Edw. Ch. (N. Y.) 251; *Carter v. Bloodgood*, 3 Sandf. Ch. (N. Y.) 293; *McKeehan v. Wilson*, 53 Pa. St. 74; *Zerbe v. Zerbe*, 84 Pa. St. 147; *Wurts v. Page*, 19 N. J. Eq. 365; *Den v. Combs*, 18 N. J. L. 27; *Creveling v. Jones*, 21 N. J. L. 573; *Van Houten v. Pennington*, 8 N. J. Eq. 745; *Augustus v. Seabolt*, 3 Metc. (Ky.) 156; *Hunt v. Johnson*, 10 B. Mon. (Ky.) 344; *Aulick v. Wallace*, 12 Bush (Ky.)

533; *Barclay v. Dupuy*, 6 B. Mon. (Ky.) 98; *Cleland v. Waters*, 16 Ga. 507; *Wootton v. Redd*, 12 Gratt. (Va.) 196; *Lynch v. Hill*, 6 Munf. (Va.) 114; *Dew v. Barnes*, 1 Jones Eq. (N. Car.) 149; *Sessoms v. Sessoms*, 2 Dev. & B. Eq. (N. Car.) 453; *Geiger v. Brown*, 4 McCord (S. Car.) 418; *Reid v. Hancock*, 10 Humph. (Tenn.) 368.

In the case of *Kellogg v. Mix*, 37 Conn. 243, the trustees, under the will of John G. Mix, applied to the superior court in equity for advice as to the proper construction of a certain clause contained in the will. The provision about which the trustees found themselves in doubt was in the following language: "After paying my debts, I give to my beloved wife C., in trust for the maintenance of herself during life, and of my daughter E., so long as she remains single; and to my son G. \$400 a year to be paid to him by my trustees." A previous clause had given the entire property to trustees for the purposes to be stated in the will. No other disposition of the income, which was over \$400, was made during the life of the widow, but the income was given to his children after her death, and any appropriation of any part of the principal before her death was forbidden, unless with her consent; and there was a provision that she should have the entire use of her portion of the estate until her death. The court, in its construction of the provision in question, declared that it was clear that the testator intended to give his widow the net income of the estate during her life, except the \$400 given to his son, and hence, that those words might be supplied in construing the legacy to her. It was also held, generally, that where a testator has omitted words in a will which are necessary to express the meaning intended, which is clearly inferable from the will taken as a whole, the court may, by construction, supply the omitted words.

"Without Issue" Read "Without Leaving Issue."—See *Sheppard v. Lesingham*, Ambli. 122; *Pye v. Linwood*, 6 Jur. 618; *Radford v. Radford*, 1 Kee. 486.

Supplying the Words "Under Twenty-one."—See *Kirkpatrick v. Kilpatrick*, 13 Ves. Jr. 476; *Wheable v. Withers*, 16 Sim. 505; *Else v. Else*, L. R., 13 Eq. 196; *Radby v. Lees*, 3 M. & G. 327; *Pennington v. Van Houten*, 8 N. J. Eq. 272; *affirmed* 745; *Den v. Combs*, 18 N. J. L. 27.

In all such cases the court acts upon the assumption that the contingency or state of circumstances which was present to the testator's mind was imperfectly described, and hence, when the testator has himself overlooked a particular event, which, had it occurred to him, he would probably have guarded against, the omission cannot be supplied by inserting the necessary clause; to do so would be too much like making a will for the testator, rather than construing that already made.¹

8. Changing Words.—To authorize the court in changing the language employed by the testator, it must be apparent, not only that the testator has used the wrong word or phrase, but also

On Marriage Read at Twenty-One or Marriageable.—*Lang v. Pugh*, 1 Y. & C. C. C. 718; *King v. Cullen*, 2 De G. & S. 252; *Woodburne v. Woodburne*, 3 De G. & S. 643.

As to Supplying Objects by Reference to Preceding Limitations.—See *Doe v. Turner*, 2 D. & Ry. 308; *Langston v. Pole*, 2 M. & P. 490; *Parker v. Tootal*, 11 H. L. Cas. 143; *Clarke v. Clemmens*, 36 L. J. Ch. 171; *Biss v. Smith*, 2 H. & M. 105; *Grimson v. Downing*, 4 Drew. 132; *Simpson v. Smith*, 1 Sneed (Tenn.) 394; *Marsh v. Hague*, 1 Edw. Ch. (N. Y.) 174.

As to Supplying Words to Provide for an Alternative Event.—See *Doe v. Scudamore*, 2 B. & P. 296; *Doe v. Micklem*, 6 East 486; *Pearsall v. Simpson*, 15 Ves. Jr. 29.

Effect of Arranging Clauses Numerically.—Where a testator divides his will into sections numerically arranged, and in some instances places the words of limitation at the end of each section, they will be considered applicable to the several devises contained in the section, and not be confined to those in immediate juxtaposition. 1 Jarm. on Wills (5th ed.) 499; *Fenny v. Ewestace*, 4 M. & S. 58; *Child v. Elsworth*, 2 De G. M. & G. 679; *Gordon v. Gordon*, L. R., 5 H. L. 282.

1. 1 Jarm. on Wills (5th ed.) *489; *Eastwood v. Lockwood*, L. R., 3 Eq. 487; *Augustus v. Seabolt*, 3 Metc. (Ky.) 156. See *Abbott v. Middleton*, 7 H. L. Cas. 80; *Murgitroyd's Estate*, 1 Brewst. (Pa.) 317; *Varner's Appeal*, 87 Pa. St. 422; *McKeehan v. Wilson*, 53 Pa. St. 74; *Butterfield v. Hamant*, 105 Mass. 339; *Hollingsworth v. Hollingsworth*, 65 Ala. 321; *Heald v. Heald*, 56 Md. 300; *Caldwell v. Willis*, 57 Miss. 571. See also *Hamilton v. Boyles*, 1 Brev. (S. Car.) 414; *Simpson v. Smith*, 1 Sneed (Tenn.) 394; *Lynch*

v. Hill, 6 Munf. (Va.) 114; *Liston v. Jenkins*, 2 W. Va. 62; *Pickering v. Langdon*, 22 Me. 413; *Arthur v. Arthur*, 10 Barb. (N. Y.) 9.

Thus, it has been held that, while a word may be rejected, if the other parts of the will show that it was improperly or incautiously used, it will not be discarded on a mere conjecture, based upon a presumption that the testator intended a provision similar to the Statute of Distributions. *Caldwell v. Willis*, 57 Miss. 555.

The testator made a devise of his real estate to his daughter, "to her, her heirs, and assigns forever;" but if she died before the age of twenty-one or marriage, in the lifetime of the testator's wife, then to the wife, "to her, her heirs, and assigns forever." He also bequeathed certain personal estate to his said daughter, "to her and her heirs forever." He then bequeathed the residue of his personal estate to his said wife and daughter, "to be equally divided between them, share and share alike, by two indifferent persons to be chosen by the executors, to them, the said wife and daughter their, and each of their, heirs forever;" after which the will contained the following clauses: "And in case of the death of either of them, then my will and desire is, that the survivor shall enjoy the whole, to them and their heirs, forever. But in case of the death of both my said wife and daughter, then I give my estate, real and personal, above mentioned, to my brothers, James, etc., to them and each and every of their heirs, and assigns forever, to be equally divided," etc. It was held that the words, "without issue," could not be supplied after the words "death of either of them," and "death of both my said wife and daughter." *Hamilton v. Boyles*, 1 Brev. (S. Car.) 414.

what is the right one; if this be clear, the change is warranted by established principles of construction.¹

1. 1 Jarm. on Wills (5th ed.) *504; Taylor v. Richardson, 2 Drew. 16; Doe v. Gallini, 5 B. & Ad. 621; 27 E. C. L. 138; Hart v. Tulk, 2 De G. M. & G. 300; Woodstock v. Shillito, 6 Sim. 416; Cox v. Britt, 22 Ark. 567. See Taylor v. Creagh, 8 Ir. Ch. Rep. 281; *In re* Bayliss' Trust, 17 Sim. 178; Pasmore v. Huggins, 21 Beav. 103; Philipps v. Chamberlaine, 4 Ves. Jr. 50; Dent v. Pepys, 6 Madd. 350; Horridge v. Ferguson, Jac. 583; Minot v. Tappan, 122 Mass. 535; Dow v. Dow, 36 Me. 211; Butterfield v. Haskins, 33 Me. 393; Phelps v. Bates, 54 Conn. 11; Roe v. Vingut, 117 N. Y. 204; Matter of Thompson, 5 Dem. (N. Y.) 393; Pond v. Bergh, 10 Paige (N. Y.) 140; DuBois v. Ray, 35 N. Y. 163; Patchen v. Patchen, 121 N. Y. 432; Den v. McMurtree, 15 N. J. L. 276; Den v. Combs, 18 N. J. L. 27; Cody v. Bunn, 46 N. J. Eq. 131; Hawes v. Foote, 64 Tex. 27; Castner's Appeal, 88 Pa. St. 491; Horwitz v. Morris, 60 Pa. St. 261; Hancock's Appeal, 112 Pa. St. 543; Hallowell's Estate, 11 Phila. (Pa.) 55; Fulford v. Hancock, Busb. Eq. (N. Car.) 55; Tayloe v. Johnson, 63 N. Car. 383; East v. Garret, 84 Va. 523; Taylor v. Meador, 66 Ga. 232; Armstrong v. Moran, 1 Bradf. (N. Y.) 314; Sloan v. Hanse, 2 Rawl. (Pa.) 28; Tennell v. Ford, 30 Ga. 707; Collier v. Collier, 3 Ohio St. 369. But see Sayward v. Sayward, 7 Me. 210; Morton v. Banett, 22 Me. 257; Fiske v. Keene, 35 Me. 349; Sawyer v. Baldwin, 20 Pick. (Mass.) 384; Robb v. Belt, 12 B. Mon. (Ky.) 643; Taylor v. Conner, 7 Ind. 115; Roome v. Phillips, 24 N. Y. 463; Jackson v. Blanshan, 6 Johns. (N. Y.) 54; Drake v. Pell, 3 Edw. Ch. (N. Y.) 251; Hawn v. Banks, 4 Edw. Ch. (N. Y.) 664; Phye v. Phye, 3 Bradf. (N. Y.) 45; Pratt v. Flamer, 5 Har. & J. Md.) 10; Raborg v. Hammond, 2 Har. & G. (Md.) 42; Janney v. Sprigg, 7 Gill (Md.) 197; Vaden v. Hance, 1 Head (Tenn.) 300; Booth v. Terrell, 16 Ga. 20; State Bank v. Ewing, 17 Ind. 68; Tayloe v. Johnson, 63 N. Car. 381; Fulford v. Hancock, Busb. Eq. (N. Car.) 55; Bostick v. Lawton, 1 Spears (S. Car.) 258; Brooke v. Croxton, 2 Gratt. (Va.) 506; Kindig v. Deardorff, 39 Ill. 300; Den v. Young, 24 N. J. L. 775. Compare Barnes v. Simms, 5 Ired. Eq. (N. Car.) 392.

"Or" Construed "And."—As the words "or" and "and" are often carelessly interchanged, in many instances the court has been called upon to rectify the blunder to preserve the manifest intention of the testator. Thus, where there is a gift to two objects, or classes of objects, in the alternative, to avoid holding the gift void for uncertainty, "or" has frequently been read "and." Richardson v. Spragg, 1 P. Wms. 434; Eccard v. Brooke, 2 Cox 213; Maude v. Maude, 22 Beav. 200.

Gifts Over on Death Under Age "or" Without Issue.—In the case of a gift over if the first taker die under age "or" without issue, "or" is construed "and," and the gift over does not take effect unless both events happen. See *Issue*, vol. 11, p. 910.

In addition to the authorities there cited, see 1 Jarm. on Wills (5th ed.) 505; Soule v. Gerrard, Cro. Eliz. 525; Walsh v. Paterson, 3 Atk. 193; Doe v. Burnsale, 6 T. R. 34; Fairfield v. Morgan, 2 B. & P. N. R. 38; Doe v. Selby, 4 D. & Ry. 608; Eastman v. Baker, 1 Taunt. 174; Phelps v. Bates, 54 Conn. 11; Neal v. Cosden, 34 Md. 421; Raborg v. Hammond, 2 Har. & G. (Md.) 42; Ward v. Barrows, 2 Ohio St. 242; Tennell v. Ford, 30 Ga. 707; Parrish v. Vaughan, 12 Bush (Ky.) 97. Compare Doe v. Watson, 8 How. (U. S.) 263; Robertson v. Johnston, 24 Ga. 102; Den v. Lake, 24 N. J. L. 686; *affirmed* 25 N. J. L. 605; Den v. English, 17 N. J. L. 280; Carpenter v. Boulden, 48 Md. 122; Dallam v. Dallam, 7 Har. & J. (Md.) 220; Chrystie v. Phye, 19 N. Y. 344; Armstrong v. Moran, 1 Bradf. (N. Y.) 314; Carpenter v. Heard, 14 Pick. (Mass.) 449; Griffith v. Woodward, 1 Yeates (Pa.) 316; Den v. Mugway, 15 N. J. L. 330; Ray v. Enslin, 2 Mass. 554; Turner v. Whitted, 2 Hawks (N. Car.) 613; Montgomery v. Wynns, 4 Dev. & B. (N. Car.) 527; Harrison v. Bowe, 3 Jones Eq. (N. Car.) 478; Kindig v. Deardorff, 39 Ill. 300; Scanlan v. Porter, 1 Bailey (S. Car.) 427; Witsell v. Mitchell, 3 Rich. Eq. (S. Car.) 289; Brewer v. Opie, 1 Call (Va.) 212; Betzhooover v. Costen, 7 Pa. St. 13; Shands v. Rogers, 7 Rich. Eq. (S. Car.) 422; Munro v. Holmes, 1 Brev. (S. Car.) 319; Seabrook v. Mikell, 1 Cheves Eq. (S. Car.) 80. See also O'Brien v. Heeney, 2 Edw. Ch. (N. Y.) 242.

Thus, a devise of slaves to M., his heirs and assigns, and, "if the said M. should die without heirs of his body lawfully begotten, or before he shall arrive unto the full age of twenty-one years, then to F.," etc., is good, by way of executory devise to F., the word "or" in this limitation being construed to mean "and." *Raborg v. Hammond*, 2 Har. & G. (Md.) 42.

B. devised "all his estate, real and personal, to his six children, by name, to be equally divided between them, share and share alike; but if any one of them should die before reaching maturity, or without lawful issue, that then his, her, or their part should devolve upon, and be equally divided among, the surviving children and their heirs and assigns forever." All the children survived the testator. Four of them subsequently died, leaving issue; and the fifth, after reaching maturity, died intestate, and without lawful issue, having previously conveyed his share of the estate. It was held that the word "or" was to be construed as "and," so that the devise over did not take effect; and the surviving child was not entitled to the share of the one dying without lawful issue. *Jackson v. Blanshan*, 6 Johns. (N. Y.) 54. See also *Kindig v. Deardorff*, 39 Ill. 300.

A testator made the following devise: "I give, devise, and bequeath unto my daughter M., and to her heirs and assigns forever, all that tract of land purchased of B., and also that part of tract marked D., in the first purchase from C., not given to my son-in-law E., as will more fully appear by reference to a deed given to F. and E., together with a tract in the last purchase marked G, together with an equal portion of my personal property with the rest of my children, not hereinbefore bequeathed;" and in a subsequent clause: "It is my will, that if any of my children, in age from my daughter M. down to the youngest, die under age or before marriage, that the portion of personal estate bequeathed to them be equally divided amongst my surviving six minor children; and the real estate, if not otherwise devised, to be equally divided between all my surviving children." It was held that "or" must be construed "and." *Bostick v. Lawton*, 1 Spears (S. Car.) 258.

Compare *Brooke v. Croxton*, 2 Gratt. (Va.) 506. In this case a testator, after directing that his estate should be

equally divided among his seven children, added: "It is my will and desire that if any of my children should die before they attain to legal age, or without a lawful heir, in either case, that all such property as they may receive in the division of my property, return to my surviving children or their lawful heirs." It was held that the limitation over took effect upon the happening of either contingency, and that upon the death of one under age, or without heirs, his share vested absolutely in the survivors; and upon the death of one of such survivors, under age, or without children, the portion which he received as survivor would not pass to his survivors.

The following analysis of the English decisions upon this subject is given by Theobald: "First. If there is a devise to A in fee, if she dies leaving lawful issue, but if she dies under age or without lawful issue, over, 'or' will be read 'and.' *Johnson v. Simcock*, 6 W. & N. 6; 9 W. R. 895. Second. If the devise is to A in fee, and if he dies under twenty-one or without issue, over, 'or' will be read 'and' to favor the issue of A. *Fairfield v. Morgan*, 2 B. & P. N. R. 38; *Denn v. Kemeys*, 9 East 366; *Eastman v. Baker*, 1 Taunt. 174; *Morris v. Morris*, 17 Beav. 198. Third. If the devise is to A for life, remainder to his children in tail, and if A dies under twenty-one or without children, over, it is doubtful whether 'or' would be read 'and.' According to the earlier authorities the change would be made. *Hasker v. Sutton*, 1 Bing. 501; 8 E. C. L. 611; 9 J. B. Moo. 2. But see *Cooke v. Mirehouse*, 34 Beav. 27. Fourth. And where, after a prior absolute gift, the gift over is upon failure of issue or some other event, such as not making a will, 'or' will be read 'and,' though the gift over may thereby become void: *Incorporated Society v. Richards*, 1 D. & W. 258; *Greated v. Greated*, 26 Beav. 621; *Green v. Harvey*, 1 Hare 428. Fifth. But if the devise is to A in tail, and if he dies under twenty-one or without issue, over, 'or' will not be construed 'and,' though, on the other hand, it seems that if the devisee died under twenty-one leaving issue, the gift over would not be held to have taken effect, so that the devise would, in fact, be construed as equivalent to 'if A dies under twenty-one without issue, or without issue at any time.' *Mortimer*

9. Transposing Words.—Where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context by being transposed, the court is warranted in making the transposition.¹

v. Hartly, 6 Exch. 47; *Soulle v. Gerard*, Cro. Eliz. 525; *Woodward v. Glasbrook*, 2 Vern. 388; and *Lord St. Leonard's* judgment in *Grey v. Pearson*, 6 H. L. Cas. 61. The devise over in this case takes effect as a remainder after an estate tail. Sixth. But if the devise over, after an estate tail to A, is in case of the death of A, or for want of his issue, 'or' must be read 'and,' in order to preserve the prior estate. *Monkhouse v. Monkhouse*, 3 Sim. 119. Seventh. 'Or' will be read 'and' when a gift is given upon either of two events, as, upon attaining twenty-one or marriage, and there is a gift over upon death under twenty-one or unmarried, the gift over being otherwise inconsistent with the prior gift. *Grant v. Dyer*, 2 Dow. 87; *Thompson v. Tenlon*, 22 L. J. Ch. 243; *Thackeray v. Hampson*, 2 Sim. & Stu. 214; *Grimshawe v. Pickup*, 9 Sim. 591; *Collett v. Collett*, 35 Beav. 312. Eighth. In some cases, where there has been a gift contingent upon attaining twenty-one, subject to a life interest, and a gift over upon death before the tenant for life or under twenty-one, 'or' has been read 'and.' *Miles v. Dyer*, 5 Sim. 435; 8 Sim. 330; *Bentley v. Meech*, 25 Beav. 197. And if a gift over upon death under age, or without leaving a husband, is afterwards referred to as 'in case of death under age as aforesaid,' 'or' will be read 'and.' *Weddell v. Mundy*, 6 Ves. Jr. 341. *Theobald on Wills* (2d ed.) 530.

"And" Construed "Or."—In some cases, from the context of the will "and" has been read "or," so as to vest a gift in the alternative in lieu of cumulative events. *Theobald on Wills* (2d ed.) 581; *Hawes v. Hawes*, 1 Ves. 13; *Jackson v. Jackson*, 1 Ves. 217; *Stapleton v. Stapleton*, 2 Sim. N. S. 212. See *Sayward v. Sayward*, 7 Me. 210; *Scott v. Guernsey*, 60 Barb. (N. Y.) 163; *East v. Garrett*, 84 Va. 523; *Janney v. Sprigg*, 7 Gill (Md.) 197; *Engleried v. Woelpart*, 1 Yeates (Pa.) 41; *Boyd's Estate*, 9 Phila. (Pa.) 337; *Turner v. Whitted*, 2 Hawks (N. Car.) 613; *Shands v. Rogers*, 7 Rich. Eq. (S. Car.) 422; *Cornish v. Wilson*, 6 Gill (Md.) 299. Compare *Malmesbury v. Malmesbury*, 31 Beav. 407; *Maynard v.*

Wright, 26 Beav. 285; *Butterfield v. Haskins*, 33 Me. 393; *Brewer v. Ople*, 1 Call (Va.) 212; *Jackson v. Topping*, 1 Wend. (N. Y.) 388; *Roome v. Phillips*, 24 N. Y. 463; *Courter v. Stagg*, 27 N. J. Eq. 305; *Ely v. Ely*, 20 N. J. Eq. 43; *Harrison v. Bowe*, 3 Jones Eq. (N. Car.) 478.

As to the construction of the phrase "unmarried and without issue," disjunctively, see *Issue*, vol. 11, p. 910.

"Nor" Construed, "or Not."—In a condition precedent, "nor" will mean "or not," if the result is to vest the gift in either of two events. *Theobald on Wills* (2d ed.) 581; *Mackenzie v. King*, 17 L. J. Ch. 448.

1. 1 Jarm. on Wills (5th ed.) §499; *Marshall v. Hopkins*, 15 East 309; *Doe v. Allcock*, 1 B. & Ald. 137; *Mason v. Robinson*, 2 Sim. & Stu. 295; *Mosley v. Massey*, 8 East 149; *Bradwin v. Harpur*, Ambl. 374; *Mutter's Estate*, 38 Pa. St. 314. See *Spark v. Purnell*, Hob. 75; *Cole v. Rawlinson*, 1 Salk. 236; *Mohun v. Mohun*, 1 Sw. 201; *East v. Cook*, 2 Ves. 32; *Jackson v. Hoover*, 26 Ind. 511; *Wager v. Wager*, 96 N. Y. 172; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Ex p. Hornby*, 2 Bradf. (N. Y.) 420; *Ferry's Appeal*, 102 Pa. St. 207; *Pennsylvania Co. v. Stokes*, 1 Brewst. (Pa.) 486; *Leidich v. Leidich*, 8 W. & S. (Pa.) 363; *Merkel's Appeal*, 109 Pa. St. 235; *Davis v. Callahan*, 78 Me. 318; *Linstead v. Green*, 2 Md. 82; *Walker v. Walker*, 17 Ala. 396; *Creveling v. Jones*, 21 N. J. L. 573; *Hawes v. Foote*, 64 Tex. 27; *Baker v. Pender*, 5 Jones (N. Car.) 351; *O'Neill v. Boozer*, 4 Rich. Eq. (S. Car.) 22; *Hunt v. Johnson*, 10 B. Mon. (Ky.) 344; *Augustus v. Seabolt*, 3 Metc. (Ky.) 156. Compare *Mooberry v. Marye*, 2 Munf. (Va.) 453.

Thus, land was given, by will, to the two sons of the testator, who ordered that, if either or both of the sons should die without issue, the share given to each by the will should go to the surviving son and the daughters of the testator in fee. It was held that the will must be construed as if the words, "or the son who has died leaving issue, who are then living," had followed the words "to the surviving

10. **Uncertainty.**—If it is impossible to ascertain the subject-matter or the objects of a gift, it will be void for uncertainty.¹

son." *Pond v. Bergh*, 10 Paige (N. Y.) 140.

To justify such a transposition the meaning and purpose of the testator must be certain. *Latham v. Latham*, 30 Iowa 297. But it is not necessary that the words, as they stand, should be absolutely senseless or contradictory; it will be sufficient if the transposition is required to give effect to an intention clearly expressed or indicated by the context. 1 Jarm. on Wills (5th ed.) 502; *Eden v. Wilson*, 1 Exch. 772; 14 Q. B. Cas. 256; 4 H. L. Cas. 257. Compare *Patchen v. Patchen*, 121 N. Y. 432.

1. Theobald on Wills (2d ed.) 584. See *Mather v. Mather*, 103 Ill. 607; *Woods v. Moore*, 4 Sandf. (N. Y.) 579; *Hoppen's Estate*, 70 Wis. 522; *Tucker Seaman's Aid Soc.*, 7 Met. (Mass.) 188; *Hosea v. Jacobs*, 98 Mass. 65; *Darcy v. Kelley*, 153 Mass. 433; *In re Traylor's Estate*, 81 Cal. 9; *Smith v. Smith*, 4 Paige (N. Y.) 271; *New York Inst.*, etc. v. How, 10 N. Y. 84; *Beekman v. Bonsor*, 23 N. Y. 298; *Bascom v. Albertson*, 34 N. Y. 584; *Ryers v. Wheeler*, 22 Wend. (N. Y.) 148; *Cresap v. Cresap*, 34 W. Va. 310; *Wilson v. Perry*, 29 W. Va. 170; *Howe v. Wilson*, 91 Mo. 45; *Byers v. Byers*, 6 Dana (Ky.) 313; *Tewksbury v. French*, 44 Mich. 100; *Stith v. Barnes*, 1 Law Repos. (N. Car.) 484; *Ballantyne v. Turner*, 6 Jones Eq. (N. Car.) 224; *Timberlake v. Harris*, 7 Ired. Eq. (N. Car.) 188; *Taylor v. American Bible Soc.*, 7 Ired. Eq. (N. Car.) 20; *Taylor v. Tolen*, 38 N. J. Eq. 95; *Pocock v. Redinger*, 108 Ind. 573; *Piercy v. Piercy*, 19 Ind. 467; *Kelley v. Kelley*, 25 Pa. St. 460; *M'Cullough v. Gilmore*, 11 Pa. St. 370; *Wooton v. Redd*, 12 Gratt. (Va.) 196; *Howard v. American Peace Soc.*, 49 Me. 288; *Drane v. Beall*, 21 Ga. 21; *Inglis v. Sailor's Snug Harbour*, 3 Pet. (U. S.) 99; *Treat's Appeal*, 30 Conn. 113; *White v. Fisk*, 22 Conn. 31; *Heuser v. Harris*, 42 Ill. 425; *Armistead v. Armistead*, 32 Ga. 597; *Lepage v. McNamara*, 5 Iowa 124. Compare *Stokeley v. Gordon*, 8 Md. 496; *Heller v. Heller*, 147 Ill. 621; *Nelson v. Pomeroy*, 74 Conn. 257; *McAllen v. Schneider*, 22 Wash. L. Rep. 193; *Eckford v. Eckford* (Iowa, 1894), 58 N. W. Rep. 1093.

The conclusion that a will is too un-

certain to be allowed to operate, will not be adopted while effect can by any means be given to it. *Winder v. Smith*, 2 Jones (N. Car.) 327.

Uncertainty as to Subject-matter of Gift.—The words at the close of a will, "if I have not given my wife a sufficient support, she is to have enough of the interest of my money to make her a plentiful support," are not sufficiently certain to impose any duty on the executor. *Ballantyne v. Turner*, 6 Jones Eq. (N. Car.) 224.

A devise of a portion of the residue of certain property was held void for uncertainty as to amount, and a devise of a residue consequently void for the same reason. *Beekman v. Bonsor*, 23 N. Y. 298.

A will contained twelve items, by most of which the testator gave specific legacies to each of his eleven children. The third item contained a bequest to one of his children of "one equal share of whatever property remains after I have given the property stated in each separate item to each individual child." The fifth and eleventh items contained similar bequests to other children, except that in the fifth item the words "a full share," and in the eleventh item the words "one-fourth of a share," were substituted for the words "one equal share" in the third item. It was held that parol evidence was not admissible to show what the testator meant by the word "share," and that these three items were void for uncertainty. *Armistead v. Armistead*, 32 Ga. 597.

A gift of some of my linen, not saying how much, or of a handsome gratuity, is void. *Peck v. Halsey*, 2 P. Wms. 387; *Jubber v. Jubber*, 9 Sim. 503. See *Jones v. Hancock*, 4 Dow. 145.

On the other hand, if a testator supplies a measure of the bequest, the court will ascertain how much ought to be expended; thus, a gift of a sum of money to an executor for his trouble, or even of a house or garden to be built at the expense of his executors, is good, and the court will fix the amount. *Jackson v. Hamilton*, 3 J. & L. 702; *Edwardes v. Jones*, 35 Beav. 474. See *Dundee v. Morris*, 3 Macq. H. L. Cas. 134.

A gift of £50 or £100, or of a sum not exceeding a certain amount, will be

construed in favor of the legatee as a gift of the larger sum. *Seale v. Seale*, 1 P. Wms. 290; *Thompson v. Thompson*, 1 Coll. 395; *Cope v. Wilmot*, 1 Coll. 396 n; *Gough v. Bult*, 16 Sim. 45.

Upon similar principles, the gift of the rest of a fund, if the rest cannot be ascertained, is void; as in a devise of such houses as she shall elect to A, and the others to B, where A dies before the testator. *Boyce v. Boyce*, 16 Sim. 476; *Jerningham v. Herbert*, 4 Russ. 388.

Where an estate was devised to one generally, without expressing what estate, and the direction was added, that if he should die without children all the property remaining at his death should go over, it was held that the description of what went over was sufficiently certain. *Burton v. Black*, 30 Ga. 638.

A devise of "what shall remain" or "be left" at the death of a legatee, where the property, or a part of it, is household furniture, farming utensils, and farm stock, expressly limited to the first taker for life, is not void for uncertainty, since these words may be construed as referring to the expected diminution of the property from its perishable nature, or by the use and wear of the first taker. *Sarle v. Probate Court*, 7 R. I. 270.

In the case of a fund bequeathed upon trust, to apply a portion to a purpose which is void and the surplus to charity, it seems the whole fund may be applied to charity, though the amount applicable to the invalid object may not be ascertainable. For instance, if a fund is given upon trust to apply the income in repairing a tomb, and to give the surplus to a charitable object, the charitable object is entitled to the whole fund. *Fisk v. Atty. Gen'l*, L. R., 4 Eq. 521; *Hunter v. Bullock*, L. R., 14 Eq. 45; *Dawson v. Small*, L. R., 18 Eq. 114; *In re Williams*, 5 Ch. Div. 735; *In re Birkett*, 9 Ch. Div. 576. See *Fowler v. Fowler*, 33 Beav. 616; *Kirkman v. Lewis*, 38 L. J. Ch. 570.

Possibly, if the invalid object is such that the whole fund might fairly be expended upon it, the whole gift will be void. *Chapman v. Brown*, 6 Ves. Jr. 404; *Cramp v. Playfoot*, 4 K. & J. 479.

The court will, if possible, ascertain the amount necessary for each object, in order to prevent the gift of the surplus from being void for uncertainty. *Mitford v. Reynolds*, 1 Ph. 185; *Dundee v. Morris*, 3 Macq. H. L. Cas. 134; *Fisk v. Atty. Gen'l*, L. R., 4 Eq. 521.

A direction that a legatee shall be maintained according to her condition in life, is not void for uncertainty. *Cresap v. Cresap*, 34 W. Va. 310.

A testator, by his will, gave to his wife absolute control of his estate, as to the settlement or income thereof, trusting that she "would advance the best interests of herself and children," and ordered that, if either of the children should treat her with disobedience or disrespect, such child should have no benefit of the property until his return to duty; also, that, upon the second marriage of the wife during the minority of the children, a person named in the will should have full power to invest the property for the benefit of the testator's heirs, the income to be subject to the control of the widow; also, that, upon the marriage of either of the children without the consent of the mother, he should forfeit all benefit arising from the estate; and, finally, that, upon the decease of the wife during the minority of the children, the before-mentioned trustee should be sole executor, to invest and dispose of the property so as to advance the interests of the heirs of the testator. It was held that the will contained no valid disposition of any part of the property of the testator. *Bayeaux v. Bayeaux*, 8 Paige (N. Y.) 333.

Where There Are Two Subjects, One of Which Partially, and the Other Entirely, Satisfies the Description.—Where a subject is found that fits and satisfies a description in every particular, and another is found that does not satisfy the description in an important particular, the former, it is to be presumed, is the subject for which the description was intended. Thus M., by will, devised and bequeathed to his wife all the property, both real and personal, "that I made a deed of gift unto her dated Sept. 17, 1851." There were two deeds of gift to take effect at his decease, one of a number of negroes, and the other of real estate, horses, stock, farm utensils, etc. It was held that the property mentioned in the latter instrument alone passed by the will. *Booker v. Booker*, 20 Ga. 786.

For a careful classification of the recent cases, upon the subject of uncertainty, see 1 *Jarm. on Wills* (6th ed.) 369.

Uncertainty as to Objects of Gift.—A testator, by one clause of his will, gave to "C. and D., sons of M., \$500 each;" by another clause, "to the seven children of R., \$200 each;" by another

clause, to the heirs of F., \$600 each. F. was still living. It was held that the devise to the heirs of F. was void for uncertainty. *Timberlake v. Harris*, 7 Ired. Eq. (N. Car.) 188.

A testator domiciled in *New York*, devised and bequeathed certain property to "five persons who shall be named and appointed as trustees by the supreme court of *Vermont*, to establish an institution for the education of females," to be located in Middlebury, *Vermont*. It was held that the bequest was void for uncertainty as to the objects of the gift. *Bascom v. Albertson*, 34 N. Y. 584.

A testatrix made the following devise: "I desire that, at my decease, after my just debts are paid, my property may be divided in the following manner,—To the Bible Society, Education, Colonization, and Home Missionary Societies, each five hundred dollars." It was admitted that these societies were not described by their proper corporate names, though they were well known and usually called by those names. It was held, the descriptions not being correct on the face of the will, so as to designate with certainty what were the objects of her bounty, that the legacies were void for uncertainty in the description of the persons who were to take. *Taylor v. American Bible Soc.*, 7 Ired. Eq. (N. Car.) 201.

A testator devised and bequeathed to his executors real and personal estate, for the purpose of creating three institutions of learning, in certain places specified, and ordered that any overplus of the property given for that purpose should "be used for the education of such youth as are not able to pay teachers fees," and that his "relations be admitted as students, free of tuition fees," at any of such seminaries. It was held that the devise and bequest were void for uncertainty as to the beneficiaries thereof. *Literary Fund v. Dawson*, 10 Leigh (Va.) 153.

A bequest in the following language: "Any surplus income that may remain, to the extent of \$1,000 per annum, I direct to be expended, by my trustees, for the support of indigent, pious young men preparing for the ministry, in *New Haven, Connecticut*," is void for uncertainty. *White v. Fisk*, 22 Conn. 31.

A devise to the persons who at the time constitute a voluntary association, is not void for uncertainty, but they will take in their individual and not in

their associate character. *Bartlet v. King*, 12 Mass. 537.

A legacy to an unincorporated society is good, if there be enough to identify the party intended. *Parker v. Cowell*, 16 N. H. 149.

A bequest of the proceeds of a certain estate for a son and his family, or such of them as the trustees may think proper, in such manner and at such times as the trustees may think proper, support in this clause being meant to include education as to the children, is not void for uncertainty, "his family" being construed to mean his children. *Whelan v. Reilly*, 3 W. Va. 597.

A clause in a will, in the words, "the remainder of my estate I do hereby devise to the poor and needy, fatherless, etc., of (two townships named), to such poor as are not able to support themselves, to be divided as my said executors may think proper without any partiality," is a valid bequest. *Landis v. Wooden*, 1 Ohio St. 160.

A will, after appointing an "administrator," and making provision for the sale of certain lands, ordered the proceeds to be divided as follows: "One-half shall go to the school district in which the farm lies, and shall be under the control of one person elected by the people of the district, and he shall be elected for four years at one time, and be required to give security for the faithful trust put in his hands, and no one shall receive any per cent. for their trouble; this shall be loaned out, and none of it shall be used except the interest, and it for no other purpose than for schooling the children; and the other half shall go to the support of the poor of Madison county, but none of it shall be used but the interest; but first the administrator shall have a reasonable pay out of the proceeds of the land for his labor." It was held that these bequests were not uncertain as to object or recipient. *Heuser v. Harris*, 42 Ill. 425.

A testator made the following bequest: "I give and bequeath to M., N., and G., and to their successors forever (who shall, as a board of trustees, add to and perpetuate their number, so long as in their opinion the objects of this bequest shall require it), all my estate, to be held by them in trust, for the promotion of education among the Indian and African children and youth of the *United States* or elsewhere, as in their judgment they shall deem best. I leave it entirely with them to decide

11. Implication—Estates Arising Therefrom—*a.* **GENERAL PRINCIPLES.**—Implication may arise from a recital, reference, or elliptical expression, which necessarily implies something else as contemplated by the testator, from the form of gift or from a direction to do something which cannot be carried into effect without of necessity involving something else as a necessary consequence.¹ The weight of authority sustains the position that the implication, to be effective, must be necessary, by which is meant, in the language of Lord Eldon, "not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed." Mere conjecture must not be taken for implication,² nor can

in what manner to expend the bequest to secure this object, either by using the principal for the education of a number of youth, and thus prepare them for immediate usefulness; or to use only the annual interest, and educate a smaller number, and thus continue; or if they shall judge it best, let them use the whole amount and establish an academy, to be a lasting benefit to that class of my fellow-men for whose benefit I have given all my property; wishing it to be used in that way, time, and place which they shall judge best, after due consideration, upon the condition that the people of color shall be in, in the *United States*, at the time that this bequest shall be at their disposal." It was held that the bequest was not void for uncertainty, either as to the objects of the charity, or as to the mode of carrying the charity into effect. *Treat's Appeal*, 30 Conn. 113. See further, on this question, *Carter v. Balfour*, 19 Ala. 814; *State v. Wiltbank*, 2 Harr. (Del.) 18; *State v. Walter*, 2 Harr. (Del.) 151; *Sweeney v. Sampson*, 5 Ind. 465; *State v. McDonogh*, 8 La. Ann. 171; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Trippe v. Frazier*, 4 Harr. & J. (Md.) 446; *Dashiell v. Atty. Gen'l*, 5 Har. & J. (Md.) 392; *Phillips Academy v. King*, 12 Mass. 546; *First Universalist Soc. v. Fitch*, 8 Gray (Mass.) 421; *Dexter v. Gardner*, 7 Allen (Mass.) 243; *Atty. Gen'l v. Reformed Protestant Dutch Church*, 33 Barb. (N. Y.) 303; *State v. McGowen*, 2 Ired. Eq. (N. Car.) 9; *Hester v. Hester*, 2 Ired. Eq. (N. Car.) 330; *Bridges v. Pleasants*, 4 Ired. Eq. (N. Car.) 26; *Witman v. Lex*, 17 S. & R. (Pa.) 88; *Gallego v. Atty. Gen'l*, 3 Leigh (Va.) 450.

Misnomer as to Object or Subject-matter.—A gift by a will to a corporation

by an erroneous name, will not be defeated where the description of the corporation given by such name, or otherwise, is sufficient to enable the court to identify the legatee with certainty by the aid of extrinsic evidence. *Moore v. Moore*, 50 N. J. Eq. 554; *Tallman v. Tallman* (Super. Ct.), 23 N. Y. Supp. 734.

A devise in a will of land described as the southeast quarter of a certain section of land, which southeast quarter did not belong to the testator, will pass the title to the southwest quarter of such section, which testator did own, where, in the preceding clause, the testator had accurately described the property which he owned, and the identification of such southwest quarter as the subject of the devise would be complete, if the reference to the southeast quarter were rejected without any substitute therefor. *Eckford v. Eckford* (Iowa, 1894), 58 N. W. Rep. 1093.

1. See the remarks of Lord Westbury in *Parker v. Tootal*, 11 H. L. Cas. 161; *Onsley v. Anstruther*, 10 Beav. 459; *Ives v. Dodgson*, L. R., 9 Eq. 401; *Ex p. Wynch*, 5 De G. M. & G. 221; *Langston v. Langston*, 2 Cl. & F. 194; *Matter of Vower*, 113 N. Y. 569. See *Deering v. Adams*, 37 Me. 264; *Chinn v. Respass*, 1 T. B. Mon. (Ky.) 25; *Peckham v. Lego*, 57 Conn. 559; *Bentley v. Kaufman*, 12 Phila. (Pa.) 435; *Metcalf v. First Parish*, 128 Mass. 370; *Masterson v. Townshend*, 123 N. Y. 458; *Sibert v. Cox*, 100 Ind. 392; *Hollingsworth v. Hollingsworth*, 65 Ala. 321; *Boston Safe Deposit, etc., Co., v. Coffin*, 152 Mass. 98.

2. Lord Eldon in *Wilkinson v. Adams*, 1 Ves. & B. 466; *McKeehan v. Wilson*, 53 Pa. St. 77; *Piper's Estate*, 33 Leg. Int. (Pa.) 228; *DeSilver's Estate*, 142 Pa. St. 75; *Jacob's Estate*, 140 Pa.

even necessary implication overrule the express language of the will.¹

6. IMPLICATION FROM RECITALS.—A recital which, in effect, merely amounts to a declaration that the testator supposes the party referred to has an interest independent of the will, is no evidence of an intent to give by the will, and does not raise a gift by implication.² But if a testator unequivocally refers to a disposition as made in the will itself, which, in fact, he has not made, the erroneous recital is taken as conclusive evidence of an intent to give by the will, and has the effect of an actual gift.³

St. 268. See *Post v. Hover*, 33 N. Y. 593; *Sutherland v. Sydnor*, 84 Va. 880; *In re Reinhardt's Estate*, 74 Cal. 371; *Grout v. Hapgood*, 13 Pick. (Mass.) 164; *Ferson v. Dodge*, 23 Pick. (Mass.) 287; *Hayden v. Stoughton*, 5 Pick. (Mass.) 536; *Denise v. Denise*, 37 N. J. Eq. 163; *McCoury v. Leek*, 14 N. J. Eq. 70; *McMichael v. Pye*, 75 Ga. 191; *Rusing v. Rusing*, 25 Ind. 63; *Waugh v. Riley*, 68 Ind. 482; *Kelly v. Stinson*, 8 Blackf. (Ind.) 387; *Howard v. American Peace Soc.*, 49 Me. 288; *Hollingsworth v. Hollingsworth*, 65 Ala. 321; *Ridgely v. Bond*, 18 Md. 448; *Edens v. Williams*, 3 Murph. (N. Car.) 27; *Eneberg v. Carter*, 98 Mo. 647.

1. *Pullen v. Randell*, 1 J. & W. 106; *Wright v. Denn*, 10 Wheat. (U. S.) 204; *McLellan v. Turner*, 15 Me. 436; *More v. Diamond*, 5 R. I. 126; *Bowers v. Porter*, 4 Pick. (Mass.) 198; *Crane v. Doty*, 1 Ohio St. 279; *Burkhart v. Bucher*, 2 Binn. (Pa.) 455; *Dewitt v. Eldred*, 4 W. & S. (Pa.) 414; *Dixon v. Ramage*, 2 W. & S. (Pa.) 142. See *Den v. Cook*, 7 N. J. L. 41; *In re Reinhardt's Estate*, 74 Cal. 365; *Dudley v. Mallory*, 4 Ga. 52; *Kelly v. Stinson*, 8 Blackf. (Ind.) 387; *Matter of Herrick's Estate* (Surrogate Ct.), 12 N. Y. Supp. 105; *Manigault v. Holmes*, 1 Bailey Eq. (S. Car.) 298; *Carr v. Porter*, 1 McCord Eq. (S. Car.) 60.

2. 1 Jarm. on Wills (5th ed.) 525; *Harris v. Harris*, Ir. L. R., 3 C. L. 294; *Circuitt v. Perry*, 23 Beav. 275; *Wigram, V. C.*, in *Adams v. Adams*, 1 Hare 540; *Lord Brougham* in *Yates v. Thomson*, 3 Cl. & F. 572; *Bibin v. Walker*, Ambl. 661; *Hunt v. Evans*, 134 Ill. 496; *Marsh v. Hague*, 1 Edw. Ch. (N. Y.) 174; *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *Atwood v. Geiger*, 69 Ga. 498.

3. Thus a gift alleged to be 'in addition' to a prior gift, where there is, in fact, no such prior gift, is sufficient evidence of an intention to confer the supposed prior gift. *Jordan v. Fortescue*, 10 Beav. 259; *Farrar v. St. Catherine's College*, L. R., 16 Eq. 24. So a statement that the testator does not give a legatee a certain sum because she is absolutely entitled to it, when, in fact, it is in the disposition of the testator, amounts to a gift of the sum in question. *Hall v. Leitch*, L. R., 9 Eq. 376. But a mere recital in a codicil of

L. J. Ch. 328; *West v. Culliford*, 3 Hare 265; *Poulson v. Wellington*, 2 P. Wms. 533; *Hunt v. Evans*, 134 Ill. 496; *Clamorgan v. Lane*, 9 Mo. 446; *Gaines v. Spann*, 2 Brock. (U. S.) 81.

A testatrix recited in her will that she wished to place all her children on an equal footing as to their worldly advancement, and that, inasmuch as her son B had been better provided for by his uncle A than she could do for her other children, she therefore gave him nothing. It appeared that the property devised by A to B was in fact the property of the testatrix. It was held that the above recital was not a ratification of the will of A, and did not adopt such devise, and that the heirs of the testatrix were not estopped by it to deny the validity of the will of A. *Clamorgan v. Lane*, 9 Mo. 446.

Upon the same principle, a gift to A cannot be implied from a recital that the testator is about to make a conveyance to him. *Hurlbut v. Holton*, 42 N. J. Eq. 16.

3. *Wigram, V. C.*, in *Adams v. Adams*, 1 Hare 540; *Lord Brougham* in *Yates v. Thomson*, 3 Cl. & F. 572; *Bibin v. Walker*, Ambl. 661; *Hunt v. Evans*, 134 Ill. 496; *Marsh v. Hague*, 1 Edw. Ch. (N. Y.) 174; *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *Atwood v. Geiger*, 69 Ga. 498.

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provided it be clear that there is nothing in the will to which it can refer.¹

c. GIFTS IMPLIED TO EFFECTUATE THE INTENT.—A gift may be implied when necessary to carry out the testator's intention or direction. Thus, from a direction that certain persons shall deal with the rents of an estate in a particular manner, a devise of the estate to those persons has been implied.² So from a direction

a supposed gift by will, will not amount to a gift. *In re Arnold's Estate*, 33 Beav. 171." Theobald on Wills (2d ed.) 574.

1. Theobald on Wills (2d ed.) 574; *Sherratt v. Oakley*, 7 T. R. 488; *Smith v. Fitzgerald*, 3 Ves. & B. 2; *Mackenzie v. Bradbury*, 35 Beav. 620; *Nugent v. Nugent*, 1r. R., 8 Eq. 78; *Ives v. Dodgson*, L. R., 9 Eq. 401.

The principle will not be applied where its effect would be to take away an express bequest by an earlier instrument to some one else. Thus, in *Re Smith*, 2 Johns. & H. 594, a testator gave by will £3,000, upon trust for A and her children, and after the decease of A, without issue, for the children of B. By a codicil of later date, the testator recited that he had, by his will, given the £3,000 to A for life, with remainder to her children, and afterward to B for life, with remainder to his children, and revoked the will as to £2,000, part of the £3,000, from and after the devise to A and her children, and, instead of giving the said sum of £2,000 to B and his children, bequeathed the same to C. It was held that the erroneous recital in the codicil that the £3,000 was given to B for life, did not amount to a gift of a life estate in the £1,000 which remained unrevoked. Wood, V. C., said: "It was clear, therefore, that he intended to raise the whole legacy to £2,000, though he made a mistake in reciting the amount of the previous gift. But in this case I am asked to deprive a class of legatees of a clear specific gift, by force of an erroneous recital in a subsequent instrument. The codicil does not purport to give anything additional to the objects of the original gift, but to take away part of what the testator supposed himself to have given. It would be a perversion of the principle, that an erroneous recital of a gift by the same instrument may be equivalent to an actual gift, to apply it so as to take away an express bequest by an earlier instrument to some one else,

and this where the codicil is not intended to confer any bounty upon the real or supposed objects of the original gift."

References to a Person as Heir Held to Create a Devise by Implication to That Person.—"Where the testator has evidently mistaken the law respecting the devolution of his property, yet, if he has by his will shown very clearly an intention that it shall devolve according to such mistaken notion, the intention will prevail. An early case presents a very nice question of this nature. A testator having issue, by C., three daughters, S., A. and E., devised to C., for life, all his freehold wherever, until S., his heir came to twenty-one, paying to the heir 10 s. during the term, and to the rest, after fifteen years old, 20 s. apiece, and the heir to pay A. and E. £100 apiece, £40 at the decease of the wife, etc.; and if S., his heir, died without heir before twenty-one, so that the lands descended and fell to A., and then A. to pay to E., etc. It was argued that S. took nothing under the will by implication, there being no express devise to her. But, on the other side, it was contended that S. was the sole heir; for it was all one to devise to her as to make a stranger heir of his land; and here the daughter S. was not sole heir unless made so by the intent of the will, which six times called the eldest daughter his heir; otherwise, A., the younger daughter, would have equal share in the land, and also the legacies. Hale, C. J., said: 'The testator was mistaken in his intent that the eldest daughter was his heir; . . . also she that is called heir is to pay the portions to the younger daughters, and no provision is made for her. Therefore, albeit there is no express devise to S., yet, she being named his heir, this is sufficient to exclude the rest, and to make her sole heir.'" 1 Jarm. on Wills (5th ed.) *530. See *Taylor v. Webb*, Sty. 331; *Parker v. Nickson*, 1 De G. J. & S. 177. Compare *Jackson v. Craig*, 15 Jur. 811.

2. 1 Jarm on Wills (5th ed.) *528;

to invest real and personal estate is implied a trust to sell the real estate.¹ To this principle may also be referred the doctrine that trustees take an estate of such quantity as may be necessary to enable them to discharge their duties.² So where a testator expresses an intention to make up a person's fortune to a certain sum, and for that purpose gives a legacy, which proves to be insufficient, the legatee will, nevertheless, be entitled to the sum specified and intended for him.³

d. INTENT TO CHARGE THE REALTY WITH DEBTS AND LEGACIES IN EXONERATION OF THE PERSONALTY WHEN IMPLIED.—See LEGACIES AND DEVICES, vol. 13, p. 120.

e. IMPLICATION OF ESTATES TAIL—GIFTS OVER IN DEFAULT OF ISSUE.—Under a will containing a provision for a devise to A and his heirs, or to A for life, followed by a gift over on an indefinite failure of issue,⁴ A takes an estate tail by implication.⁵

Ex p. Wynch, 5 De G. M. & G. 221. See *Langston v. Langston*, 2 Cl. & F. 194; *Masterson v. Townshend*, 123 N. Y. 458; *Sibert v. Cox*, 100 Ind. 392.

1. *Affleck v. James*, 17 Sim. 121.

2. *Doe v. Homfray*, 33 E. C. L. 55; *Oates v. Cooke*, 3 Burr. 1686; *Deering v. Adams*, 37 Me. 273; *Post v. Hover*, 33 N. Y. 599.

3. 1 Jarm. on Wills (5th ed.) *529; *Onsley v. Anstruther*, 10 Beav. 459. Compare *Thompson v. Whitelock*, 5 Jur. N. S. 991.

4. As to definite and indefinite failure of issue, see *ISSUE*, vol. 11, p. 899.

5. 1 Jarm. on Wills (5th ed.) *554; *Theobald on Wills* (2d ed.) *563; *Macbell v. Weeding*, 8 Sim. 4; *Daintry v. Daintry*, 6 T. R. 307; *In re Bank's Trusts*, 2 K. & J. 387. For other authorities, see *ISSUE*, vol. 11, p. 899 *et seq.*

"It has long been settled, however, that a devise in a will which is regulated by the old law, to a person and his heirs or to a person indefinitely, with a limitation over in case he die without issue, confers an estate tail, on the ground, in the former case, that the testator has explained himself to have used the word 'heirs' in the qualified and restricted sense of heirs of the body, and in the latter case, on the ground that he has, by postponing the ulterior devise until the failure of the issue of the prior devisee, afforded an irresistible inference that he intended that the estate to be taken by the prior devisee, under the indefinite devise, should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the

ulterior devise, which, as an executory devise to take effect on a general failure of issue, would, of course, be void for remoteness." 1 Jarm. on Wills (5th ed.) *554.

"If the limitation is to A simply, or to A for life, with a gift over in default of issue, A will take an estate tail, though there are words which might constructively limit the failure of issue within a definite period, since this is the only construction which will carry anything to the issue. *Wyld v. Lewis*, 1 Atk. 432; *Simmons v. Simmons*, 8 Sim. 22, where the devise was in effect to A for life, and if she dies without issue, over, the power to appoint to issue being merely discretionary. *Butt v. Thomas*, L. R., 11 Exch. 235; 1 H. & N. 109. *Quære* whether an estate tail will be implied in a person from a gift over in default of his issue simply, where no interest is given to him by the will. *Parker v. Tootal*, 10 H. L. Cas. 143. See *Walter v. Drew*, Comyns Rep. 373. And where, in a devise to A for life, remainder to his children, either for life or in tail, an estate tail is implied in A from a gift over in default of issue, the estate tail so implied will be in remainder, to take effect after the prior estates expressly limited. *Doe v. Halley*, 8 T. R. 5; *Doe v. Gallini*, 5 B. & Ad. 621; 27 E. C. L. 138; 3 Ad. & E. 340; 30 E. C. L. 112; *Forsbrook v. Forsbrook*, L. R., 3 Ch. 93; *Andrew v. Andrew*, 1 Ch. Div. 410. And where an estate tail is to be implied either in an ancestor or his issue, it will be implied in the ancestor, so as to take in the whole line of issue. *Atkinson v. Holtby*, 10 H. L. Cas. 313; *Forsbrook*

On the other hand it is held that a gift over on a definite failure of issue has no such effect.¹

f. GIFT TO ISSUE NOT IMPLIED FROM GIFT OVER IN DEFAULT OF ISSUE.—It has been held that a gift to issue is not implied from a gift over upon a definite failure of issue,² but a contrary construction has in several instances been adopted.³

v. Forsbrook, L. R., 3 Ch. 93. Theobald on Wills (2d ed.) 563, 564.

American Cases Illustrating the Rule.
—*B.*, by his will, dated April 5, 1771, made the following devise: "My will and pleasure is, that my son W. shall have the farm I now live on," etc., together with some articles of personal property specified; "but if my said son may happen to die unmarried, or without lawful issue, then it is my will and pleasure that the said estate shall descend to my next heir of the name of B., and that he may not sell, exchange, or dispose of any part of said estate, without the consent, approbation, and concurrence of my executors." The testator died in August, 1775, leaving five sons and eight daughters; W., the devisee, died April 20, 1817, unmarried and without issue, leaving one sister, and nephews and nieces, living. It was held that W., the devisee, took an estate tail by implication. *Jackson v. Billinger*, 18 Johns. (N. Y.) 368.

A testatrix made the following devise: "I give and devise all the remainder of my real estate unto all my grandchildren, in equal shares, and to their heirs and assigns forever. And it is hereby provided, and my will is, that if any of my grandchildren should die, leaving no surviving issue, then I give and devise all the estate, both real and personal, herein given to such grandchild, unto the survivor or survivors of such as shall die as aforesaid, and to their heirs and assigns forever; provided, that none of my grandsons shall, in any event, have any of my personal estate, other than the specific legacies herein bequeathed unto them, as long as any of my granddaughters, or any of their issue, be living. It is also further provided, and my will is, that if all my grandchildren should die leaving no surviving issue, then I give and devise all my estate unto two of the daughters of my uncle, Thomas Field, to wit: Mary and Sally, and unto two of my said uncle's granddaughters, to wit: Mary and Elizabeth Thornton, and to their heirs and assigns forever."

It was held that the grandchildren of the testatrix took estates tail in her real estate, and not fee simples conditional upon their dying without issue. *Burrough v. Foster*, 6 R. I. 534.

A testator devised real and personal estate in trust "to pay one-fifth of the rents, income, and interest thereof to each of my four sisters now living, M., E., F. and A., for and during all the term of their natural lives; and the remaining fifth part of my said residuary estate, real and personal, to the children of my deceased sister S., in equal parts and shares in fee." And "upon the decease of any and either of my said sisters or nieces, without issue (if with issue, the issue to inherit their shares), I grant and convey their portion of my estate for the use of my other sisters and children, in equal parts and shares in fee." It was held that the devisees took an estate tail in the realty. *Pott's Appeal*, 30 Pa. St. 168.

See further *M'CIntic v. Manns*, 4 Munf. (Va.) 328; *Den v. Taylor*, 5 N. J. L. 417; *Smith's Appeal*, 23 Pa. St. 9.

At the present time the rule has been altered by statute in most states, see *ISSUE*, vol. 11, p. 918.

1. 1 Jarm. on Wills (5th ed.) *555; *Den v. Snitcher*, 14 N. J. L. 53; *Turner v. Withers*, 23 Md. 18.

2. 1 Jarm. on Wills (5th ed.) *561; *Monypenny v. Dering*, 7 Hare 588.

3. *Bentley v. Kaufman*, 12 Phila. (Pa.) 435. In this case, a testatrix by her last will and testament directed that all her estate, real and personal, should be converted into money by her executors, and the proceeds invested; the interest to be paid to her son during his lifetime, and if he should die without issue, then the whole amount was given to charitable purposes. In the construction of this language, it was held that the words "die without leaving issue" were to be construed as meaning issue living at the death of the son, and the son, therefore, took not an absolute interest in the fund, but only a life interest in the income, and that there was a gift by implication of the corpus of

g. GIFT TO CHILDREN NOT IMPLIED FROM GIFT OVER IN DEFAULT OF ISSUE.—A gift to children is not implied from an absolute gift of personalty to A, and if he shall die without having or without leaving children (which means without having had a child born, or without leaving a child living at his decease), nor from a gift to several as tenants in common, and if any die, without issue, their shares to those then living or their children.¹ And even if the gift to the parent is expressly for life, the children will not be held to take by implication in the absence of special circumstances,² although in such case the court will lay hold of any indication of intention to raise a gift to them, and avoid imputing to the testator so extraordinary an intent as that the gift over is to take effect if the first taker have no child, but that the property is not to go to the child, if there is one, or its parent.³

h. IMPLICATION OF LIFE ESTATES.—A devise to the testator's heir at law, after the death of A, gives A an estate for life by implication; but under a devise to B, a stranger, or to the heir and

the legacy to the son's issue if he should have any, and if not, a gift over. Another case very similar in its characteristics, was that of *Still v. Spear*, 3 Grant's Cas. (Pa.) 307, to which the court, in the above case of *Bentley v. Kaufman*, 12 Phila. (Pa.) 435, referred in maintaining its position in the controversy at bar. "The case *Still v. Spear*, 3 Grant's Cas. (Pa.) 307," said the court, "was as near the present case as possible. There was a bequest of a certain fund in trust, to pay the interest to Levi Still, and, in case of his death 'without leaving issue,' to pay the principal to the children of Chas. Still; and it was held that Levi Still took no absolute interest under the will, but only an interest in the income for life; that the failure of issue contemplated was not an indefinite failure of issue, but a failure of issue living at the death of Levi Still, that there was by implication a gift to such issue, and on failure of such issue, the bequest over to the children of Charles Still was good, etc."

1. 1 Jarm. on Wills (5th ed.) *563; Theobald on Wills (2d ed.) 568; Addison v. Busk, 14 Beav. 459; Cooper v. Pitcher 4 Hare 485; Dowling v. Dowling, L. R., 1 Eq. 442.

2. 1 Jarm. on Wills (5th ed.) *564; Theobald on Wills (2d ed.) 568; Green v. Ward, 1 Russ. 262; Ranelagh v. Ranelagh, 12 Beav. 200; Sparks v. Restal, 24 Beav. 218; Neighbour v. Thurlow, 28 Beav. 33; Hayton's Trusts, 4 N. R. 54; Seymour v. Kilbee, L. R., 3 Ir. 33; Cooper v. Pitcher, 4 Hare 485.

3. 1. Jarm. on Wills (5th ed.) 564; Theobald on Wills (2d ed.) 569; *Es. p.* Rogers, 2 Madd. 576; *Kinsella v. Caffrey*, 11 Ir. Ch. Rep. 154.

Thus C. by his will, after providing for his wife, divided his real property into five parts, which were nearly equal. He first gave one of the portions to his executors in trust, and they were to hold it for the separate use of his daughter J. during her life; but the will was silent as to the trust estate after her death. The next portion he gave to his son T. in fee. The next portion he gave to his executors in trust for the use of the wife of his son H. during her life, and on her decease the estate was to descend to H.'s children. The fourth portion was given to his trustees in like manner for the use of his son E. during life, and after his death the estate was to go to E.'s right heirs. And the fifth and last portion he gave in part to his son D. in fee, and in part to D. for life, with remainder to his right heirs. The residue of his estate, the testator gave to his executors in trust, to divide it among his children and daughter-in-law, before named, to and for the same estates, uses, limitations and trusts, etc., as before provided. He authorized his executors to sell any of the real property, and on their selling any, they were to arrange it so as to make up the share out of which it was to be sold equal to the other shares, so that no one of his children, or such devisees, should be losers by such sales, or less benefited by his bounty, thereby devised to them severally and respectively. At the date

others jointly, after the death of A, A takes no estate by implication, since the heir at law may have been intended to take in the meantime.¹ So a devise to one of several coheiresses, after

of the will his daughter J. had a large family of children, and her husband was, in the testator's opinion, unfit to manage her estate. No reason or circumstance appeared which could have induced the testator to omit a provision for these children. On the construction of the will, it was held that the effect of the devise was to vest the first parcel in the trustees, in trust for J. for life, with remainder to her children. *Sturges v. Cargill*, 1 Sandf. Ch. (N. Y.) 318. But compare remarks of Lord Cranworth in *Lee v. Busk*, 2 De G. M. & G. 812; Lord Romilly in *Neighbour v. Thurlow*, 28 Beav. 33; Turner, L. J., in *Dowling v. Dowling*, L. R., 1 Ch. 615; Jussel, M. R., *In re Coleman*, 4 Ch. Div. 165.

1. 1 Jarm. on Wills (5th ed.) *532; Theobald on Wills (2d ed.) 564; *King v. Ringstead*, 9 B. & C. 224; 17 E. C. L. 359; *Gardner v. Sheldon*, Vaughan 259; *Tuder L. C.* 541; *Aspinall v. Petvin*, 1 Sim. & Stu. 544; *Upton v. Ferrers*, 5 Ves. Jr. 804; *Dyer v. Dyer*, 1 Meriv. 414. See *Lovett v. Gillender*, 35 N. Y. 617; *Rathbone v. Dyckman*, 3 Paige (N. Y.) 9; *Kelly v. Stinson*, 8 Blackf. (Ind.) 387; *Anders v. Gerhard*, 140 Pa. St. 156; *McCoury v. Leek*, 14 N. J. Eq. 70; *Den v. Holton*, 23 N. J. L. 425.

In *Ralph v. Carrick*, 11 Ch. Div. 878, where it was held that if the gift over was to the heir at law conjointly with other persons, no estate arose by implication, Cotton, L. J., said: "As regards the raising gifts for life by implication arising from a gift to some person after the death of the person to whom it is sought to give a life estate by implication, we have two rules. As to real estate, if there is a gift to a testator's heir at law after the death of A, that does give by implication a life estate to A. If there is a gift of the testator's real estate to a stranger after the death of A, that does not raise the implication.

"Then, for the purpose of seeing whether the principle of one of those rules or of the other applies to the present case, we must consider what is the principle of the two rules. As regards an heir at law, if the real estate is given to him alone after the death of A B, there is a gift to him at that time

of what, in the absence of any gift, he would take immediately after the death of the testator. To make sense of this you must take it as expressing an intention to exclude the heir at law till that time arrives. Now an heir at law can only be excluded by giving the property to somebody else, and, therefore, when there is a gift to the heir at law alone of real estate after the death of A, a gift of a life estate to A is implied, because in no other way can the heir at law be excluded. But if the gift of the estate after the death of A is to a stranger, that reasoning does not apply, for the stranger takes simply and entirely by the bounty of the testator, and in the absence of any gift, neither after the death of the named person nor at any other time, will he take anything, and it is not necessary to give anything to A in order to postpone the gift to the stranger, for there is no difficulty in giving an estate to the stranger on the death of A, leaving it in the meantime to go to the heir at law.

"Is there any rule established by the authorities as applicable to a gift to the heir at law and another person jointly after the death of A. I am of opinion that none of the cases establish any rule of construction applicable to such a case. Although cases have been cited in which, in a gift to an heir at law and others after the death of A, a life estate to A has been implied, none of the judges have laid down that there is a general rule of construction which, unaided by anything else in the will, will raise the implication from a devise in those terms. In each case the decision has been rested on the particular expressions of the will, and this negatives the existence of any such general rule of construction as has been contended for. . . . That being so, does this case come within the principle of the rule applicable to a gift to the heir at law after the death of A, or within the principle of the rule applicable to a gift to a stranger after the death of A? In my opinion it comes within the latter, because, although the heir at law is one of the persons to whom the gift is made, it is not necessary to give to anybody else in order to postpone the

interest he is to take under the will, as he does not, under the gift, take that which, independently of gift, would come to him. Independently of gift he takes the whole real estate, but under that gift he takes only a share in it. So that, both as regards the interest given to the stranger, and as regards the modification of the interest which the heir at law takes, it cannot be said that the gift after the death of A., is inoperative, unless you treat it as a postponement of the gift and give a life interest to A."

Rebuttal by Contrary Implication.—

Where a testator, being seized of a dwelling house and farm, and of other property, both real and personal, gave a pecuniary legacy to his daughter, payable at twenty-one, or on her marriage; and gave to his wife the house and farm and his furniture for life, and one-third of his personal property absolutely, and then concluded as follows: "And after the death of my wife, in case I should have no more children, I give, devise, and bequeath unto my said daughter, my said dwelling house and farm, together with all the rest and residue of my personal and real estate," it was held that the wife did not take a life estate in such residue, by implication. *Rathbone v. Dyckman*, 3 Paige (N. Y.) 10. In giving the opinion in the above case the court used the following language: "It is upon the principle of carrying into effect the supposed intention of the testator that all the cases of devises and bequests by implication have been decided. If the particular devise or bequest cannot reasonably be accounted for, except upon the supposition that the testator intended to make the corresponding disposition of other parts of his property, or of previous estates therein, the courts will carry into effect the intention of the testator, by implying such corresponding disposition. Thus, if the devisor gives to his heirs at law the whole of any portion of his real estate after the death of his wife, and there is nothing in the will from which that particular devise can reasonably be accounted for, except upon the supposition that the decedent intended to give the wife the use of the property in the meantime, the law supplies the deficiency in the declared intention of the testator, and gives to the wife a life estate by implication. On the other hand, if the particular devise or bequest can be reasonably accounted for, taking the whole

will together, without supposing that the testator must have intended to make some corresponding disposition of other parts of the property or previous estates therein, not expressed, such corresponding disposition will not be implied. An implication may also be rebutted by a contrary implication which is equally strong. Thus, if a testator should devise his estate to his wife during her widowhood only, and to his heir at law after the death of his wife, the limitation in the first devise could not reasonably be accounted for upon the supposition that the testator intended his wife should enjoy the estate after her second marriage, and consequently it would rebut the presumption arising from the last devise, that he intended to give her an estate for life absolutely. In such a case, upon the second marriage the estate would go to the heir at law.

"In the case under consideration the will was made by the decedent a few days before his death; probably in his last sickness, and in contemplation of his approaching dissolution. He had at that time but one child, an infant between one and two years of age. There appears to have been a solicitude on the part of the testator to provide for other children, if he should have any, which I cannot reasonably account for under the circumstances, except upon the supposition that he expected posthumous issue. The general intention of the testator appears to have been to give to his widow the farm and dwelling house in the county of Westchester, during her life, and to his child or children a corresponding equivalent in legacies out of his personal estate; and then to divide the residue of his personal estate between the widow and his child or children, one-third to the former and two-thirds to the latter. The legacies to the daughter and to his other children, if he should have any, were not to be paid to them until they arrived at the age of twenty-one, or were married; and from the age of his wife it was hardly probable that she would remain single until that time. It is, therefore, rather an unnatural presumption to suppose the testator intended to give all the residue of his property to his wife for life, leaving his infant child or children wholly unprovided for in the meantime, and dependent upon a stepfather for subsistence."

the death of A, gives A an estate for life.¹ Upon the same principle, if personal property be given to the next of kin, or to

Devisee Need Not Be Described as Heir—Time When Heir Is to Be Ascertained.—"Of course, it is not essential to the doctrine that the will should describe the devisee as the heir apparent or heir presumptive of the testator. Thus, a devise 'to my eldest son B, after the death of A,' would raise an implied estate for life in A, the fact being that B is the heir apparent, though not designated as such. The authorities do not distinctly inform us, however, whether, in order to raise the implication, the devise must be to the person who, according to the state of events at the making of the will, would be the testator's heir, or the person who eventually becomes such. The former seems to be the preferable doctrine; for to treat it as applying to the eventual heir, would be to construe the will according to subsequent events, in opposition to a fundamental principle of construction. If, therefore, a testator having two sons, A and B, devise real estate to B (the younger son) after the decease of his (the testator's) wife, this would not, it is conceived, give to the wife an estate for life by implication, though it should happen that, by the decease of A, the elder son, without issue, in the testator's lifetime, the younger son (*i. e.*, the devisee) had become his heir. On the other hand, if a testator, whose issue was an only daughter, devised real estate to such daughter after the death of his wife, and it happened that he had a son afterwards born, who survived him, the sound conclusion would seem to be, that the wife would take an implied estate for life, though the ulterior devisee was not in event the testator's heir; the result, in short, being that the implication occurs wherever the express devise is to the person who is the testator's heir apparent or presumptive at the date of the will, and not otherwise. Perhaps, when the distinction between a devise to the heir and to a stranger was originally established, the difficulty attending the application of the doctrine to an heir or heiress presumptive, who is liable to be superseded by the birth of a son of the testator, was not sufficiently considered." 1 Jarm. on Wills (5th ed.) *533.

Further Qualifications.—"The express gift of certain lands to A does

not in itself prevent him from taking other lands by implication. See 13 H. 7, f. 17; *Brook, Devise*, pl. 52, cited in *Gardner v. Sheldon, Vaughan* 259; *Tudor L. C.* 547. Therefore, where lands are devised to A for life, and after the death of A, the lands previously devised, together with other lands, are devised to B, A will, or will not, take an estate for life, by implication, in the other lands, according as he is the heir, or a stranger. *Aspinwall v. Petvin*, 1 Sim. & Stu. 544; *King v. Ringstead*, 9 B. & C. 218; 17 E. C. L. 359; *Attwater v. Attwater*, 18 Beav. 330. But words which, taken in their grammatical sense, are joint, and apply to the two classes of property, will be construed distributively if the intention of the testator is manifest that the lands not expressly devised for life, are to go to the devisees at once. *Cook v. Gerard*, 1 Saund. 183, citing 9 B. & C. 225; *Hutton v. Simpson*, 2 Vern. 723; *Prec. Ch.* 452; *Doe v. Brazier*, 5 B. & Ald. 64. The mere fact that provision has already been made for A will be an argument against giving a life estate by implication, and, therefore, in favor of a distributive construction. See *Stevens v. Hale*, 2 Dr. & Sm. 22; *James v. Shannon*, 1 R., 2 Eq. 118. Of course, if the devise after the death of A can be construed as merely postponing the vesting in possession till the death of A, no argument in favor of implication can arise. *Barnet v. Barnet*, 29 Beav. 239. And in the same way, if there is a residuary devise, so that nothing is undisposed of, there can be no implication. *Horton v. Horton*, Cro. Jac. 74." *Theobald on Wills* (2d ed.) 565. 1. *Theobald on Wills* (2d ed.) 564; *Hutton v. Simpson*, 2 Vern. 723; *Rex v. Ringstead*, 9 B. & C. 218; 17 E. C. L. 359.

"This, it must be admitted, is a considerable extension of the doctrine, and carries it beyond the principle on which it is founded, since there seems to be not the same absurdity in supposing a testator to give to one of his co-heiresses after the death of another person, intending it to descend to all in the meantime, as where the devisee is the same and the only individual upon whom the intermediate interest would have descended. The point, too, rests rather on *dictum* than decision, for the

one of the next of kin, after the death of A, A will take a life interest by implication, if there is no residuary bequest.¹ But if the gift over be to other persons than the next of kin, or to the next of kin along with others, A takes no interest by implication.²

i. GIFT TO A TILL TWENTY-ONE, WITH A GIFT OVER IN CASE OF DEATH UNDER AGE.—Under a limitation of real or personal property to A, till twenty-one, with a gift over if he dies under twenty-one, A takes by implication the fee in realty, or an absolute interest in personalty, defeasible upon death under twenty-one.³

case in which Lord Cowper advanced this position was decided upon another point, and it is not to be found in the contemporary reports of the same case; but it was referred *arguendo* as a settled rule of law in another case." 1 Jarm. on Wills (5th ed.) *534. See *Rex v. Ringstead*, 9 B. & C. 218; 17 E. C. L. 359.

1. Theobald on Wills (2d ed.) 566; 1 Jarm. on Wills (5th ed.) *544; *Stevens v. Hale*, 2 D. & S. 22; *Cock v. Cock*, 21 W. R. 807; *Blackwell v. Bull*, 1 Keen. 176. Compare *White v. Green*, 1 Ired. Eq. (N. Car.) 45.

"So after a life interest to A., with a life interest in certain events to B., followed by a gift over after the deaths of A. and B., a life interest has been implied in B. though the events did not happen. *In re Betty Smith's Trusts*, L. R., 1 Eq. 79; *In re Blake's Trust*, L. R., 3 Eq. 799. See *Isaacson v. Van Goor*, 42 L. J. Ch. 193; 21 W. R. 156. Where the testator's widow was directed to carry on the testator's business, and after his death he directed his property to be divided among his children, the widow took a life interest in the property, upon the general intention to keep the family together. *Blackwell v. Bull*, 1 Keen. 176. See *Cockshott v. Cockshott*, 2 Colly. 432. A residuary bequest, or a gift in default of appointment, where the bequest after the life of A. is made under a power, affords an argument against the implication of a life interest. *Cranley v. Dixon*, 23 Beav. 512; *Henderson v. Constable*, 5 Bear 297. There is no implication in favor of A. where the gift is if A. dies under twenty-one or unmarried, since in such a case an absolute interest and not a life estate would have to be implied. *James v. Shannon*, Ir. R., 2 Eq. 118; *Harris v. DuPasquier*, 20 W. R. 668." Theobald on Wills (2d ed.) 566.

2. *Ralph v. Carrick*, 11 Ch. Div. 873.

3. Theobald on Wills (2d ed.) *567; 1 Jarm. on Wills (5th ed.) *548; *Tomkins v. Tomkins*, cited 1 Burr. 234; *Paylor v. Pegg*, 24 Beav. 105. See *Gardiner v. Stevens*, 30 L. J. Ch. 199; *In re Harrison's Estate*, L. R., 5 Ch. 408; *Cropton v. Davies*, L. R., 4 C. P. 159; *Wilks v. Williams*, 2 J. & H. 125; *Savage v. Tyers*, L. R., 7 Ch. 356.

But in *Fitzhuny v. Bonner*, 2 Drew. 36, a testator gave his residue to his wife, for her own and her son's support; clothing, and education, until the son should attain twenty-one. If the son died under twenty-one, then the testator gave all the interest of his bank stock to his wife for life; after her death, he gave all his property to his daughter. It was held that the son did not take any estate by implication on attaining twenty-one; but there was an intestacy. *Kindersley, V. C.*, saying: "The testator having provided for his widow and his son, till he should attain twenty-one, and having provided what is to take place, if his son should die under twenty-one, has not in express terms made any provision for the event of his living to attain twenty-one. Now, can I imply a gift to the son, in the event of his attaining twenty-one, of the whole of the property? No doubt there are many cases where the court will, in the absence of express gift, raise a gift by implication; but it will not do so unless the implication is necessary, irresistible, that is, where, looking at the language, at all the dispositions of the will, and the circumstances, there is an irresistible inference in favor of implying a gift. But do I find here any such irresistible inference? What are the previous dispositions? Until the son attains twenty-one, they are in favor of the widow and the son; if he dies under twenty-one, they are in favor of his widow. What is there to lead to an

j. ABSOLUTE INTEREST NOT IMPLIED FROM GIFT TILL TWENTY-ONE.—A simple gift to trustees in trust for A till he attains twenty-one, will not, in the absence of special circumstances, give A the absolute interest.¹

k. NO IMPLICATION THAT EQUITABLE DISPOSITIONS COINCIDE WITH LEGAL.—Where a testator gives several distinct subjects of disposition to trustees, and then proceeds to dispose of the equitable or beneficial interest in terms applicable to one of those subjects only, there is no necessary implication that he intended the legal and equitable disposition to be coextensive,² though it may be highly probable that he did so, especially when the omitted subject is convenient (though not essential) to the enjoyment of the other.

irresistible inference that, if the son should attain twenty-one, he is to be benefited, exclusively of the testator's widow? Then, as to the circumstances, there is not even a probability that a man leaving a widow and a son should intend to provide for the son exclusively, leaving the mother at the mercy of the son, who may or may not fulfill the moral obligation cast upon him; still less is there anything in the circumstances in this case to lead to an irresistible inference of any such intention."

1. Theobald on Wills (2d ed.) 567; Hedley's Trusts, 25 W. R. 529. See *McCutcheon v. Allen*, L. R., 5 Ir. 268.

In *Hedley's Trusts*, 25 W. R. 529, a testatrix, after directing payment of debts and legacies, gave all the residue of her estate and effects to a trustee, upon trust for her daughter till she should attain the age of twenty-one years or marry, whichever should first happen, and appointed the trustee sole executor of her will. It was held that there was no implied gift of the capital to the daughter on her attaining twenty-one or marrying.

"But very slight indications of intention have been held sufficient to give the absolute interest, though possibly some of the earlier decisions may be difficult to support. In some cases the court has found a direct gift to the legatee, with a *superadded* direction that it was to be in trust till he should come of age. *Atkinson v. Naice*, 1 Bro. C. C. 91; *Hale v. Beek*, 2 Eden 229. See *Tunaley v. Roch*, 3 Drew. 720. In others an absolute interest has been implied from a direction that the trust is to cease at twenty-one, or from a reference to the trustees as trustees for

the legatees. *Peat v. Powell*, Ambl. 387; 1 Eden 479; *Wilks v. Williams*, 2 J. & H. 125. Or again, an absolute interest has been given because the trustees are directed to apply, not only the interest, but the produce, till the legatees attain twenty-one. *Newland v. Shephard*, 2 P. Wms. 194." Theobald on Wills (2d ed.) 567.

2. 1 Jarm. on Wills (5th ed.) *549; *Stubbs v. Sargon*, 2 Keen 255; 3 Myl. & C. 507; *Jackson v. Noble*, 2 Keen 590. Compare *Ackers v. Phipps*, 9 Bligh 431; 3 Cl. F. 665.

In *Stubbs v. Sargon*, 2 Keen 255; 3 Myl. & C. 507, as stated in 1 Jarm. on Wills (5th ed.) *549, "a testatrix devised to trustees and their heirs her copyhold dwelling house (wherein she principally resided), garden and ground, together with the furniture and effects therein, and the coach-house and stable thereto belonging, and also the ten cottages, and two new cottages built by her, with their appurtenances, at L., upon trust, that the trustees and the survivors, etc., and the heirs or assigns of the survivor, should pay the rents of the said hereditaments to her niece S. S., the wife of G. S., or permit and suffer her to use and occupy the said hereditaments, during her life, to the intent that the same hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to G. S. for his life; and after his decease, upon trust, that the trustees and the survivors and survivor of them, and the heirs or assigns of such survivor, should be possessed of and interested in the said hereditaments, in trust for such of the testatrix's nephews and nieces, or grandnephews and grandnieces, as S. S. should

1. GIFTS IMPLIED FROM POWERS OF APPOINTMENT.—Where property is given, or appointed under a general power, to A for life, and after his death to such children, relations or other defined class of objects, or in such shares, as he shall appoint, a gift over will be implied to the objects in default of appointment, on the assumption that the testator could not have intended the objects to be disappointed by the neglect of the donee to exercise the power in their favor.¹

appoint; and in default of appointment, upon trust that the said trustees and the survivors and survivor of them, or the heirs or assigns of such survivor, should sell and dispose of the said hereditaments and premises; and the testatrix directed that the produce of such sale should constitute part of her residuary personal estate. The will contained a general residuary clause. Lord Langdale, M. R., held that the furniture and effects did not pass to S. S., but belonged to the residuary legatees, the testatrix having, in the statement of the trusts, employed words only applicable to the real estate; and Lord Cottenham, on appeal, was of the same opinion, observing, that it was probable the testatrix intended that the furniture and effects should accompany the copyholds, but she had omitted to declare such to be her intention."

1. 1 Jarm. on Wills (5th ed.) *551. See *Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; *Cruwys v. Colman*, 9 Ves. Jr. 319; *Forbes v. Ball*, 3 Meriv. 437; *Walsh v. Wallinger*, 2 R. & M. 78; *Fordyce v. Bridges*, 10 Beav. 90; *Fenwick v. Greenwell*, 10 Beav. 412; *Reid v. Reid*, 25 Beav. 469; *Izod v. Izod*, 32 Beav. 242; *Salisbury v. Denton*, 3 K. & J. 535; *Alloway v. Alloway*, 4 D. & W. 380; *Burrough v. Philcox*, 5 Myl. & C. 73; *Falkner v. Wynford*, 15 L. J. Ch. 8; *Caplin's Will*, 2 D. & S. 527; *Varell v. Wendell*, 20 N. H. 431; *Smith v. Floyd*, 140 N. Y. 337.

A bequest was in the following language: "I give to my wife my estate, for her to divide amongst my children as she may think best. If she should marry it is my desire that the property be divided between my wife and my children, share and share alike." By this clause the children received an interest in the property. It is a gift to them; and though the wife might postpone the division, and, when it was made, divide the estate unequally, she could not defeat the gift. In the event she did not divide the estate, the children

were entitled to equal portions. *Cathey v. Cathey*, 9 Humph. (Tenn.) 470. Compare *Word v. Morgan*, 5 Coldw. (Tenn.) 407.

In this case the second clause in a will was as follows: "I give and bequeath to my beloved wife, all my estate, both real and personal, to dispose and divide among my children as she may think best." It was held that the will did not vest in the widow an absolute interest in the property of the testator, but only a qualified interest in the same, with power of appointment, in the exercise of a sound discretion, to the children. And thus the exercise of this power of appointment is a condition precedent to the actual enjoyment of the estate, in whole or in part, by the children, and no beneficial interest in them can be enjoyed until the power is exercised. *Word v. Morgan*, 5 Coldw. (Tenn.) 407.

Time When Objects Are Ascertained.—"A gift arising by implication from a power of selection or distribution, however, applies to the persons who are objects of the power, and to them only; and, consequently, if the appointment is to be testamentary, the gift takes effect in favor of the objects living at the decease of the donee, to the exclusion of any who may have died in his lifetime, and who, of course, could not have been made objects of an appointment by will. *Walsh v. Wallinger*, 2 R. & M. 78. See also *Kennedy v. Kingston*, 2 J. & W. 431; *Freeland v. Pearson*, L. R., 3 Eq. 658. In *Falkner v. Wynford*, 15 L. J. Ch. 8; 9 Jur. 1006, the power was to appoint by deed or will, and, consequently, the gift by implication was not restricted to the objects living at the decease of the donee. An express gift, in default of appointment, applies to the same class of persons as a simple gift unconnected with any power. *Pattison v. Pattison*, 19 Beav. 638; *Richards v. Davies*, 13 C. B. N. S. 69, 861; 106 E. C. L. 69, 861. And it is said that a gift to a class

An express gift over in default of appointment precludes all implication,¹ but a gift over in default of objects of the power, strengthens the implication in their favor.² The principle does not apply where the donee has absolute discretion to appoint,³ nor where the power is to be exercised only in events which never happen,⁴ nor where the power is to appoint in favor of some one person or of a certain member out of a class.⁵ A bare power to appoint a sum of money to a particular person will not give that person any interest if the power is not exercised.⁶

m. IMPLICATION OF CROSS-REMAINDERS.—(See REMAINDERS AND EXECUTORY INTERESTS, vol. 20, p. 868).—The conclusions from the authorities upon the subject are thus stated by Mr. Jarman and his English editors:⁷

1. Under a devise to several persons in tail, being tenants in common, with a limitation over for want, or in default, of such

in such shares as A shall by will appoint, is to be distinguished from a mere power for A to give among the class, and is for this purpose equivalent to an express gift in default. *Lambert v. Thwaites*, L. R., 2 Eq. 151. But in *Woodcock v. Renneck*, 1 Ph. 72; 4 Beav. 190, it was held by Lords Lyndhurst and Langdale, that the question who were entitled under such gift depended upon the construction of the whole clause, including the words importing power. Consequently, if all the objects die in the donee's lifetime, no gift at all can be implied. So, although the power be to appoint by deed or will; yet, if, upon the true construction of the instrument creating it, the objects of it are required to be living at a deferred period, the implied gift in default will also be to those persons only. *Halfhead v. Shepherd*, 28 L. J. Q. B. 248; 5 Jur. N. S. 1162; *In re White's Trust*, Johns. 656; *In re Phene's Trusts*, L. R. 5 Eq. 346; *Winn v. Fenwick*, 11 Beav. 438; *Stolworthy v. San-croft*, 33 L. J. Ch. 708; 10 Jur. N. S. 762. But it has been doubted whether the point of construction in the last two cases was rightly decided. L. R., 2 Eq. 160; 4 Ch. Div. 68." 1 Jarman on Wills (5th ed.) *552.

1. *Pattison v. Pattison*, 19 Beav. 638; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Goldring v. Inwood*, 3 Giff. 139. Compare *In re Jeffery's Trusts*, L. R., 14 Eq. 136.

2. *Theobald on Wills* (2d ed.) 570; 1 Jarman on Wills (5th ed.) *552; *Butler v. Gray*, L. R., 5 Ch. 30. See *Kellett v. Kellett*, Ir. R., 5 Eq. 298.

"And there is, it seems, no neces-

sary inference that the testator intends that a qualification, applied by him exclusively to the objects of the power, should be extended to the objects of the gift expressly limited, in default of appointment to a class of objects identical in other respects with that of the power. Thus, where (*Smith v. Death*, 5 Madd. 227) the devise was to A for life, with remainder to such child and children of A, and him surviving, who should be educated as a member of the Church of England, in such parts and proportions, etc., as A should appoint, and, in default of such appointment, to the first son of A who should be educated as aforesaid, and the heirs of the body of such son, with divers remainders over; it was contended that as the power of appointment was restricted to "surviving" children, the gift over was to be construed with a like limitation; but Sir J. Leach, M. R., held that such a construction would be contrary to the force of the expressions used, and was not warranted by necessary or rational inference." 1 Jarman on Wills (5th ed.) *552.

3. *In re Eddowes*, 1 D. & S. 395; *Theobald on Wills* (2d ed.) 570. Compare *Brook v. Brook*, 3 S. & G. 280.

4. *Theobald on Wills* (2d ed.) 570; *Halfhead v. Shepherd*, 28 L. J. Q. B. 248; 5 Jur. N. S. 1162.

5. 1 Jarman on Wills (5th ed.) *552; *Theobald on Wills* (2d ed.) 570; *Sugd. on Powers* (8th ed.) 593; *Carthew v. Enraght*, 20 W. R. 743.

6. *Theobald on Wills* (2d ed.) 570; *Bull v. Vardy*, 1 Ves. Jr. 270. See *Tweedale v. Tweedale*, 7 Ch. Div. 633.

7. 2 Jarman on Wills (5th ed.) *555.

issue, cross-remainders are to be implied among the devisees in tail.¹

2. This rule applies whether the devise be to two persons, or a larger number, though it be made to them "respectively," and though in the devise over the testator have not used the words "the said premises," or "all the premises," or "the same," or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares.²

3. The rule applies though the ulterior devise is on a failure of issue, at a particular period.³

1. See *Taaffe v. Conmee*, 10 H. L. Cas. 85; *Hannaford v. Hannaford*, L. R., 7 Q. B. 116; *Holmes v. Meynel*, Raym. 452; *Lillibridge v. Adie*, 1 Mason (U. S.) 224; *Seabrook v. Mikell*, Cheeves Eq. (S. Car.) 80; *Allen v. Ashley School Fund*, 102 Mass. 262; *Dow v. Doyle*, 103 Mass. 489; *Parker v. Parker*, 5 Met. (Mass.) 134; *Hoxton v. Archer*, 3 Gill & J. (Md.) 199; *Kerr v. Verner*, 66 Pa. St. 326; *Pierce v. Hakes*, 23 Pa. St. 231; *Wall v. Maguire*, 24 Pa. St. 248; *Turner v. Fowler*, 10 Watts (Pa.) 325. Compare *Fenby v. Johnson*, 21 Md. 106.

A testator, after giving the use and improvement of all his real and personal property to his wife during her widowhood, made the following residuary devise: "I give to my five sons all the residue and remainder of my real estate, to be equally divided among them, they to come into possession when my wife's improvement ends; and if any or either of my said sons should die before they arrive to the age of twenty-one years, or should die without any legal heir of their body, then, and in that case, their share or shares shall descend equally to their surviving brother or brothers." It was held that each of the sons took an estate tail in one-fifth of the land devised, with cross-remainders. *Parker v. Parker*, 5 Met. (Mass.) 134.

2. *Taaffe v. Conmee*, 10 H. L. Cas. 85; *Hannaford v. Hannaford*, L. R., 7 Q. B. 116.

But of course, if the several shares are to go over to the ulterior devisee upon the failure of issue of any of them, cross-remainders will not be implied. *Baldrick v. White*, 2 Bailey (S. Car.) 442; *Fenby v. Johnson*, 21 Md. 106. See REMAINDERS, vol. 20, p. 868.

3. *Maden v. Taylor*, 45 L. J. Ch. 539. In this case, a testator devised free-hold

estate on trust for his nieces, M., B., S., and J., for their respective lives, as tenants in common, and on the death of all or any of them, then as to the part of her or them so dying, in trust for all and every child and the children of them respectively, and the heirs of their bodies; and if any of them should die without leaving issue living at her death, then in trust for the survivors and survivor of them and the heirs of her and their bodies, and if all except one should die without leaving lawful issue, then in trust for such only or surviving niece and the heirs of her body, and in case of a total failure of issue of them, then in trust for his heirs. B. died having had four children, three of whom died infants and unmarried. J. died having had three children, one of whom died an infant and unmarried. M. died a spinster. S. was a spinster, and over sixty. It was held that cross-remainders in tail were to be implied between the children of the tenants for life. Sir G. Jessel, M. R., said: "The difficulty I feel in implying cross-remainders here is that the gift over is on failure of issue at a particular period. In the ordinary case where the gift over is on an indefinite failure of issue, the implication makes an exhaustive disposition; nothing can descend to the heir. But where the failure of issue is restricted to the death of the tenant for life, the heir may come in after all, notwithstanding the implication, for the tenant in tail may survive the tenant for life, on the particular period, and then die without issue. Still, I am in favor of extending the rule, if it is an extension. . . . I think the true rule is laid down in the old case of *Doe v. Webb*, 1 Taunt. 234, that in order to ascertain whether you should imply cross-remainders, you have to ascertain whether the testator intended that the whole

4. The rule applies in regard to executory trusts at least, though there be an express direction to insert cross-remainders among another class of objects, or a limitation over among some of the same objects, and even in direct devises an express limitation of cross-remainders among another class of objects has been held not to repel the implication.¹

5. The word remainder following a devise to several in tail will raise cross-remainders among them.²

estate should go over together. If you once get to that point that he intends the whole estate to go over together, you are not to let a fraction of it descend to the heir at law in the meantime. You are to assume that what is to go over together, being the entire estate, is to remain subject to the prior limitations, until the period when it is to go arrives.

"Now, if this is the true principle, I think it applies to a case like this, where it is plain in one event the whole estate is to go over together, although it is possible that another event may happen in which that intention may, to a certain extent, be suspended. The trust here is for all the nieces for their respective lives, and after the death of any of them (I read the substance of the limitations) in trust for the children of her or them, respectively, and the heirs of their bodies (whether they take as tenants in common, or as joint tenants with several inheritances, it is not necessary to decide—that would depend on the word "respectively"), and in case any of them shall die without leaving lawful issue living at her or their decease, then in trust for the survivors or survivor of them in tail, and if all except one should die without leaving lawful issue, then in trust for such only or surviving niece in tail, and in case of a total failure of his nieces (I think it must still mean at the death), then in trust for his own right heirs—so that there is a gift over of the whole estate on failure of some kind of prior limitations. Now, if I do not imply cross-remainders, the result will be that in the case of Betsy, who had four children, there will be an intestacy as to three shares, that is, as to three-fourths of her fourth share, until it shall be ascertained that the remaining child dies also without issue; if that is the meaning of the words total failure of issue, or if it is to be limited to dying without issue at her own death, then, of course, there

would be an absolute intestacy as to those three-fourths. That, as I said before, is not to be read as being the meaning of the testator where he intends obviously to keep the estate together; and I think I am not unfairly extending the rule, for I take that to be the rule in implying cross-remainders, and consequently I so hold."

1. 2 Jarm. on Wills (5th ed.) *554-555; *Horne v. Barton*, Coop. 257; 19 Ves. Jr. 398. See *Green v. Stephens*, 12 Ves. Jr. 419.

In *Horne v. Barton*, 19 Ves. Jr. 398, under a devise in trust to settle on the testator's children in equal shares and proportions, undivided, for and during their respective lives, the remainder to their issue, severally and respectively in tail general, with cross-remainders over, there being two daughters, cross-remainders were inserted, not only among the several children of each, but also as between the two families. Sir W. Grant said: "This is not a question about raising cross-remainders by implication; but the settlement contains an express direction to insert cross-remainders. Estates for life only are given to the children, with remainders in tail to their several and respective issue; and the cross-remainders are directed to be inserted after such limitation. That direction would not be substantially complied with without inserting a direction that, upon failure of issue of the one, the estate should go to the other. Even under a direction that in default of such issue it should go over, upon the modern decisions cross-remainders would be implied. Here is no disposition of the reversion, but it is not probable that he meant his children, to whom he intended to give only estates for life, should take the fee, while there was any issue to take the inheritance."

2. *Doe v. Burville*, 2 East 47, n.; stated 2 Jarm. on Wills (5th ed.) *552. Compare *Pery v. White*, Cowp. 777.

6. It is no objection to the implication of cross-remainders that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail and others tenants for life, with remainder to their issue in tail.¹

7. A devise to the children of A for life, and for want and in default of such issue then over, creates cross-remainders, by implication, for life among such devisees.²

8. The better opinion is that statutes which provide that the words "die without issue," and similar expressions, shall be construed to mean a definite failure of issue, do not affect the foregoing principles.³

1. See *Vanderplank v. King*, 3 Hare 1.
2. 2 Jarm. on Wills (5th ed.) *554, 555; *Ashley v. Ashley*, 6 Sim. 358. See also *Pearce v. Edmeades*, 3 Y. & C. 246; *Walmsley v. Foxhall*, 1 De G. J. & S. 605; *Loring v. Coolidge*, 99 Mass. 191; *Cudworth v. Thompson*, 3 Desaus. (S. Car.) 256; *Williams v. Kibler*, 10 S. Car. 427.

3. 2 Jarm. on Wills (5th ed.) *555, note. Compare *Forrest v. Whiteway*, 3 Exch. 367.

Mr. Theobald's Conclusions.—Mr. Theobald deduces the following propositions from the English cases:

"First. If there is a devise of lands to two or more as tenants in common, and the heirs of their bodies respectively, followed by a gift over in default of such issue, the gift over takes effect only in default of all such issue as would take under the antecedent limitations, and therefore cross-remainders are implied between the tenants in tail. *Doe v. Webb*, 1 Taunt. 234; *Powell v. Howells*, L. R., 3 Q. B. 655; *Hannaford v. Hannaford*, L. R., 7 Q. B. 116. And if the gift over is limited, not expressly in default of issue, but as a remainder, the same result follows. *Doe v. Burville*, 2 East 47, n. The word 'reversion' would probably now be held to have the same force, notwithstanding *Pery v. White*, Cowp. 777. The arguments against the implication of cross-remainders, founded upon the number of the devisees and such words as 'severally' and 'respectively,' or the fact that the whole is not expressly given over, must now be considered exploded.

"Second. The result will be the same if the gift over is in default of issue, to take under the preceding limitations, living at the death of their parents. *Maden v. Taylor*, 45 L. J. Ch. 569.

"Third. It has been said that if cross-

remainders are provided between certain objects in certain events, the implication of cross-remainders between those objects in different events, does not arise; so that, for instance, if cross-remainders are provided between the children of separate families among themselves, cross-remainders would not be implied between the children of one family and those of the other. *Clache's Case*, Dyer 330, however, which is usually cited on this point, is no authority for any such proposition. All that case decides is, that cross-remainders cannot be implied in the face of an express limitation over in a certain event with which such an implication would be inconsistent. See the remarks of the Lord Justice Turner in *Atkinson v. Barton*, 3 De G. F. & J. 339; and the decision in *Rabbeth v. Squire*, 19 Beav. 77; 4 De G. & J. 406, was based on totally different grounds. The true rule is laid down by Turner, L. J.: 'Cross remainders are to be implied or not, according to the intention. The circumstance of remainders, having been created between the parties in particular events, is a circumstance to be weighed in determining the intention, but is not decisive upon it,' *Atkinson v. Barton*, 3 De G. F. & J. 338 (*reversed* on appeal, but on different grounds, 10 H. L. Cas. 313). See too *Vanderplank v. King*, 3 Hare 1; *In re Ridge's Trusts*, L. R., 7 Ch. 665.

"Fourth. Cross-remainders will be implied even though, as the result of legal rules and not of the testator's intention, the class of persons between whom they are implied take different interests, if, for instance, some are tenants in tail, others only tenants for life, with remainders to their children in tail. *Vanderplank v. King*, 3 Hare 1.

"Fifth. Cross-remainders will be implied in a devise to the children of A,

n. IMPLICATION OF CROSS EXECUTORY LIMITATIONS.—In the case of limitations in fee of the realty, or of absolute interests in personalty among several devisees or legatees, as tenants in common, with a limitation over in case they all die under age, the better opinion is that cross executory limitations among the several devisees or legatees will not be implied, and hence the share of any one of them dying during his minority will devolve upon his representatives, unless and until they all die under age.¹

which carries to them only a life estate, with a gift over for want of such issue of *A. Ashley v. Ashley*, 6 Sim. 358.

"Sixth. And where realty or personalty is given to several persons as tenants in common for life, with remainders to their issue, followed by a gift over if all should die without leaving issue, cross-limitations between the first takers and their families will be implied. *In re Ridge's Trusts*, L. R., 7 Ch. 665; *In re Clark*, 11 W. R. 871. See also *Coates v. Hart*, 3 De G. J. & S. 504.

"Seventh. But cross-limitations will not be implied so as to divest vested interests. The implication arises from the presumption against intestacy, but where there are vested interests there can be no intestacy. See *Rabbeth v. Squire*, 19 Beav. 70; 4 De G. & J. 406; *In re Clark*, 11 W. R. 871. "Upon the same principal, when the testator has disposed of his whole interest in realty or personalty, if, for instance, absolute vested interests have been given to several tenants in common, with a gift over upon the death of all in certain events, cross-limitations cannot be implied between them, as there can be no intestacy, and cross-limitations would divest vested interests. *Skey v. Barnes*, 3 Meriv. 334; *Bromhead v. Hunt*, 2 J. & W. 459; *Baxter v. Losh*, 14 Beav. 612; *Beaver v. Nowell*, 25 Beav. 551.

"Eighth. If, however, the interests are not vested, but contingent, with a gift over upon the death of all before the interests vest, the argument against an intestacy applies, and no argument can be raised against cross-limitations, on the ground that they would divest vested gifts, and therefore, in all probability, cross-limitations would be implied. *Mackell v. Winter*, 3 Ves. Jr. 236, 536; *Scott v. Bargeman*, 2 P. Wms. 68; 2 Eq. Abr. 542; *Graves v. Waters*, 10 Ir. Eq. 234. There are no grounds for supposing *Scott v. Bargeman*, 2 P. Wms. 68, to be

overruled. The point in *Beauman v. Stock*, 2 B. & B. 406, was totally different. It was whether benefit of survivorship would be implied between tenants in common taking vested interests, and the incidental remarks of Lord Manners cannot be considered as overruling a case expressly approved by Lord St. Leonards in *Vize v. Stoney*, 1 D. & W. 348, and followed by *Graves v. Waters*, 10 Ir. Eq. 234." Theobald on Wills (2d ed.) 571.

1. "The question whether cross executory limitations can be implied among devisees in fee, arises when real estate is devised to several persons in fee, with a limitation over, in case they all die under a given age, or under any other prescribed circumstances; in which case it is by no means to be taken as a necessary consequence of the doctrine respecting the implication of cross-remainders among devisees in tail, discussed in the last chapter, that reciprocal executory limitations will be implied among such devisees in fee. The principal difference between the two cases seems to be this: In the case of a devise to several persons in tail, assuming the intention to be clear that the estate is not to go over to the remainder-man until all the devisees shall have died without issue, the effect of not implying cross-remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of all. On the other hand, in the case of limitations in fee of the realty, and of absolute interests in personalty (both which are clearly governed by the same principle), as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event upon which it is not divested, a partial intestacy can never arise from want of a limitation over. To introduce cross-limitations among the devisees in such a case, would be to

12. What Passes Under a General or Residuary Bequest.—See LEGACIES AND DEVICES, vol. 13, p. 45.

13. What Passes Under a General or Residuary Devise.—See LEGACIES AND DEVICES, vol. 13, p. 51. See also *supra*, this title, *Words Descriptive of Property—To What Period Referred; infra*, this title, "*Lands*"—"Real Estate."

14. Under What Circumstances a General Devise or Bequest Operates as a Good Execution of a Power.—See POWERS, vol. 19, pp. 929, 936.

15. Construction of Words Descriptive of Property—*a. "LANDS"—"REAL ESTATE"*—(1) *Reversionary Interests.*—A general devise of lands or "real estate" carries reversionary interests, in the absence of an intent to the contrary;¹ as where the testator treats the reversion as undisposed of² by the will. A devise of lands "not settled" includes an unsettled reversion in settled lands.³ A charge of annuities upon the lands passing by the general words will not exclude reversions,⁴ nor will the fact that some of the limitations of the will are inapplicable to the reversion.⁵

divest a clear absolute gift upon reasoning merely conjectural; for the argument that the testator could not intend the retention of the property by the respective devisees to depend upon the prescribed event not happening to the whole, however plausible, scarcely amounts to more than conjecture. He may have such an intention; and, if not, the answer is, *voluit sed non dixit*. If, therefore, a gift is made to several persons in fee simple, as tenants in common, with a limitation over in case they all die under age, the share of one of the devisees dying during minority will devolve upon his representatives, unless and until the whole die under age." 2 Jarm. on Wills (5th ed.) *556. See *Skey v. Barnes*, 3 Meriv. 354; *Turner v. Frederick*, 5 Sim. 466; *Templeman v. Warrington*, 13 Sim. 267; *Cohen v. Waley*, 15 Sim. 318; *Baxter v. Fish*, 14 Beav. 612; *Edwards v. Tuck*, 23 Beav. 268; *Beaver v. Nowell*, 25 Beav. 551; *Mair v. Quilter*, 2 Y. & C. C. C. 465; *In re Ridge's Trusts*, L. R., 7 Ch. 665; *Fenby v. Johnson*, 21 Md. 111.

Cross excepting limitations, however, were implied in regard to bequests of personality in some earlier cases. *Scott v. Bargeman*, 2 P. Wms. 68; *Mackell v. Winter*, 3 Ves. Jr. 236, 536. Supposed by Jarman to have been overruled. 2 Jarm. on Wills (5th ed.) *561.

1. *Hawkins on Wills* *33; *Theobald on Wills* (2d ed.) 162; 1 Jarm. on Wills (5th ed.) *663; *Church v. Mundy*, 15

Ves. Jr. 396; *Ford v. Ford*, 6 Hare 486; *Chester v. Chester*, 3 P. Wms. 56; *Doe v. Fossick*, 1 B. & Ad. 186; 20 E. C. L. 374; *Mostyn v. Champneys*, 1 Scott 293; 1 Bing. (N. Car.) 341. See *Brown v. Boyd*, 9 W. & S. (Pa.) 128; *M'Cay v. Hugus*, 6 Watts (Pa.) 347; *Drew v. Wakefield*, 54 Me. 297; *O'Neale v. Ward*, 3 Har. & M. (Md.) 93; *Hayden v. Stoughton*, 5 Pick. (Mass.) 538.

2. *Strong v. Teatt*, 2 Burr. 912.

3. *Hawkins on Wills* *34; *Glover v. Spendlove*, 4 Bro. C. C. 337. "A devise of land not settled, or out of settlement, is equivalent to a devise of lands not otherwise disposed of, over which the testator has absolute dominion, and will therefore pass a reversion in fee in settled lands, though the testator may confirm the settlement. *Incorporated Soc. v. Richards*, 1 D. & W. 258; *Chester v. Chester*, 3 P. Wms. 56; *Atty. Gen'l v. Vigor*, 8 Ves. 256; *Jones v. Skinner*, 5 L. J. Ch. N. S. 87; *Kelley v. Duffy*, 4 L. R. Ir. 601;" *Theobald on Wills* (2d ed.) 162.

4. *Theobald on Wills* (2d ed.) 162; *Doe v. Fossick*, 1 B. & Ad. 186; 20 E. C. L. 374; *Doe v. Ieyes*, 1 B. & Ad. 593; 20 E. C. L. 448.

5. *Theobald on Wills* (2d ed.) 163.

"The fact that the limitations on which the reversion is dependent are such that some of the limitations of the will cannot take effect upon the reversion, will not prevent the reversion from passing. If there are other causes besides the reversion, the limitations inapplicable to the reversion will be

(2) *Leaseholds for Lives*.—A devise of all testator's "lands and hereditaments," or all his "real estate," carries leaseholds for lives as well as freeholds in fee, notwithstanding some parts of the will are inapplicable to them.¹

(3) *Leaseholds for Years*.—At common law, a devise of "real estate," "lands," "lands and tenements," or "lands, tenements, and hereditaments," did not carry leaseholds for years, unless at the time of the devise the testator had no freehold lands answering the description.² The rule, however, readily yielded to indications from the context of an intent to pass leaseholds, as where the devise was of lands of which the testator stood "seised or possessed or in any way interested."³ Under the English Wills Act, a devise of "lands" includes leaseholds, unless an intent to the contrary appears;⁴ but it seems that a devise expressly of "freehold" lands or "real estate" is not within the act and only passes leaseholds, if there are no freeholds.⁵ Statutes similar

referred to the other lands *reddendo singula singulis*. *Doe v. Weatherby*, 11 East 322; *William v. Thomas*, 12 East 141; *Freeman v. Chandos*, Cowp. 363; *Doe v. Bartle*, 5 B. & Ald. 492; *Morris v. Lloyd*, 33 L. J. Exch. 202. Under this head would come all wills since the Wills Act, where such of the limitations as can never take effect, upon the reversion, may be looked upon as intended to operate upon after acquired lands. And even if there are no other lands, the reversion will pass if some of the limitations of the will are applicable to it. *Church v. Mundy*, 12 Ves. Jr. 426; *Tennant v. Tennant*, Dru. temp. Sugden 161; 1 J. & L. 379; *Ford v. Ford*, 6 Hare 486; *Roe v. Avis*, 4 T. R. 605; *Goodtitle v. Miles*, 6 East 494, must be considered overruled. If, however, none of the limitations of the will could take effect upon the reversion, there seems no reason for supposing the reversion would pass. *Tennant v. Tennant*, Dru. temp. Sugden 161; 1 J. & L. 379, is not *contra*, since the devise of the reversion was capable of taking effect so far as the life interest given to R. was concerned. *Goodtitle v. Miles*, 6 East 494, seems to have been decided upon this principle, though the facts did not justify its application." *Theobald on Wills* (2d ed.) 163.

1. *Weigall v. Brome*, 6 Sim. 99; *Fitzroy v. Howard*, 3 Russ. 225.

2. *Hawkins on Wills* *30; *Theobald on Wills* (2d ed.) 165; 1 Jarm. on Wills (5th ed.) *668; *Rose v. Bartlett*, Cro. Car. 293; *Thompson v. Lawley*, 2 Bos. & P. 313; *Gully v. Davis*, L. R., 10 Eq.

562; *Chapman v. Hart*, 1 Ves. 271. See *Day v. Trig*, 1 P. Wms. 286; *Doe v. Cranstoun*, 7 M. & W. 1; *Minnis v. Aylett*, 1 Wash. (Va.) 300. But see *Shreve v. Shreve*, 17 N. J. Eq. 487.

Under statutes which provide that the will shall speak from the death, the question would seem to be whether the testator had freeholds at his death, not when the will was made. See *Gully v. Davis*, L. R., 10 Eq. 562.

3. *Addis v. Clement*, 2 P. Wms. 456. See *Hartley v. Hurle*, 5 Ves. Jr. 540; *Swift v. Swift*, 1 De G. F. & J. 160.

Somewhat similar limitations, however, without the word "possessed," have been held not to pass leaseholds. *Pistol v. Richardson*, 2 P. Wms. 459, note; *Davis v. Gibbs*, 3 P. Wms. 26.

4. *Theobald on Wills* (2d ed.) 165.

Stat. 1 Vict., ch. 26, § 26. "And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise, which would describe a customary copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

5. *Gully v. Davis*, L. R., 10 Eq. 562. See *Emuss v. Smith*, 2 De G. & S.

to the English Wills Act exist in the States of *Virginia*, *West Virginia*, and *Kentucky*.¹

(4) *Beneficial Interest in Mortgages*.—A general devise of all testator's lands, tenements, and hereditaments, does not carry the beneficial interest in money secured by mortgages.² But a devise of particular lands of which the testator is only mortgagee, to several persons in succession, would, it seems, pass the beneficial interest, as something was clearly intended to pass, and the limitations are inappropriate to a devise of the mere legal estate.³

(5) *Trust and Mortgage Estates*.—A general devise of testator's "lands," "lands in A," or "real estate," includes lands of which the testator was seised as trustee or mortgagee, unless an intention to the contrary appear.⁴

722; *Stone v. Greening*, 13 Sim. 390; *Turner v. Turner*, 21 L. J. Ch. 843.

1. Stimson's Am. Stat. Law, § 2808; *Virginia* Code, ch. 118, § 15; *Kentucky* Gen. Stat., ch. 113, § 21; *West Virginia* Laws (1882), ch. 84, § 14.

2. 1 Jarm. on Wills (5th ed.) *689; *Hawkins on Wills* *38; *Theobald on Wills* (2d ed.) 167; *Strode v. Russel*, 2 Vern. 624; *Casborne v. Scarfe*, 1 Atk. 605; 2 J. & W. 194. See *Martin v. Weston*, 2 Burr. 969; *Martin v. Smith*, 124 Mass. 111.

In *Casborne v. Scarfe*, 2 J. & W. *195, Lord Eldon said: "The person having the equity of redemption is considered as owner of the land, and the mortgagee as entitled only to retain it as a security or a pledge for a debt. For this reason a mortgage, though a fee, is considered in this court as personal assets, and shall go to the executor, notwithstanding that the legal estate vests in the heir in point of law. The husband of a *feme* mortgagee shall not be tenant by the curtesy of the mortgage, unless the mortgage be foreclosed, by which it ceases to be a pledge. It shall not pass by a devise of all his lands, tenements, and hereditaments. This was unanimously resolved by Lord Cowper, assisted by Lord C. J. Trevor and Mr. J. Tracy, in the case of *Litton v. Falkland*, 2 Vern. 625. The words are: 'It was unanimously agreed, first, that mortgages in fee, although forfeited when the will was made, did not pass by the general words; although he afterwards foreclosed those mortgages, or obtained a release of the equity of redemption, they should not pass by a will,' but go to the heirs at law; this

shows that the release of the equity of redemption or foreclosure is considered in equity as a new purchase or acquisition of the real estate in the land."

3. *Theobald on Wills* (2d ed.) 167; *Woodhouse v. Meredith*, 1 Meriv. 450. See *Burdus v. Dixon*, 4 Jur. N. S. 967; *Knollys v. Shepherd*, 1 J. & W. 499; *Clarke v. Abbott*, Barn. Ch. 461.

4. *Hawkins on Wills* *35; 1 Jarm. on Wills (5th ed.) 693; *Braybroke v. Inskip*, 8 Ves. Jr. 435; *Bainbridge v. Ashburton*, 2 Y. & C. C. 347. See *Leeds v. Munday*, 3 Ves. Jr. 348; *Wall v. Bright*, 1 J. & W. 494; *Galliers v. Moss*, 9 B. & C. 267; 17 E. C. L. 375. See *Taylor v. Benham*, 5 How. (U. S.) 270; *Richardson v. Woodbury*, 43 Me. 206; *Abbott, Petitioner*, 55 Me. 580; *Jackson v. DeLancey*, 13 Johns. (N. Y.) 537; *Merritt v. Francis F. Ins. Co.*, 2 Edw. Ch. (N. Y.) 547; *Downing v. Marshall*, 23 N. Y. 366; *Bangs v. Smith*, 98 Mass. 270; *Ballard v. Carter*, 5 Pick. (Mass.) 112; *Martin v. Smith*, 124 Mass. 111; *Cogdell v. Widow, etc.*, 3 Desaus. (S. Car.) 346; *Gibbes v. Holmes*, 10 Rich. Eq. (S. Car.) 484; *Drane v. Gunter*, 19 Ala. 731; *Wills v. Cooper*, 25 N. J. L. 161; *Van Wageningen v. Brown*, 26 N. J. L. 196; *Marshall v. Hadley*, 50 N. J. Eq. 547; *In re Clowes* (1893), Ch. 214; *Heath v. Knapp*, 4 Pa. St. 230. Compare *Breckinridge v. Waters*, 4 Dana (Ky.) 620.

B., in 1770, being indebted to A., by three several bonds, in order to secure the payment of the same, executed to A. a mortgage on all his lands in the province of *New York*, a portion of which lands were referred to by name and part, consisting of the premises in

question, passing under a general clause, and covenanted that on default, the mortgagee, his heirs, etc., might enter. A. died, having ordered by her will all her estates in certain patents and elsewhere, wheresoever and whatsoever, to be converted into money by her executors, and to be equally divided among her five children, who were to be tenants in common in fee of the realty until such sale and distribution. In 1771, before the death of A., the mortgage had become forfeited, and a judgment had also been recovered by A. against B. B., by his will, executed in 1780, made a devise of his estate to his wife, and in the event of her death without disposing of the same by grant or devise, he devised it over to his daughter D. In 1788, the judgment against B. was revived by the executors of A., and the *scire facias* was directed to the heirs of B., who were summoned, but not to the wife of B., the tenant for life, who was not summoned; and execution was issued thereon and the lands of B. sold and purchased by R., who had married one of the daughters and devisees of A., and conveyed to him, who took possession of the premises in question under that deed, which, however, it was now conceded did not pass the premises. R. procured conveyances from three of the other devisees of B., and the tenants of the land in 1790 attorned to R. and surrendered their possession to him, and agreed to hold under him. The wife of B. having died after devising her estate to trustees in trust for her daughter D, it was held, in an action for ejectment on the demise of D. and her trustees, against persons claiming under R., that R. had a right of entry under the will of A., as devisee of the mortgage which passed by the general words of the will, such appearing to be the intention of the testatrix, and that the defendant could set it up as an outstanding title to defeat the action of the plaintiff. *Jackson v. DeLancey*, 13 Johns. (N. Y.) 537.

"There is, however, a distinction between cases where the testator is mortgagee, in trust, and where he is also beneficially entitled to the mortgage money. First. Where the testator has the legal estate in a mortgage, and the beneficial interest is also vested in him, the legal effect passes under a gift of 'all the rest of my real and personal estate to A for her own use and benefit,' though there may be a charge of

debts. *In re Stevens' Will*, L. R., 6 Eq. 597. In such a case it is reasonable to suppose that the beneficial ownership and the legal estate were meant to go together. If the devise is to trustees, subject to a charge of debts, apparently the legal estate would not pass, the arguments from the convenience of uniting the legal estate with the beneficial interest being away. *In re Horsfall, McClell. & Y.* 292. This is *a fortiori* the case where the devise is to trustees subject to the payment of debts upon trusts inapplicable to the legal estate. See *In re Packman*, 1 Ch. Div. 215, where the testator was beneficially interested in a moiety of the equity of redemption. But if the trustees are directed to get in debts due on any security, they take the legal estate. *In re Arrowsmith's Trusts*, 6 W. R. 642. The legal estate will not pass where the devise is after payment of debts to two persons as tenants in common. *Doe v. Lightfoot*, 8 M. & W. 553. Or where it is to several persons in definite shares, though not subject to debts. *Martin v. Laverton*, L. R., 9 Eq. 563. Or where it is to an indefinite class, as tenants in common. *In re Finney's Estate*, 3 Giff. 465. Second. Mere trusts estates will not be prevented from passing under a general devise by words of benefit superadded. *Bainbridge v. Ashburton*, 2 Y. & C. 347; *Sharpe v. Sharpe*, 12 Jur. 598; *Lewis v. Mathews*, L. R., 2 Eq. 177; and see *Ex p. Shaw*, 8 Sim. 159. But they will not pass if there is a charge of debts, whether by express words or by implication from a residuary devise, where legacies have been previously given. *Roe v. Reade*, 8 T. R. 118; *Leeds v. Munday*, 3 Ves. Jr. 348; *Hope v. Liddell*, 21 Beav. 183; *In re Bellis' Trusts*, 5 Ch. Div. 504. See, however, *In re Brown*, 3 Ch. Div. 156. Nor where the devise is on trust for sale. *Ex p. Marshall*, 9 Sim. 555; *In re Cantley*, 17 Jur. 124; *Morley's Will*, 10 Hare 293; *In re Smith's Estate*, 4 Ch. Div. 70. Nor where the devise is to uses in strict settlement. *Thompson v. Grant*, 4 Madd. 232. As to whether a devise to the separate use will prevent trust estates from passing, see *Lindsell v. Thacker*, 12 Sim. 178." *Theobald on Wills* (2d ed.) 168.

A devise of a freehold estate will not pass a mortgage taken back by a testator, upon a sale of the property subsequent to making the will. *In re Clowes* (1893), 1 Ch. 214.

(6) *Lands Contracted for*.—Lands contracted for pass by a general devise of all the testator's lands, although not actually conveyed.¹

(7) *Lands Contracted to Be Sold*.—A general devise of lands carries the legal estate in lands which the testator has contracted to sell, but the devisee will not be entitled to the purchase-money beneficially.²

(8) "*Lands*" *Includes Houses, Mines, Wells*.—(See LAND, vol. 12, p. 655).—*Prima facie* the word "land" includes houses, mines, wells, and whatever else the soil may hold above or below it, the maxim being *cujus est solum, ejus est usque ad cælum*.³ The term may, however, be restricted by the context to the earth's surface.⁴

b. TENEMENTS—HEREDITAMENTS.—These words are broader than "lands," and include every species of realty, corporeal or incorporeal, that may be holden or inherited.⁵ In many states, "land" by statute includes "tenements and hereditaments."⁶

c. MESSAGE.—See MESSAGE, vol. 15, p. 386.

d. PREMISES.—See PREMISES, vol. 19, p. 4.

e. HOUSE.—See HOUSE, vol. 9, p. 777.

f. CURTILAGE.—See CURTILAGE, vol. 1, p. 968.

g. APPURTENANCES.—See APPURTENANCES, vol. 1, p. 644.

h. FARM.—See FARM, vol. 7, p. 811.

i. DEVISE OF FREE USE—USE AND OCCUPATION.—A devise of the "free use" or of the "use and occupation" of land, passes an estate in the land, and, consequently, a right to let or assign it, and is not confined to the personal use or occupation of the property, unless the context clearly calls for a more limited construction.⁷

1. *Collinson v. Girling*, 4 Myl. & C. 75; *Atcherley v. Vernon*, 10 Mod. 518. See *In re Champion*, 1 Busb. Eq. (N. Car.) 248; *Gist v. Robinet*, 3 Bibb (Ky.) 4; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 316; *Smith v. Jones*, 4 Ohio 121.

2. *Wall v. Bright*, 1 J. & W. 494; *Knollys v. Shepherd*, 1 J. & W. 479. See *Jackson v. DeLancey*, 13 Johns. (N. Y.) 554; *Atwood v. Weems*, 99 U. S. 183.

"Where a testator has contracted to sell real estate, so that he is a constructive trustee of the legal estate, it will pass under a devise of trust estates, and not under a general devise upon trusts for sale. *Lysaght v. Edwards*, 2 Ch. Div. 499. *Purser v. Darby*, 4 K. & J. 41, only decides that, where the estate contracted to be sold is specifically devised, it is excepted from a general devise of trust estates. If there is no devise of trust estates, the legal estate in lands contracted to be sold will pass under a general devise of real and per-

sonal estate, upon trust to get in and dispose of the personality; the legal estate being required for the purpose of the trust. *Wall v. Bright*, J. & W. 494; *Lysaght v. Edwards*, 2 Ch. Div. 515. But it will not if the devise is to tenants in common with limitations over. *Thirtle v. Vaughan*, 24 L. T. 5; 2 W. R. 632. A devise of mortgaged estates on trust, to get in the mortgage debts, will not pass a legal estate which has descended to the testator as heir of a deceased mortgagee. *Ex p. Morgan*, 10 Ves. 100." *Theobald on Wills* (2d ed.) 169.

3. Co. Litt. 4 a; 3 Kent's Com. (13th ed.) 378; *Schouler on Wills* (2d ed.), § 498.

4. *Schouler on Wills* (2d ed.), § 498; *Haydon's Will*, 2 And. 123.

5. Bouv. Dict. "Tenements," "Hereditaments;" *Schouler on Wills* (2d ed.), § 498.

6. *Stimson's Am. Stat. Law*, §§ 1300, 1301 and Supp.

7. 1 Jarm. on Wills (5th ed.) *798.

j. DEVISE OF "RENTS AND PROFITS" OR "INCOME" OF LAND.—A devise of the "rents and profits" or of the "income" of land, passes the land itself, both at law and in equity.¹ At common law, such a devise carried only an estate for life, unless words of inheritance were added;² but under the English Wills Act of Victoria, and corresponding statutes in nearly all the *United States*, it passes a fee, or at least the whole estate of which the testator had power to dispose.³ It seems to be the better opinion that a direction to trustees to pay an annuity out of "rents and profits" creates a charge upon the *corpus* of the land where the purposes of the trust require it, unless the context shows that 'rents and profits' means only 'annual rents and profits.'⁴

See *Cook v. Gerrard*, 1 Saund. 186 e; *Whittome v. Lamb*, 12 M. & W. 813; *Rabbeth v. Squire*, 4 De G. & J. 406; *Mannox v. Greener*, L. R., 14 Eq. 456; *Fillingham v. Bromley*, T. & R. 536; *Maclaren v. Staintor*, 27 L. J. Ch. 442; *Stone v. Parker*, 29 L. J. Ch. 874. See *Tobias v. Cohn*, 36 N. Y. 363; *Beekman v. Hudson*, 20 Wend. (N. Y.) 53; *Garland v. Garland*, 73 Me. 97; *Pardue v. Givens*, 1 Jones Eq. (N. Car.) 307; *Hogan v. Hogan*, 44 Mich. 147.

1. 1 Jarm. on Wills (5th ed.) *797. As to devise of "rents and profits" see Co. Litt. 4 b. *Parker v. Plummer*, Cro. Eliz. 190; *Johnson v. Arnold*, 1 Ves. 171; *Baines v. Dixon*, 1 Ves. 42; *Doe v. Lakeman*, 2 B. & Ad. 42; 22 E. C. L. 19; *South v. Alleine*, 1 Salk. 228; *Blann v. Bell*, 2 De G. M. & G. 781; *Cooke v. Husband*, 11 Md. 492; *France's Estate*, 75 Pa. St. 220; *Anderson v. Greble*, 1 Ashm. (Pa.) 138; *Sill's Appeal*, 1 Grant Cas. (Pa.) 235; *Baker v. Scott*, 62 Ill. 86; *Cassilly v. Meyer*, 4 Md. 1; *Earl v. Rowe*, 35 Me. 419; *Smith v. Dunwoody*, 19 Ga. 237; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 94; *Chapman v. Nichols*, 61 How. Pr. (N. Y. Supreme Ct.) 275.

Thus a testator ordered certain "real estate to remain as at present as long as the law will allow," the rent to be divided equally among his children and their legal representatives, and his "bank stock also to remain unsold, and the dividends divided in the same manner, and any money" he might "have at interest, the interest to be divided in the same manner, and the principal, as fast as the same may be paid, to be re-invested, and the interest to be divided as aforesaid." It was held that under this devise, the stock

itself and the principal of the debts passed to the devisees, and that the direction that the one should remain unsold and the other be re-invested as it might be received, could not prevent the children from now claiming the principal. *Cassilly v. Meyer*, 4 Md. 1.

A testatrix bequeathed all her estate, real and personal, after the payment of her debts, to trustees, to collect rents and dividends, and pay one-half thereof to her granddaughter, for her separate use; and to divide the other half equally among the children of her said granddaughter. It was held that the equitable title to one-half the property was vested in the granddaughter. *Sill's Appeal*, 1 Grant Cas. (Pa.) 235.

As to devise of income, see *Mannox v. Greener*, L. R., 14 Eq. 456; *Sampson v. Randall*, 72 Me. 109; *Reed v. Reed*, 9 Mass. 372.

The principle in the text, of course, like all other rules of construction, yields to anything in the context indicating a contrary intent. *Collier v. Grimesey*, 36 Ohio St. 17; *Boyle v. Parker*, 3 Md. Ch. 45.

2. *Hodson v. Ball*, 14 Sim. 571; 1 Jarm. on Wills *798.

3. *Penty v. West*, 6 C. B. 201; 60 E. C. L. 199; *Mannox v. Greener*, L. R., 14 Eq. 456.

4. *Hawkins on Wills* 121, citing *Traford v. Ashton*, 1 P. Wms. 415; *Allan v. Backhouse*, 2 Ves. & B. 64; *Bootle v. Blundill*, 1 Meriv. 232; *Wilson v. Halliley*, 2 R. & My. 590; *Phillips v. Gutteridge*, 3 De G. J. & S. 332. But in *Delaney v. Aulen*, 84 N. Y. 16, the rule was said to be much relaxed. In this case, the will of K. gave her residuary estate, real and personal, to her executors in trust, to receive the rents and profits of the real estate, to invest and keep

invested the personal estate, and to apply such rents and profits and the interest or income of the personality to the use of her husband for life, except that they should apply to the use of the plaintiff, who, the will states, was brought up by the testatrix, "the sum of \$500 per annum thereout," until he reached the age of twenty-one, after that, "the sum of \$1,000 thereout," during the life of her husband, and after that, "\$2,000 thereout, during his natural life." There was no gift of the remainder. The testatrix had a brother living at the time of making the will, who survived her; at the date of the will, and at the time of the death of the testatrix, the income from the residuary estate was ample to pay the annuities so given to the plaintiff and leave a larger sum for the husband. After the death of the latter, the property did not yield enough to keep the real estate in good repair, to pay taxes and incidental expenses, and to pay the plaintiff his annuity. In an action asking for a construction of the will, and that the deficiency be paid out of the *corpus* of the estate, it was held that the intention of the testatrix was that the gift to the plaintiff should be paid only from the annual profits of the estate; and that no part of the *corpus* of the estate could be applied to make up the deficiency. In this case Folger, C. J., said: "There can be no question that the testatrix, when she made her will, looked upon the rents, profits and income of her estate as enough to pay this annuity, to leave a larger sum for the use of her husband during his life, and for a surplus for her next of kin after his death. She designated the profits as the fund from which the sum should come with which to pay the annuity. But the inquiry may not stop there. It is to be pushed further, until it is learned whether she meant, if that fund failed, that, nevertheless, the plaintiff should be paid his annuity every year in full, though the body of the estate should be impaired or consumed, and her husband in his lifetime, and her next of kin after his death, get nothing. This at first blush seems a purpose so extreme as not to be attributed to the testatrix, unless the words she has used, as construed by inexorable rules, and the circumstances of the case, clearly lead thereto. The words of the will are to the effect that the rents, profits, and income of the estate shall furnish the

means to pay the plaintiff's annuity. They are given to the executors in trust to receive and apply. Generally speaking, the interpretation of the words 'rents and profits' is, that they mean the annual rents and profits. (*Heneage v. Andover*, 3 Y. & J. 360; *Allan v. Backhouse*, 2 Ves. & B. 65.) If there were no contrary adjudication, it could be fairly argued that a direction to raise money by annual rents and profits is to be put in contradistinction to a sale and mortgage. (*Allan v. Backhouse*, 2 Ves. & B. 65.) Indeed the Vice-Chancellor of *England*, in *Forbes v. Richardson*, 11 Hare 354, said: 'I do not find any case where a direction for payment out of annual rents and profits has been held to give a right against the *corpus*, or beyond the annual or current rents and profits.' This remark, however, in view of other decisions, must be confined to a direction, where the word 'annual' is expressly, or by most clear implication, attached to the words 'rents and profits.' It is not too much to say, however, that the meaning most naturally to be got from a direction to take rents and profits, and thereout to pay a sum of money, would confine the means to pay to the moneys derived from the rents and profits as they came to hand from year to year, and would not extend to an appropriation of the body of the estate. Lord Eldon said, in *Boote v. Blundell*, 1 Meriv. 102: 'If I were asked this question anywhere but in Westminster Hall, I should answer in the affirmative, that by profits he probably meant annual profits only.' Judge Cowen, in *Bloomer v. Waldron*, 3 Hill (N. Y.) 361, indicates the same opinion, and says that the natural and obvious meaning of the words has been departed from in chancery to such a degree as may entrap a plain man; and that a forced and unnatural interpretation has been gone into in pressing exigencies. Yet that interpretation has become, with some limitations, a well established rule of chancery. 'Whatever might have been the interpretation of these words had the case been new, whatever doubt might arise upon them as denoting annual or permanent profit,' says Sir Thomas Plumer, 'it is now too late to speculate, this court having, by a technical, artificial, but liberal construction, in a series of authorities, admitting it to be the natural meaning, extended those words, when applied to the object of raising a gross sum at a

h. ESTATE.—“Estate” is a word of comprehensive signification, and carries both real and personal property, unless confined to the personalty by the context or by clear intent, apparent upon

fixed time, when it must be raised and paid without delay, to a power to raise by sale or mortgage, unless restrained by other words.’ *Allan v. Backhouse*, 2 Ves. & B. 65. He cites and discusses many cases, and adds: ‘The rule has now become an established one of construction, not permitting the court to exercise any discretion.’ That was in 1813. Two things are to be noticed in the first of these remarks, as somewhat limiting the extent of it. First, that the object of the power is to raise a gross sum at a fixed time, which must be raised and paid without delay, and, second, that the direction is not restrained by other words. Many of the cases are where legacies are to be paid out of the profits; a legacy is a gross sum, and generally to be paid at a fixed time and without delay. Some of them are cases of annuities which, though payable from time to time, are at each time of payment gross sums and payable at fixed times. An annuity falls within the rule, unless the other words of the will restrain it. We think, though, that later adjudications have somewhat relaxed the rule, looking at the purpose that first set it up, viz.: by a liberal construction of the words of the testator, taking them to amount to a direction to sell, so as to obtain the end that the testator intended by raising the money. (2 Story’s Eq. Jur., § 1064 a; *Green v. Belcher*, 1 Atk. 505.) So that it has come in the course of judgment, that not only the other words of the will may restrain the operation of the rule, but so may all other indications which courts are wont to note, in order to gather the intention of the maker of a disposing instrument in writing. The courts have been ready to take hold of the context of wills to hold the rule in check. (*Wilson v. Halliley*, 1 Russ. & M. 590; *Small v. Wing*, 5 Bro. P. C. (Tomlin’s ed.) 66; 3 Y. & J.) And where the rule has been applied, the use of it has at times been justified, only by such being the intention of the testator as derived from all the words of the will. (*Schermerhorne v. Schermerhorne*, 6 Johns. Ch. (N. Y.) 70.) Indeed, it may now be said that there is no principle whatever involved in these cases, save to ascertain what is

the testator’s intention and to carry that intention into effect (*Baker v. Baker*, 6 H. L. Cas. 616); wherein that construction is to be given that, under the circumstances, appears to be the correct one, each case getting little aid from the authorities, and depending, in a great degree, upon its own circumstances and language. (*Id.*; per Lord Chelmsford, Lord Chancellor; per Lord Cairns, L. J.; *Birch v. Sherratt*, L. R., 2 Ch. 644.) As expressed by Lord Cranworth, in *Baker v. Baker*, 6 H. L. Cas. 616, the real question is, is that which is given, given as an annuity, or as the interest of a fund; does the language of the testator import that a sum at all events is annually to be paid out of his general estate, or only that it is the interest, or a portion of the interest, of a capital sum that is to be set apart. So Denio, J., says: ‘No positive rule of ready application to every case can be laid down, but each will depend upon a consideration of all the material provisions of the will to be construed, and of the extrinsic circumstances respecting the testator’s family and estate, which may be fairly brought to bear on the question of intent.’ See *Pierrepont v. Edwards*, 25 N. Y. 128, the authority of which case, it is plain, fettered the judgment of the learned General Term. He further says that ‘the leading principle of the cases is that when the testator bequeaths a sum of money, or which is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money should be paid to the legatee at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund,’ and cites *Dicken v. Edwards*, 4 Hare 273. We cannot fail to perceive that the rigid rule stated in *Allan v. Backhouse*, 2 Ves. & B. 65, has been relaxed, and that the courts may now exercise their judgment. And the question arises in every such case, which was the primary and most material portion of the testator’s intent, and which was, in his mind, the incident to such primary intention (*Id.*), and this may be gathered from the context of the will, and from such extrinsic circum-

the whole will;¹ and, *a fortiori*, the word "estate," if coupled with other words which are themselves sufficient to carry the whole

stances as are properly taken into view in such a case."

1. *Hamilton v. Hodsdon*, 6 Moo. P. C. 76; *Hawksworth v. Hawksworth*, 27 Beav. 1; *Doe v. Morgan*, 6 B. & C. 512; 13 E. C. L. 239. See *Stump v. De Neale*, 2 Cranch (C. C.) 640; *Blagge v. Miles*, 1 Story (U. S.) 426; *Archer v. Deneale*, 1 Pet. (U. S.) 585; *Jackson v. Merrill*, 6 Johns. (N. Y.) 191; *Jackson v. DeLancey*, 11 Johns. (N. Y.) 365; 13 Johns. (N. Y.) 537; *Turbett v. Turbett*, 3 Yeates (Pa.) 187; *Davies v. Miller*, 1 Call. (Va.) 127; *Cole v. Clayborn*, 1 Wash. (Va.) 262; *Doe v. Kinney*, 3 Ind. 50; *Houghton v. Hapgood*, 13 Pick. (Mass.) 154; *Doe v. Roe*, 1 Dev. L. (N. Car.) 382; *Den v. Drew*, 14 N. J. L. 68; *Norris v. Clark*, 10 N. J. Eq. 51; *Andrews v. Brumfield*, 32 Miss. 107; *Blewer v. Brightman*, 4 McCord (S. Car.) 60; *Mumford's Estate*, Myr. Prob. (Cal.) 133; *Den v. Snitcher*, 14 N. J. L. 53; *Naglee's Estate*, 52 Pa. St. 154; *Smith v. Smith*, 17 Gratt. (Va.) 268; *Matthews v. Matthews*, 13 La. Ann. 197; *Dole v. Johnson*, 3 Allen (Mass.) 364; *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 329; *Shumate v. Bailey*, 110 Mo. 411.

In *Hamilton v. Hodsdon*, 6 Moo. P. C. 76, a testator, by his will, devised to J. (his heir at law) part of his estate in fee, and also a life estate in another portion of his estate named P.; and also gave to F. (his wife), a life estate in part of P., during her viduity, with remainder to his other son N., in tail, remainder to his (the testator's) daughters for life; and after giving certain specific chattels to F., the will proceeded as follows: "I give all the remainder of my estate that is now in my possession, or may hereafter be mine, excepting what I have particularly given away, unto my wife F. And it is my will that, whatever my estate may consist of, after debts and legacies are paid, it be kept together under the direction of my wife F." N. died without issue, and F., the widow, also died, unmarried and intestate. The heirs at law of J. sold the estate P. to the appellants, subject to the life estate of the daughters. In a suit by the appellants, against the daughters of the testator, the co-heiresses of F., for a partition,

it was held, by the judicial committee, affirming the decree of the court in *Bermuda*, that the remainder in fee, in the estate "P.," passed to F., under the residuary clause. In this case Lord Brougham said: "The principle is now (whatever it may have been anciently) perfectly recognized, nor do I understand it to be substantially disputed on the side of the appellant at the bar, that the word 'estate' is *genus generalissimum*, and will, by its own proper force, without any proof *aliunde* of an intention to aid the construction, carry the realty as well as personalty; and is not to be confined and restrained to personalty only, unless there is a clear intent expressed in other parts of the will, to be gathered either from the whole will, which (I agree with what Lord Eldon has said in one or two of the cases cited) you are always to look to, or from the way in which the word is used in the particular part of the will where the contested use of it arises; or in some other way it is shown to be restricted to mere personal estate, contrary to the strict, usual, and now established force, effect, and value of the word.

"Now, that being the case, the only question is whether, in this case, the natural force and effect of the word is restricted, for it is admitted, on the part of the respondents, in favor of the judgment of the court below, and not denied at all in that judgment, that it may be so qualified and restricted as not to have its proper and natural force; if I may so speak, that force which naturally and properly would belong to it if not so restrained; or that it may be so restrained by matter showing the general intention to be to restrain it, or any words used in collocation; for instance, with the other words, or the particular mode in which it is used by the maker of the instrument. Now, it is needless to cite cases upon this, either upon the legal force and effect of the word if not restrained, or upon the power of circumstances to except it from that general rule, or to restrain its meaning, for it seems to be generally admitted. It must always be kept in view that nobody here contends, nor does the judgment of the court below require such contention, that the word 'estate' should be here used to mean only real

personal estate, will carry the realty, as otherwise it would be inoperative.¹ Whether the word will be confined to personalty, by a context composed of words *ejusdem generis* exclusively applicable to that species of property which are not in themselves sufficient to pass the entire personal estate, is very doubtful. The weight of authority is, perhaps, in favor of the restriction.²

l. PROPERTY.—(See PROPERTY, vol. 19, p. 283).—The principles applicable to the construction of the word "estate," apply equally to the construction of the word "property."³

m. EFFECTS.—See EFFECTS, vol. 6, p. 174.

n. MORTGAGES—SECURITIES FOR MONEY—MONEY ON SECURITY.—A bequest of "mortgages," "securities for money," or

estate. In means both realty and personalty, and the fallacy of the argument for the appellants throughout appears to me to be this: They say, 'How can this mean real estate, when you have the word "effects," which only applies to personalty?' The real meaning of the word 'estate' is not 'real estate,' but 'real' plus 'personal,' and so *reddendo singula singulis*, these words which are to be restricted words, because they only apply to personal estate as they include future acquisitions, which would not, in the case of lands, pass under such a gift. As the words are not intended to be used as excluding personalty, those words which are added here will apply to the personal part of the estate, and it does not follow on that account that, because there is personalty whereon they can operate, therefore the realty is to be excluded."

1. Theobald on Wills (2d ed.) 157; Tilley v. Simpson, 2 T. R. 659 n; Edwards v. Barnes, 2 Bing. N. Cas. 252; 29 E. C. L. 324; Doe v. Langlands, 14 East 370; Jongsma v. Jongsma, 1 Cox 362; Patterson v. Huddart, 17 Beav. 210; Hamilton v. Buckmaster, L. R., 3 Eq. 323; Sanderson v. Dobson, 7 C. B. 81; 10 B. C. 47. See Dobson v. Bowness, L. R., 5 Eq. 404; Loftus v. Stoney, 17 Ir. Ch. 178; Mayo v. Bland, 4 Md. Ch. 484.

2. Lord Hardwicke, in Tilley v. Simpson, 2 T. R. 659, n.; D'Almaine v. Moseley, 1 Drew. 632; *contra*, Loftus v. Stoney, 17 Ir. Ch. 178; *In re* Greenwich Hospital Imp. Act, 20 Beav. 458.

Cases in Which the Trusts Are Inapplicable to Realty.—"If there are any words in the gift accurately applicable to realty, such as 'devise,' the fact that the trusts declared are only applicable to personalty will not prevent the real estate from passing. Doe v. Chapman, 1 H. Bl. 223; Dunnage v.

White, 1 J. & W. 583; Stokes v. Salomons, 9 Hare 75; Lloyd v. Lloyd, L. R., 7 Eq. 458; Longley v. Longley, L. R., 13 Eq. 133. Real estate will pass even if there are no words technically appropriate, and the trusts declared are not literally applicable to realty, if they can be held popularly applicable. Saumarez v. Saumarez, 4 Myl. & C. 331; D'Almaine v. Moseley, 1 Drew. 632; Morrison v. Hoppe, 4 De G. & S. 234. Thus the words 'collect and get in' will not prevent realty from passing. Hamilton v. Buckmaster, L. R., 3 Eq. 323. So, too, if the trust is for sale or investment, the inapplicability of the subsequent trusts to realty is immaterial. O'Toole v. Browne, 3 El. & Bl. 572; Streatfield v. Cooper, 27 Beav. 338; Fullerton v. Martin, 22 L. J. Ch. 893; Dobson v. Bowness, L. R., 5 Eq. 404. See also Affleck v. James, 17 Sim. 121. If, however, the gift is to trustees, their executors, administrators, and assigns, on trusts exclusively applicable to personalty, real estate will not pass. Doe v. Buckner, 6 T. R. 610; Pagson v. Thomas, 6 Bing. N. Cas. 337; Coard v. Holderness, 20 Beav. 147." Theobald on Wills (2d ed.) 158.

3. Theobald on Wills (2d ed) 157; See Brawley v. Collins, 88 N. Car. 605; Taubenhan v. Dunz, 20 Ill. App. 262; Johnson v. Goss, 128 Mass. 433; Otis v. Coffin, 7 Gray (Mass.) 511; Gibbens v. Curtis, 8 Gray (Mass.) 392; Wheeler v. Dunlap, 13 B. Mon. (Ky.) 291; Rossetter v. Simmons, 6 S. & R. (Pa.) 452; Fraser v. Hamilton, 2 Desaus. (S. Car.) 573; M'Lenore v. Blocker, 1 Harp. Eq. (S. Car.) 272; Pell v. Ball, Spears Eq. (S. Car.) 48; Den v. Payne, 5 Hayw. (Tenn.) 104; Atkins v. Kron, 2 Ired. Eq. (N. Car.) 58; Jameson, Appellant, 1 Mich. 99; Seekright v. Carlington, 1 Wash. (Va.) 45.

"money as securities," carries both the beneficial interest in the security and the legal estate in the land, subject to the mortgage, upon the principle that the testator meant the legatee to receive the money and possess all powers necessary to recover it.¹

o. GROUND RENTS.—A devise of freehold or leasehold ground rents passes the reversion.²

p. MONEY OR MONEYS.—See MONEY, vol. 15, p. 702.

q. "MONEY DUE AND OWING."—"Money due and owing at the testator's decease" will pass a balance at bank, damages recovered by the executor and unliquidated at death, money due on a policy of insurance upon the testator's life, and money due the testator from an executor where the estate has been got in before the testator's death;³ but will not pass money due on a contract not completed till after the testator's death,⁴ nor a distributive share in the residuary personal estate of another person, not ascertained at the time of the testator's death.⁵

r. READY MONEY—CASH.—(See READY MONEY, vol. 19, p. 971).—Ready money will pass money in bank or in the hands of an agent used as a banker; but not notes of hand, debts due from

1. Hawkins on Wills *48; Schouler on Wills (2d ed.), § 524; 1 Jarm. on Wills (5th ed.) *699; *In re Ring's Mortgage*, 5 De G. & S. 644; *Renvoize v. Cooper*, 6 Madd. 371; *Knight v. Robinson*, 2 K. & J. 563; *Arrowsmith's Trusts*, 4 Jur. N. S. 1123.

In *Re Cantley*, 17 Jur. 124, *Kincrosley, C. C.*, held that a bequest of "money on securities" did not pass the legal estate. But in *Doe v. Bennett*, 6 Exch. 892, it was expressly ruled that the words "to receive all moneys upon mortgage," were sufficient to pass both the money on mortgage and the legal estate upon which it was secured. *Parke, B.*, said: "It must be assumed that the testator meant his wife to receive the money, and to possess all powers necessary for the purpose of recovering it." And this was approved in *Arrowsmith's Trusts*, 4 Jur. N. S. 1123, by the Lords Justices. See *Brown v. Brown*, 6 W. R. 613.

It seems that the Conveyancing Act of 1881 has altered the law in this respect in *England*. See MONEY, vol. 15, p. 701.

What Securities for Money Will Not Pass.—"Securities for money" will not pass a balance on current account at the bank (a), money on a deposit account (b), I. O. U.'s (c), shares (d), bank stock (e), mere debts (f), a lien for unpaid purchase-money (g), or

money lent on mortgage where the legal estate is in trustees, and the testator is entitled only to the residue after certain payments (h). *Vaisey v. Reynolds*, 5 Russ. 12 (a); *Hopkins v. Abbott*, L. R., 19 Eq. 222 (b); *Barry v. Harding*, 1 J. & L. 475 (c); *Hudleston v. Gouldsbury*, 10 Beav. 547; *Turner v. Turner*, 21 L. J. Ch. 843 (d); *Ogle v. Knipe*, L. R., 8 Eq. 434 (e); *In re Mason's Will*, 34 Beav. 494 (f); *Goold v. Teague*, 7 W. R. 84; 5 Jur. N. S. 116 (g); *Ogle v. Knipe*, L. R., 8 Eq. 434 (h). *Theobald on Wills* (2d ed.) 148.

2. *Theobald on Wills* (2d ed.) 155; *Maundy v. Maundy*, 2 Stra. 1020; *Kaye v. Laxon*, 1 Bro. C. C. 76; *Alexander v. Paxson*, 47 Pa. St. 12.

3. *Theobald on Wills* (2d ed.) 147, citing *Carr v. Carr*, 1 Meriv. 541; *Waite v. Combes*, 5 De G. & S. 676; *Bide v. Harrison*, L. R., 17 Eq. 76; *Petty v. Willson*, L. R., 4 Ch. 574; *Bainbridge v. Bainbridge*, 9 Sim. 16. See *Byron v. Brandreth*, L. R., 16 Eq. 475. See *Delamater's Estate*, 1 Whart. (Pa.) 362.

4. *Stephenson v. Dowson*, 3 Beav. 342.

5. *Martin v. Hobson*, L. R., 8 Ch. 401. Otherwise, however, if the estate has been got in by the executor so as to constitute a debt due from him. *James, L. J.*, in *Martin v. Hobson*, L. R., 8 Ch. 406, citing *Bainbridge v. Bainbridge*, 9 Sim. 16.

an agent or salesmaster, dividends not demanded, rent or interest due on mortgage.¹ "Cash" will not include bonds, long annuities, or promissory notes.²

s. **GOODS AND CHATTELS**—(See **CHATTELS**, vol. 3, p. 163; **GOODS**, vol. 8, p. 1362).—The phrase "goods and chattels," unrestrained by the context, will carry the whole personal estate.³ "Chattels, real and personal," unexplained by the context, will not pass realty.⁴ Under a bequest of goods and chattels in a particular place, choses in action, as bonds or securities for money, will not pass, since they have in themselves no locality distinct from the domicile of the owner, except for purposes of probate jurisdiction.⁵

t. **THINGS**.—See **THINGS**, vol. 25, p. 1058.

u. **POSSESSIONS**.—See **POSSESSION**, vol. 18, p. 842, note.

v. **HOUSEHOLD EFFECTS — FURNITURE — GOODS**.—See **HOUSEHOLD**, vol. 9, p. 782, note 3.

16. **Meaning of Certain Words Descriptive of Objects**—a. **CHILDREN**.—See **CHILDREN**, vol. 3, p. 229.

b. **GRANDCHILDREN**.—See **GRANDCHILDREN**, vol. 8, p. 1412.

c. **COUSINS**.—See **COUSINS**, vol. 4, p. 462.

d. **NEPHEWS, NIECES**.—See **NEPHEWS**, vol. 16, p. 485.

e. **FAMILY**.—See **FAMILY**, vol. 7, p. 807.

f. **NEXT OF KIN**.—See **NEXT OF KIN**, vol. 16, p. 703; **KINDRED**, vol. 12, p. 521.

g. **ISSUE**.—See **ISSUE**, vol. 11, p. 868.

h. **DESCENDANTS**.—See **DESCENDANTS**, vol. 5, p. 641; **ISSUE**, vol. 11, p. 868.

i. **RELATIONS**.—See **RELATIONS**, vol. 20, p. 728.

17. **Construction of Gifts to Classes**—a. **DISTINGUISHING CHARACTERISTICS OF SUCH GIFTS**.—See **LEGACIES AND DEVISES**, vol. 13, p. 60.

b. **TIME OF ASCERTAINING THE CLASS**—(1) *In Gifts to Children*.—In the case of gifts of real or personal property to children as a class, the following distinctions have been adopted:

1. If the gift be immediate (*i. e.*, to take effect in possession *eo instanti* the testator dies) all children living at the testator's death

1. Theobald on Wills (2d ed.) 147; Parker v. Marchant, 1 Y. & C. C. 290; Powell's Trust, Jo. 49; Vaisey v. Reynolds, 5 Russ. 12; Fryer v. Rankin, 11 Sim. 55; Smith v. Butler, 1 J. & L. 692; May v. Grove, 3 De G. & S. 462. See Smith v. Burch, 92 N. Y. 228.

2. Beales v. Crisford, 13 Sim. 592.

3. Schouler on Wills (2d ed.), § 508; 1 Jarm. on Wills (5th ed.) *751; 1 Schouler on Pers. Prop. (2d ed.), § 16; Kendall v. Kendall, 4 Russ. 370; Moore v. Moore, 1 Bro. C. C. 127. See also Jackson v. Robinson, 1 Yeates (Pa.) 101.

4. Grayson v. Atkinson, 1 Wils. 333; Theobald on Wills (2d ed.) 160.

5. Schouler on Wills (2d ed.), § 508; Theobald on Wills (2d ed.) 154; Moore v. Moore, 1 Bro. C. C. 127; Burke v. Turner, 7 Sim. 681; Fleming v. Brook, 1 Sch. & Lef. 318; Chapman v. Hart, 1 Ves. 271; Lady Aylesbury's Case, 11 Ves. 662; Hertford v. Lowther, 7 Beav. 1. See Kingsley v. Blackmer (Vt. 1891), 22 Atl. Rep. 600; Pennimen v. French, 17 Pick. (Mass.) 404.

It has been held, however, that debts due from persons living in the county pass under a gift of property in the

take, to the exclusion of those born afterwards.¹ The fact that there is a gift over in default of children or in case any die under age, does not enlarge the class.² If there are no children *in esse* at the testator's death, the better opinion is that all children born at any time afterwards are entitled.³

2. Under a gift to children by way of remainder, all are entitled who come into existence before the period of distribution, to the exclusion of those who may come into existence at any time afterwards.⁴ Under such a limitation the children *in esse* at the death of the testator take vested interests, subject to open up and let in those afterwards born before the period of distribution.⁵ The

county. *Tyrone v. Waterford*, 1 De G. F. & J. 613.

1. Theobald on Wills (2d ed.) 243; 2 Jarm. on Wills (5th ed.) *156; *Singleton v. Gilbert*, 1 Cox 68; *Viner v. Francis*, 2 Cox 190; *Heathe v. Heathe*, 2 Atk. 121; *Scott v. Harwood*, 5 Madd. 205; *Hill v. Chapman*, 1 Ves. Jr. 405; *Garbrand v. Mayot*, 2 Vern. 105. See *Merriam v. Simonds*, 121 Mass. 198; *Gardiner v. Guild*, 106 Mass. 25; *Yeaton v. Roberts*, 28 N. H. 459; *Hall v. Smith*, 61 N. H. 144; *Meares v. Meares*, 4 Ired. (N. Car.) 192; *Knight v. Knight*, 3 Jones Eq. (N. Car.) 167; *Gross' Estate*, 10 Pa. St. 361; *Shotts v. Poe*, 47 Md. 514; *Post v. Herbert*, 27 N. J. Eq. 540; *Chasmar v. Bucken*, 37 N. J. Eq. 415; *Downing v. Marshall*, 23 N. Y. 373; *Tucker v. Bishop*, 16 N. Y. 402; *Mowatt v. Carow*, 7 Paige (N. Y.) 339; *Palmer v. Horn*, 20 Hun (N. Y.) 70; *Springer v. Congleton*, 30 Ga. 977. But see *Cook v. Cook*, 2 Vern. 545; *Northey v. Strange*, 1 P. Wms. 341; *Wood v. McGuire*, 15 Ga. 202; *Abbott v. Essex Co.*, 18 How. (U. S.) 202; *Conner v. Ogle*, 4 Md. Ch. 425; *Griffin v. Lynch*, 16 Ind. 396; *Soteldo v. Clement*, 29 Ohio L. J. 384.

A devise to "B's children, their heirs and assigns forever," vests the property in such as may be *in esse* at the testator's death. *Wood v. McGuire*, 15 Ga. 202.

2. Theobald on Wills (2d ed.) 244; *Davidson v. Dallas*, 14 Ves. Jr. 576; *Berkeley v. Swinburne*, 16 Sim. 275; *Andrews v. Cartington*, 3 Bro. C. C. 401; *Scott v. Harwood*, 5 Madd. 205. See *Hutcheson v. Jones*, 2 Madd. 406; *Chasmar v. Bucken*, 37 N. J. Eq. 415; *Den v. Sayre*, 3 N. J. L. 183; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185; *Walker v. Williamson*, 25 Ga. 549; *Lorillard v. Coster*, 5 Paige (N. Y.) 172.

3. Theobald on Wills (2d ed.) 244;

Shep. Touch. 438; *Weld v. Bradbury*, 2 Vern. 705; *Harris v. Lloyd*, T. & R. 310; *Hutcheson v. Jones*, 2 Madd. 124; *Shephard v. Ingram*, Ambl. 448.

Formerly there was some doubt as to whether a devise of realty in such case would not fail altogether; but the better opinion now is that such a devise would go to all after born children. Theobald on Wills (2d ed.) 544, citing *Fear. Rem.* 532; *Shep. Touch.* 438.

4. Theobald on Wills (2d ed.) 244; 2 Jarm. on Wills (5th ed.) *156. REMAINDERS, vol. 20, p. 855; *Hamletts v. Hamlett*, 12 Leigh (Va.) 350. See *Knight v. Knight*, 3 Jones Eq. (N. Car.) 167; *Heilman v. Heilman*, 129 Ind. 59; *Lombard v. Willis*, 147 Mass. 13; *Britton v. Miller*, 63 N. Car. 268; *Teed v. Morton*, 60 N. Y. 503; *Haskins v. Tate*, 25 Pa. St. 249; *Wilson v. Corbin*, 1 Pars. Sel. Cas. (Pa.) 347; *Sorver v. Berndt*, 10 Pa. St. 213; *Swinton v. Legare*, 2 McCord Eq. (S. Car.) 440; *Cole v. Creyon*, 1 Hill Eq. (S. Car.) 311; *Clarke v. Terry*, 34 Conn. 176; *Hill v. Rockingham Bank*, 45 N. H. 270.

5. 2 Jarm. on Wills (5th ed.) 157; *McGregor v. Toomer*, 2 Strobb. Eq. (S. Car.) 51; *Crim v. Knotts*, 4 Rich. Eq. (S. Car.) 340; *Hamletts v. Hamlett*, 12 Leigh (Va.) 350; *Denny v. Allen*, 1 Pick. (Mass.) 147; *Annable v. Patch*, 3 Pick. (Mass.) 360; *Johnson v. Valentine*, 4 Sandf. (N. Y.) 36; *Nordine v. Greenfield*, 7 Paige (N. Y.) 544; *Campbell v. Stokes*, 142 N. Y. 23; *Harris v. Alderson*, 4 Sneed (Tenn.) 250; *Hovey v. Nellis*, 98 Mich. 374; *Budd v. Haines* (N. J. Eq. 1894), 29 Atl. Rep. 170.

REMAINDERS, vol. 20, p. 854. Compare *Cleghorn v. Scott*, 86 Ga. 496; *Bruce v. Bissell*, 119 Ind. 529; *Dole v. Keyes*, 143 Mass. 237; *Ballard v. Ballard*, 18 Pick. (Mass.) 41; *Haskins v. Tate*, 25 Pa. St. 249; *Yeaton v. Roberts*, 28 N.

rule is the same whether the gift over be a remainder or an executory interest,¹ nor does the fact that there is a gift over in case of

H. 459; *Phillips v. Johnson*, 14 B. Mon. (Ky.) 140; *McArthur v. Scott*, 113 U. S. 340.

R. devises real and personal estate, after the death of his wife, to whom he gives the use and profits during her life, to all the children of his brothers and sisters, "as well of those brothers and sisters who are deceased, as of those who still survive, in equal proportions." At the time of making the will, and of the death of R., there were living forty-seven nephews and nieces; thirty-eight of them, together with three others born after his death, survived the wife. It was held that the forty-seven took a vested remainder in the land, which opened to let in the three; and that the personal estate belonged to the forty-one who survived the wife. *Denny v. Allen*, 1 Pick. (Mass.) 147.

The testator bequeathed the residue of his estate, after his wife's death or marriage, to be equally divided among James, Mary, Patsey, Nancy and Narcissa (who were the testator's children), the children of his son George, the children of his daughter Elizabeth, the children of his son Bedford, deceased, and the children of his daughter Obedience; his five children legatees were all married, and had, in all, thirty-one children living at his death; his son Bedford left three children; and his son George and daughters Elizabeth and Obedience were married, and these four had, in all, eighteen children living at testator's death; and the three last had five children born after his death and during the widow's life. It was held, first, that the children of George, Elizabeth, and Obedience, born after the testator's decease and during the widow's life, as well as those in being at the testator's death, are entitled to shares; second, that such of the grandchildren as were in being at the testator's death took vested interests, subject, however, to be diminished by the birth of other grandchildren, and the after born grandchildren, as soon as they came in being, took likewise vested interests. *Hamletts v. Hamlett*, 12 Leigh (Va.) 357.

B. made the following devise: "If I should have no child by my wife R., I do then give the use of all my personal estate, not mentioned, to my daughter C., during her natural life, at

her decease to be equally divided, share and share alike, amongst all her children, to them and their heirs; and if I should have no child by my wife, I do then give and bequeath the use of all my estate, both real and personal, to C., during her life, and at her decease to be equally divided amongst her children, to them, etc.; if I should leave no children, and my daughter should die and leave no children, then, at the decease of my wife," over. It was held that, upon the decease of B., without other children, those of his daughter took a vested remainder, which opened to let in after born children. *McGregor v. Toomer*, 2 Strobb. Eq. (S. Car.) 51.

A testator provided: "It is my will and desire, that the rest and remainder of my estate be divided into equal shares among my brothers John and Henry's lawful children, and that my said brothers have the use of their children's portion, or part, during their natural lives, and at their death, to their children forever." At the death of the testator, John had eight children living, and Henry had three; and Henry had nine children born afterwards. It was held that John and Henry were each entitled to take one moiety of the estate for life, and that at Henry's death all his children, as well those born after the decease of testator as those born before, were entitled to his moiety as remainder-men. *Crim v. Knotts*, 4 Rich. Eq. (S. Car.) 340.

A testator, by his will, empowered his executors to sell his property, real and personal, and gave the interest of the proceeds, and the rents and profits of such of the real estate as should remain unsold, to his wife for life, with remainder to the children of his brother who should be living at the decease of the widow, and to the lawful issue of such children. It was held that, upon the testator's death, the widow took a life estate in the property unsold, and that the brother's children then living took vested remainders in fee, subject to open and let in after-born children, and to be divested by death during the life of the widow, or by the execution of the executor's power of sale. *Nodine v. Greenfield*, 7 Paige (N. Y.) 544.

1. 2 Jarm. on Wills (5th ed.) 157, 158; *Stanley v. Wise*, 1 Cox 432; *Ellison v.*

the decease of any of the children under age, affect the construction.¹ The principle seems to extend to all cases in which the distribution is postponed, as to a gift to be divided twenty years after testator's death.² If no children are born before the death of the tenant for life, all after born children are admitted, unless there is a clear intent to make distribution once for all when the funds fall into possession.³

Airey, 1 Ves. 111; Haughton v. Harrison, 2 Atk. 329; Baldwin v. Rogers, 3 De G. M. & G. 649.

1. 2 Jarm. on Wills (5th ed.) 157; Berkeley v. Swinburne, 16 Sim. 275.

2. 2 Jarm. on Wills (5th ed.) 158; Oppenheim v. Henry, 10 Hare 441; Webster v. Welton, 53 Conn. 184; McArthur v. Scott, 113 U. S. 340; Phelps v. Phelps, 28 Barb. (N. Y.) 121; Fulkerson v. Bullard, 3 Sneed (Tenn.) 260. But see, as to postponement of possession for special purposes, as to pay annuities and the like, Singleton v. Gilbert, 1 Cox 68; Coventry v. Coventry, 2 D. & S. 470; Hill v. Chapman, 1 Ves. Jr. 405; Cort v. Winder, 1 Coll. 320; Thomman's Estate, 161 Pa. St. 444.

Cases Illustrating the Rule.—A testator ordered that his negroes should be hired out by his executors for five years, "and at the expiration of five years that my executors divide said negroes equally among all my children, and in case any of my children should die before said time, leaving lawful children, said children shall take the shares of their parents." It was held that this was a bequest to a class answering a certain description at the end of five years, and no interest vested until that time. Fulkerson v. Bullard, 3 Sneed (Tenn.) 260.

A testator, after bequeathing several specific legacies in former clauses of his will, provided that, after paying, etc., such legacies, as to all the rest, residue, and remainder of his property, he bequeathed, etc., the same to his children and grandchildren, as follows: He ordered the same to be divided into as many shares as he should have children and grandchildren living at the end of ten years after his decease, provided A. or D. should either of them be living at the time. But if, before the expiration of ten years from his death, A. and D. should both die, then, at the death of the survivor of them, he ordered his said residuary estate to be divided into as many shares as he should have children and grandchildren living at the death of the survivor.

By another clause, he provided that if his wife should die before the division of the residuary estate, an annuity previously granted to her in the will should be incorporated with such residue; but if she should die after such division, the annuity fund should be divided among as many children and grandchildren as he should have at the time of her decease. It was held that the interests taken by the children and grandchildren were not vested by the death of the testator, to be paid at the end of ten years, but that they were executory, and that only such grandchildren as were alive at the expiration of the ten years would be entitled to a share of the property. Phelps v. Phelps, 28 Barb. (N. Y.) 121.

3. Theobald on Wills (2d ed.) 246, citing Chapman v. Blissett, Cas. temp. Talb. 145; Wyndham v. Wyndham, 3 Bro. C. C. 58; Conduitt v. Soane, 4 Jur. N. S. 502, explaining Grodfrey v. Davis, 6 Ves. Jr. 43.

Such, at least, is the case in bequests of personality by way of remainder. Theobald on Wills (2d ed.) 346; 2 Jarm. on Wills (5th ed.) 176.

Or in the case of remainders of freehold, where the legal estate is in trustees or mortgagees. Theobald on Wills (2d ed.) 245; 2 Jarm. on Wills (5th ed.) 171; *In re Eddell's Trusts*, L. R. 11 Eq. 559; Berry v. Berry, 7 Ch. Div. 657; Astley v. Micklethwait, 15 Ch. Div. 59.

And such would also seem to be the case in regard to remainders of freehold, in states in which statutes exist, which provide that the remainder shall not be destroyed by the determination of the particular estate. See 2 Jarm. on Wills (5th ed.) 171-176; REMAINDERS, vol. 20, p. 892.

But in states in which a contingent remainder of freehold still continues liable to destruction, by the determination of the particular estate (see REMAINDERS, vol. 20, p. 886) before it is ready to vest, a remainder of freehold fails if there are no children *in esse* when the prior life estate determines.

3. Upon the same principle, if the interest bequeathed is reversionary, the class remains open till the interest falls into possession.¹

4. When there is a bequest of an aggregate fund to children as a class, and the share of each child is made payable on attaining a given age or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded.² If

Theobald on Wills (2d ed.) 244; 2 Jarm. on Wills (5th ed.) 176; Rhodes v. Whitehead, 2 D. & S. 532; Price v. Hall, L. R., 5 Eq. 399; Perceval v. Perceval, L. R., 9 Eq. 386; Brackenbury v. Gibbons, 2 Ch. Div. 417; Cunliffe v. Branker, 3 Ch. Div. 393.

1. Theobald on Wills (2d ed.) 246; Walker v. Shore, 15 Ves. Jr. 122; Harvey v. Stracey, 1 Drew. 122.

"But this does not apply where a residue is given, and some portion of the property which falls into it is reversionary, unless there are provisions indicating an intention to treat the reversionary property separately. Hill v. Chapman, 1 Ves. Jr. 40; 53 Bro. C. C. 391; Hagger v. Payne, 23 Beav. 474; Coventry v. Coventry, 2 D. & S. 470; King v. Cullen, 2 De G. & S. 252." Theobald on Wills (2d ed.) 246.

2. Hawkins on Wills *75; 2 Jarm. on Wills (5th ed.) *160. *163; Andrews v. Partington, 3 Bro. C. C. 403; Whitbread v. St. John, 10 Ves. Jr. 152; Dawson v. Massey, 2 Ch. Div. 753; Brandon v. Aston, 2 Y. & C. C. 24; Clarke v. Clarke, 8 Sim. 59; Buckley v. Reed, 15 Pa. St. 83; Heisse v. Markland, 2 Rawle (Pa.) 274; Wilson v. Corbin, 1 Pars. Sel. Cas. (Pa.) 347; Drake v. Pell, 3 Edw. Ch. (N. Y.) 251; Collin v. Collin, 1 Barb. Ch. (N. Y.) 636; Double-day v. Newton, 27 Barb. (N. Y.) 431; Tucker v. Bishop, 16 N. Y. 404; Hubbard v. Lloyd, 6 Cush. (Mass.) 522; Emerson v. Cutter, 141 Pick. (Mass.) 108; Fosdick v. Fosdick, 6 Allen (Mass.) 43; Handberry v. Doolittle, 38 Ill. 206; Hempstead v. Dickson, 20 Ill. 193; Travis v. Morrison, 28 Ala. 494; Hocker v. Gentry, 3 Metc. (Ky.) 463; Richardson v. Sinkler, 2 Desaus. (S. Car.) 127; Simpson v. Spence, 5 Jones Eq. (N. Car.) 208; Fleetwood v. Fleetwood, 2 Dev. Eq. (N. Car.) 222; Vanhook v. Rogers, 3 Murph. (N. Car.) 178.

Thus, a bequest of a residue "unto all the children of M. equally, when they shall severally attain the age of twenty-five years," includes all the

children born before one attains that age, although born after the death of the testator, but does not include those born after one attains that age. Hubbard v. Lloyd, 6 Cush. (Mass.) 522.

The following distinctions are said to be sustained by the English authorities:

"If there is a direct gift 'to be paid at twenty-one, or to such as attain twenty-one,'

"a. If any member of the class attain twenty-one in the testator's lifetime, the class is fixed at the testator's death. Hagger v. Payne, 23 Beav. 474. A child *en ventre* at the testator's death was held not to be included in *Re Gardiner's Estate*; Garratt v. Weeks, L. R., 20 Eq. 647, *sed quare*. See Bortoft v. Wadsworth, 12 W. R. 523.

"b. If none attain twenty-one in the testator's lifetime, all born at the testator's death, and coming into existence before the eldest attains twenty-one, are admitted. Hoste v. Pratt, 3 Ves. Jr. 730; Balm v. Balm, 3 Sim. 492; Blease v. Burgh, 2 Beav. 221; Oppenheim v. Henry, 10 Hare 441; Gillman v. Daunt, 3 K. & J. 48; Lock v. Lamb, L. R., 4 Eq. 372; Gimblett v. Purton, L. R., 12 Eq. 427. As a rule, each child attaining twenty-one is entitled to have his share paid to him, but this is not so if the whole income is given for maintenance and there are children who require maintenance. Berry v. Bryant, 2 D. & S. 1.

"c. It seems doubtful whether, if there are no children at the testator's death, all would be admitted, whether born before or after the eldest attains twenty-one. Armitage v. Williams, 27 Beav. 346, better reported in 7 W. R. 650, which seems an authority for the affirmative, was probably decided on the authority of *Mainwaring v. Beevor*, 8 Hare 44. See *Harris v. Lloyd*, T. & R. 310. There are the following exceptions to the rule: (a) If the time fixed for payment would carry the class beyond the limits of perpetuity, members

the gift is to A for life, and then to children who attain twenty-one, the class will be fixed as regards exclusion at the death of A, or when the eldest attains twenty-one, whichever is last.¹

5. A child *en ventre* at the time when the class closes, is admitted even though the word "living" or "born" be added to the description.²

coming into existence after the testator's death, and before the time of payment, will not be admitted. *Kevern v. Williams*, 5 Sim. 171; *quare* as to *Elliott v. Elliott*, 12 Sim. 276. (b) Maintenance out of the shares or presumptive shares of children will not extend the class. *Gimblett v. Purton*, L. R., 12 Eq. 427. But if maintenance and advancement are continued beyond the time when the eldest child attains twenty-one, if, for instance, advancement is directed out of vested and presumptive shares, all children will be let in. *Iredell v. Iredell*, 25 Beav. 485; *Bateman v. Gray*, L. R., 6 Eq. 215. In *Deffis v. Goldschmidt*, 19 Ves. Jr. 566; 1 Meriv. 417, where expressions were used showing that the parents could not die leaving a child who would not be entitled to maintenance, all children were included. See *Evans v. Harris*, 5 Beav. 45. (c) If distribution is to be made when all attain twenty-one, or when the youngest attains twenty-one, all children will be admitted. *Hughes v. Hughes*, 3 Bro. C. C. 434; 14 Ves. Jr. 256; *Mainwaring v. Beevor*, 8 Hare 44, and perhaps *Armitage v. Williams*, 27 Beav. 346; 7 W. R. 650. On the other hand, the class would again be restricted if the distribution is to be made when the youngest for the time being attains twenty-one. *Gooch v. Gooch*, 14 Beav. 565; 3 De G. M. & G. 366.

"(d) When the gift is of a particular sum to each member of the class, the class is fixed at the death of the testator, whether possession is postponed to twenty-one or not. *Ringrose v. Braham*, 2 Cox 384; *Storrs v. Benbow*, 2 Myl. & K. 46; 3 De G. M. & G. 390; *Butler v. Lowe*, 10 Sim. 317. And if there are no children then in existence, the gift fails. *Mann v. Thompson*, Kay 638; *Rogers v. Mutch*, 10 Ch. Div. 25." *Theobald on Wills* (2d ed.) 246-248.

1. *Theobald on Wills* (2d ed.) 248; 2 Jarm. on Wills (5th ed.) *161; *Clarke v. Clarke*, 8 Sim. 59; *Robley v. Ridings*, 11 Jur. 813; *Beckton v. Barton*, 27

Beav. 99; *Parsons v. Justice*, 34 Beav. 598; *Emmet v. Emmet*, 13 Ch. Div. 484; *Brandon v. Aston*, 2 Y. & C. C. 24.

2. *Theobald on Wills* (2d ed) 249; *Doe v. Clarke*, 2 H. Bl. 399; *Clarke v. Blake*, 2 Bro. C. C. 319; *Trower v. Butts*, 1 Sim. & Stu. 181.

"It is now fully settled, that a child *en ventre sa mere* is within the intention of a gift to children living at the death of a testator; not because such a child (and especially in the early stages of conception) can strictly be considered as answering the description of a child living, but because the potential existence of such a child places it plainly within the reason and motive of the gift. Sir J. Leach in *Trower v. Butts*, 1 Sim. & Stu. 184. Similarly, when there is a gift to the children of a tenant for life, a gift over if at the end of five years she has not had a child, will not take effect if she then has a child *en ventre*. *Pearce v. Carrington*, L. R., 8 Ch. 969. A child *en ventre* is for this purpose supposed to be born at the time of distribution; if, therefore, supposing it to have been then born, it would have been illegitimate, it will not be admitted to take, notwithstanding the marriage of its parents before its birth. *In re Corlass*, 1 Ch. Div. 460. But though a child *en ventre* is looked upon as existing for the purpose of receiving a benefit, it is not looked upon as existing for any other purpose, if, for instance, distribution is to be made when the youngest child for the time being attains twenty-one; the fact that there is a child *en ventre* when the youngest attains twenty-one will not postpone the division. *Blasson v. Blasson*, 2 De G. J. & S. 665." *Theobald on Wills* (2d ed.) 249.

In the *United States*, the doctrine that a child *en ventre* will be considered a child living whenever it is for his benefit to be so considered, has been frequently recognized. *Groce v. Rittenberry*, 14 Ga. 234; *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 508;

6. It seems to be the better opinion that the words "to be born" or "to be begotten," annexed to an immediate gift to children, so that, but for the words, it would have been confined to children existing at the testator's death, will have the effect of extending the gift to all children who shall ever come into existence, since by such construction only, can the words in question be given some operation.¹ But this rule does not apply to general pecuniary legacies, since its effect would be to postpone the distribution of the general estate (out of which the legacies are payable) until the death of the parent of the legatees,² nor does it apply to gifts preceded by a life estate, or where distribution is to be made at some future time, as when the children attain a specified age, or marry; since the words may be satisfied without departure from the ordinary construction.³

Burke v. Wilder, 1 McCord Eq. (S. Car.) 551; *Swift v. Duffield*, 5 S. & R. (Pa.) 38; *McKnight v. Read*, 1 Whart. (Pa.) 213; *Laird's Appeal*, 85 Pa. St. 339; *Steadfast v. Nicoll*, 3 Johns. Cas. (N. Y.) 18; *Smart v. King*, Meigs (Tenn.) 149; *Picot v. Armistead*, 2 Ired. Eq. (N. Car.) 226; *Petway v. Powell*, 2 Dev. & B. Eq. (N. Car.) 312; *Jenkins v. Freyer*, 4 Paige (N. Y.) 47. Compare *Armistead v. Dangerfield*, 3 Munf. (Va.) 20; *Starling v. Price*, 16 Ohio St. 29.

But whether he can take as a child "born," has been seriously questioned. *Hall v. Hancock*, 15 Pick. (Mass.) 258.

1. 2 Jarm. on Wills (5th ed.) *178; *Mogg v. Mogg*, 1 Meriv. 654; *Gooch v. Gooch*, 14 Beav. 565; 3 De G. M. & G. 366; *Eddowes v. Eddowes*, 30 Beav. 603; *Shinn v. Motley*, 3 Jones Eq. (N. Car.) 490; *Napier v. Howard*, 3 Ga. 202. See *Butterfield v. Haskins*, 33 Me. 392; *Bullock v. Bullock*, 2 Dev. Eq. (N. Car.) 316. Compare *Burke v. Wilder*, 1 McCord Eq. (S. Car.) 551. In some cases it has been said that the doctrine of the text is confined to devises of realty. *Sprackling v. Ranier*, 1 Dick. 344; *Dias v. DeLivera*, L. R., 5 App. Cas. 132. The soundness of any such distinction may well be questioned. 2 Jarm. on Wills (5th ed.) *180, note (h), by Randolph & Talcott.

2. 2 Jarm. on Wills (5th ed.) *179; *Storrs v. Benbow*, 2 Myl. & K. 46; *Townsend v. Early*, 28 Beav. 429; *Whitbread v. St. John*, 10 Ves. Jr. 152; *Gilbert v. Boorman*, 11 Ves. Jr. 238. But see *Bullock v. Bullock*, 2 Dev. Eq. (N. Car.) 316; *Shinn v. Motley*, 3 Jones Eq. (N. Car.) 491.

3. 2 Jarm. on Wills (5th ed.) *180;

Whitbread v. St. John, 10 Ves. Jr. 152; *Gilbert v. Boorman*, 11 Ves. Jr. 238; *Paul v. Compton*, 8 Ves. Jr. 375. See *Brown v. Williams*, 5 R. I. 318; *Yeaton v. Roberts*, 28 N. H. 459; *Jackson v. Housel*, 17 Johns. (N. Y.) 281.

But of course if the testator shows an intent not to exclude any after born children, such intention will be carried into effect. *Wms. on Exrs.* 1092. See *Deffis v. Goldschmidt*, 1 Meriv. 417; 19 Ves. Jr. 566; *Hutcheson v. Jones*, 2 Madd. 406. Compare *Ballard v. Ballard*, 18 Pick. (Mass.) 41; *Moore v. Weaver*, 16 Gray (Mass.) 305; *Moore v. Dimond*, 5 R. I. 121; *Hawkins v. Everett*, 5 Jones Eq. (N. Car.) 45; *Harris v. Alderson*, 4 Sneed (Tenn.) 254.

The following principles, which differ somewhat from the text, have been deduced from the English cases by Mr. Theobald: "Mere words of futurity, as, for instance, a gift to the children that may be born, will not extend the class. *Storrs v. Benbow*, 2 Myl. & K. 46; 3 D. M. & G. 390; *Townsend v. Early*, 3 De G. F. & J. 1. Where the words are 'born or to be born,' the rules appear to be: When the gift is after a life estate, such words will not extend the class. *Sprackling v. Ranier*, 1 Dick. 344; *Whitbread v. St. John*, 10 Ves. Jr. 152; *Parsons v. Justice*, 34 Beav. 598. The case is, of course, different if the gift is to children 'now born or who shall be born in the lifetime of their parents.' *Scott v. Scarborough*, 1 Beav. 154. The rule is the same where the gift is to children now born, or who may be born hereafter, who shall attain twenty-one. *Iredell v. Iredell*, 25 Beav. 485; *Bateman v. Gray*, 20 Beav. 447; L.

7. The words "which shall be begotten," "to be begotten," or even "hereafter to be born," annexed to the description of children or issue, will not exclude those in existence before the making of the will.¹

8. A gift to children "born" or "begotten" extends to children coming *in esse*, after the making of the will, and even after the death of the testator, where the time of distribution being posterior to that event, the gift would, by the general rule of construction, include such after born children.²

9. Under a devise to children born at a particular time, children take a vested interest immediately on their birth, not subject to be divested by death before the specified period.³

R., 6 Eq., 215. In a case of a direct gift of personality to children, the words 'now born or to be born hereafter' would probably be held to be intended to refer to children born between the date of the will and the death. *Dias v. DeLIVERA*, L. R., 5 App. Cas. 123. In case, however, of a direct devise of realty under similar words, children born after the testator's death have been included. *Mogg v. Mogg*, 1 Meriv. 654; *Gooch v. Gooch*, 14 Beav. 565; *Eddowes v. Eddowes*, 30 Beav. 603. If, however, the gift is of a legacy to each of the children begotten or to be begotten, the class will not be extended beyond the testator's death, as not merely the distribution of what the children are to take, but of the whole estate of the testator, would be indefinitely postponed. *Butler v. Lowe*, 10 Sim. 317." *Theobald on Wills* (2d ed.) 251.

1. 2 Jarm. on Wills (5th ed.) *182; *Doe v. Hallett*, 1 M. & S. 124; *Hebblethwaite v. Cartwright*, Cas. temp. Talb. 31; *In re Pickup's Trusts*, 1 J. & H. 389; *Almack v. Horn*, 1 H. & M. 630. Compare *Matchwick v. Cock*, 3 Ves. Jr. 611; *Freemantle v. Taylor*, 15 Ves. Jr. 363; *Christopherson v. Naylor*, 1 Meriv. 326; *In re Sheppard's Trusts*, 1 K. & J. 269; *Early v. Benbow*, 2 Coll. 342; *Wilkinson v. Adam*, 1 Ves. & B. 468.

2. 2 Jarm. on Wills (5th ed.) *184; *Browne v. Groombridge*, 4 Madd. 262; *Ringrose v. Bramham*, 2 Cox 384; *Doe v. White*, 1 Exch. 526; 2 Exch. 797.

3. 2 Jarm. on Wills (5th ed.) *185; *Patterson v. Mills*, 18 L. J. Ch. 449.

Class to Take in Default of Appointment—How Ascertained.—"When there is a gift to children, as A may appoint, with no gift in default of appointment, and no appointment is made, similar rules apply as to the period at which

the class is to be ascertained. First. A direct gift to children, as A may appoint, goes apparently to all the children living at the death of the testator, to the exclusion of those born afterwards, though before the death of A. *Coleman v. Seymour*, 1 Ves. 209. Second. A gift to A for life, with remainder to his children, as he shall appoint, goes to all the children born in the testator's lifetime and coming into being before A's death. *Crone v. Odell*, 1 Ball & B. 449; 3 Dow. 68; *Norman v. Norman*, Beav. 430; *Lambert v. Thwaites*, L. R., 2 Eq. 151. Third. If the only gift is through the power, so that the children take by implication only, in default of appointment, the rules are the same. Thus, where there is a power to A to dispose of certain property among children, the gift, in default of appointment, goes to those born at the testator's death, to the exclusion of those born subsequently. *Longmore v. Broom*, 7 Ves. Jr. 124. And where the gift is to A for life, and then to dispose of the capital among his children, all children born before A's death take a share. *Grieverson v. Kirsopp*, 2 Keen 653. Fourth. If the donee of the power and the tenant for life are different persons, and the donee dies before the tenant for life, the class is ascertained at the death of the latter. *White's Trusts*, Johns. 656. And, apparently, if there is anything to show that personal enjoyment by the beneficiaries was intended, those dying before the tenant for life would be excluded. *In re White's Trusts*, 1 Johns. 656; *Carthew v. Enraught*, 20 W. R. 743; *In re Phene's Trusts*, L. R., 5 Eq. 346. At what time the class would be ascertained, if the donee of the power survives the tenant for life, is uncertain; though by analogy to the case of a

(2) *Gifts to Other Classes of Relatives—Grandchildren, Great-Grandchildren, Brothers, Nephews, Nieces, Cousins.*—The foregoing principles applicable to the construction of gifts to children as a class, apply equally to gifts to issue of every degree, as grandchildren, great-grandchildren, etc., as well as to gifts to brothers, sisters, nephews, nieces, and cousins.¹

(3) *Gifts to Relations.*—Under a gift to relations, *prima facie* the class is to be ascertained at the death of the *propositus*. Therefore, where the gift is immediate, or in remainder to the testator's relations after gifts to persons who are some of the next of kin, his next of kin at his death alone take.² If the gift is to such relatives as survive the tenant for life, the class is ascertained at the death of the ancestor, while those who die before the tenant for life are excluded.³ But where there is a gift to A, either for life with remainder to her children, or to A absolutely, followed by a gift over, if A dies without issue, to the testator's relations, and A is the sole next of kin at the date of the will and death, the class will be ascertained at A's death.⁴ The testator may, himself, of course, fix the exact time at which the class is to be ascertained, as where he bequeaths the property to such of them as claim within a specified time after advertisement.⁵

direct gift, it seems, it would be ascertained at the death of the tenant for life, and not of the donee of the power. Fifth. When there is a direct vested gift to children as A shall appoint, the fact that the power is to appoint by deed or will, or by will only, will not affect the class to take in default of appointment. *Casterton v. Sutherland*, 9 Ves. Jr. 445; *Falkner v. Wynford*, 15 L. J. Ch. 8; *Lambert v. Thwaites*, L. R., 2 Eq. 151. See *Winn v. Fenwick*, 11 Beav. 438, there discussed. Sixth. If the only gift is through the power, only those will take in default of appointment who could have taken under the power, and therefore, if the power is to dispose of certain property by will, only those who survive the donee can take in default of appointment. *Walsh v. Wallinger*, 2 R. & M. 78; *Kennedy v. Kingston*, 2 J. & W. 431; *Reid v. Reid*, 25 Beav. 469; *Freeland v. Pearson*, L. R., 3 Eq. 658; *In re Susanne's Trusts*, 47 L. J. Ch. 65; *Sinnot v. Walsh*, L. R., 5 Ir. 27. See *Brown v. Pocock*, 6 Sim. 257, where it does not appear from the report whether the wife survived the husband or not. See *Lambert v. Thwaites*, L. R., 2 Eq. 157." *Theobald on Wills* (2nd ed.) 249.

1. 2 Jarm. on Wills (5th ed.) 156, 160. See *Chase v. Peckham*, 17 R. I. 385;

Matter of Woodward, 117 N. Y. 523. The fact that a legacy is given a member of a class as an individual does not prevent his sharing in the gift to the class. *Cushing v. Burrell*, 137 Mass. 21. See *REMAINDERS*, vol. 20, p. 855, and cases cited.

As to gifts to more remote relatives as relatives, heirs, or next of kin, see the next two subdivisions.

2. *Theobald on Wills* (2d ed.) 264, citing *Raynes v. Mowbray*, 3 Bro. C. C. 234; *Masters v. Hooper*, 4 Bro. C. C. 207; *Pearce v. Vincent*, 1 C. & M. 598. See further *Eagles v. Le Breton*, L. R., 15 Eq. 148; *Stert v. Platel*, 5 Bing. N. Cas. 434; 35 E. C. L. 165; *Jones v. Oliver*, 3 Ired. Eq. (N. Car.) 373. But see *Hardy v. Gage* (N. H. 1891), 22 Atl. Rep. 558.

3. *Theobald on Wills* (2d ed.) 264, citing *Bishop v. Cappel*, 1 De G. & S. 411.

4. *Theobald on Wills* (2d ed.) 265; citing *Marsh v. Marsh*, 1 Bro. C. C. 293; *Jones v. Colbeck*, 8 Ves. Jr. 38; *Lees v. Massey*, 3 De G. F. & J. 113.

5. *Theobald on Wills* (2d ed.) 265, citing *Tiffin v. Longman*, 15 Beav. 275. See, upon the general subject, 2 Jarm. on Wills (5th ed.) *129 *et seq.*

Ascertaining the Class of Relations to Take in Default of Appointment.—
"Where there is a power to appoint to

(4) *Gifts to Heirs or Next of Kin.*—Under a gift to heirs or next of kin, the objects of the gift are to be ascertained at the death of the ancestor, and where there is, in addition, a reference to the Statute of Distributions, or to intestacy, this rule is almost without exception.¹

relations and no gift in default of appointment: First. If there is no life interest, and the power is a general power to appoint to the testator's relations, it seems the class to take will be ascertained at the death of the testator, and not when the power expires. *Cole v. Wade*, 16 Ves. Jr. 27, in which case, however, the actual point did not arise, since the next of kin at the testator's death, and the time when the power expired, were the same. Second. If there is a life interest, and the tenant for life has power to appoint to the testator's or his own relations, the class is to be ascertained at the death of the tenant for life, whether the power is to appoint by deed or will. *Harding v. Glyn*, 1 Atk. 468; *Birch v. Wade*, 3 Ves. & B. 198. See too in *Brown v. Higgs*, 8 Ves. Jr. 561. And it makes no difference whether the power is one of selections or distribution merely. *Pope v. Whitcombe*, 3 Meriv. 689, as corrected by Lord St. Leonards on Powers 662, and *Finch v. Hollingsworth*, 21 Beav. 112; *Caplin's Will*, 2 D. & S. 527. See too Atty. Gen'l v. Doyley, 4 Vin. Abr. 485, where the tenant for life and the donee of the power were different persons, and the class was ascertained at the death of the tenant for life." *Theobald on Wills* (2d ed.) 265.

1. *Theobald on Wills* (2d ed.) 280. See 2 Jarm. on Wills (5th ed.) *129; 1 Powell on Devises 282, note; *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 36, note; *Whittaker v. Whittaker*, 40 N. J. Eq. 33; *Killett v. Shepard*, 139 Ill. 433; *Rand v. Butler*, 48 Conn. 293; *Dove v. Torr*, 128 Mass. 38; *Whall v. Converse*, 146 Mass. 348; *In re Tucker's Will*, 63 Vt. 104; *Bullock v. Bullock*, 2 Dev. Eq. (N. Car.) 307; *Jones v. Oliver*, 3 Ired. Eq. (N. Car.) 373; *Lawton v. Corlies* (Supreme Ct.), 12 N. Y. Supp. 484; *Woodward v. James*, 44 Hun (N. Y.) 95; *Buzly's Appeal*, 61 Pa. St. 111. Compare *Wood v. Bullard*, 151 Mass. 325; *Proctor v. Clark*, 154 Mass. 45; *Peck v. Carlton*, 154 Mass. 231; *Sears v. Russell*, 8 Gray (Mass.) 95; *Hardy v. Gage* (N. H. 1891), 22 Atl. Rep. 557; *Delaney v. McCormack*, 88 N.

Y. 174; *Gourdin v. Shrewsbury*, 11 S. Car. 1.

"The same rules apply to realty, personality, and to a mixed fund. *Cusack v. Rood*, 24 W. R. 391. First. Thus the rule applies, whether the bequest to next of kin is immediate, or preceded by a life interest or contingent. *Moss v. Dunlop*, Johns. 490; *Bird v. Luckie*, 8 Hare 301. Second. And, if the gift is to next of kin living at a particular time, it will go to such of the next of kin at the testator's death as are living at that time. *Spink v. Lewis*, 3 Bro. C. C. 355. Third. If there is a devise to A for life, with remainder to his eldest son for life, with a direction on his death to convey the estate to the heir male of A, the eldest son of A is entitled, on A's death, to have the fee conveyed to him. *In re Grayson*, 48 L. J. Ch. 354. Similarly, if personality is given to A for life, and then to the testator's next of kin, though A may be one of the next of kin, or even the only next of kin, at the testator's death, or even the only next of kin at the date of the will as well as at the testator's death, the class will, nevertheless, be ascertained at the testator's death. *Doe v. Lawson*, 3 East 278; *Ware v. Rowland*, 2 Ph. 635; *Holloway v. Holloway*, 5 Ves. Jr. 399; *Barker's Trust*, 1 Sm. & G. 118; *Gorbell v. Davison*, 18 Beav. 556; *Starr v. Newberry*, 23 Beav. 436. The mere exception from the class of next of kin of certain persons, who could only be members of the class on the supposition of the death of the tenant for life, will not alter the time for fixing the class. *Lee v. Lee*, 1 D. & S. 85. See *Cooper v. Denison*, 13 Sim. 290. Fourth. Where, however, the gift is to the next of kin of a deceased person, and the tenant for life is the sole next of kin at the date of the will, so that the class cannot be increased if the tenant for life survives the testator, there is a stronger argument against ascertaining the next of kin at the testator's death; but probably this circumstance would not alone be sufficient to oust the rule. *Wharton v. Baker*, 4 K. & J. 483. Fifth. The same rules apply where the

c. TAKING PER CAPITA OR PER STIRPES.—When the objects of a gift take as individuals in their own right, they are said to take *per capita*; when by right of representation, *per stirpes*. Thus, where all the beneficiaries stand in the same degree of relationship to the *propositus*, as children or grandchildren, and claim directly from him in their own right, and not through some intermediate relation, they take *per capita*, in equal shares. But where

gift to the next of kin is not by way of remainder, but by way of executory limitation. Thus, in a gift to A for life, where A is sole next of kin at the date of the will and death, and then to her children, or to A absolutely, and if she dies without children or under twenty-one, to the testator's next of kin, the next of kin are ascertained at the testator's death. *Long's Will*, 9 W. R. 589; *Murphy v. Donegan*, 3 J. & L. 534; *Baker v. Gibson*, 12 Beav. 101; *Harrison v. Harrison*, 28 Beav. 21; *Mitchell v. Bridges*, 13 W. R. 200. See *Urquhart v. Urquhart*, 13 Sim. 613; *Minter v. Wraith*, 14 Sim. 549. The case is, however, different if the gift is not to next of kin, but to the 'nearest of kin of my own family,' or to relations. *Clapton v. Bulmer*, 5 Myl. & C. 108; see pp. 264, 265. In the former case the intention is to let the property go as the law would give it; in the latter, to make a complete disposition by the will to a particular class contemplated by the testator, though, owing to the vagueness of the description, the courts may be compelled to have recourse to the statute, that the gift may not be void for uncertainty. Sixth. Even if the gift be to a class of persons who must be the testator's next of kin, if any survive him, and if they die without issue, to his next of kin, the next of kin are ascertained at his death. *Seifferth v. Badham*, 9 Beav. 372. Seventh. The testator may of course direct the class of next of kin to be ascertained at any time or in any manner he chooses. *Pinder v. Pinder*, 28 Beav. 44; *White v. Springett*, L. R., 4 Ch. 300.

"The mere use of words of futurity will not alter the ordinary rule; for instance, if the bequest be to A for life, and after his death for such persons as shall be my next of kin. *Holloway v. Holloway*, 5 Ves. Jr. 399; *Doe v. Lawson*, 3 East 278; *Rayner v. Mowbray*, 3 Bro. C. C. 234.

"But if the gift is, after the decease of the tenant for life, to such persons as shall then be my next of kin, the word

'then' must refer to the death of tenant for life. *Long v. Blackall*, 3 Ves. Jr. 486; *Wharton v. Barker*, 4 K. & J. 483. See *Clowes v. Hilliard*, 4 Ch. Div. 413; *In re Morley's Trusts*, 25 W. R. 825. But it must be clear that the word 'then' is used temporally and not equivalent to thereupon, and that it may not be referred to other words pointing to the testator's death, as will be the case if the gift is, for instance, 'to such persons as would, by virtue of the statutes for the distribution of intestates' estates, have become and been then entitled thereto in case I had died intestate.' *Bullock v. Downes*, 9 H. L. Cas. 1; *Doe v. Lawson*, 3 East 278; *Cable v. Cable*, 16 Beav. 507; *Wheeler v. Addams*, 17 Beav. 417; *Fletcher v. Fletcher*, 3 De G. F. & J. 775; *Day v. Day*, Ir. R., 4 Eq. 385; *Mortimore v. Mortimore*, L. R., 4 App. Cas. 448. Where the gift is to next of kin of a person dead at the date of the will, the class is ascertained at the testator's death. *Phillips v. Evans*, 4 De G. & S. 188. And the rule would be the same if the person, whose next of kin are the legatees, is not dead at the date of the will, but dies in the testator's lifetime. *Vaux v. Henderson*, 1 J. & W. 388; *In re Gryll's Trusts*, L. R., 6 Eq. 589. But this rule gives way to an intention that the next of kin of the deceased person are to be ascertained at his death. *In re Harris*, 2 Sim. N. S. 106; 15 Jur. 1121. And if the gift is to the next of kin of a person who survives the testator, the class is ascertained at the death of that person. *Gundry v. Pinniger*, 1 De G. M. & G. 502; *Jacobs v. Jacobs*, 16 Beav. 557; *Markham v. Ivatt*, 20 Beav. 579." *Theobald on Wills* (2d ed.) 280.

Heirs Construed Next of Kin.—In bequests of personalty the expression "heirs," or "heirs at law," has frequently been construed next of kin. *Hardy v. Gage* (N. H. 1891), 22 Atl. Rep. 557; *Tillman v. Davis*, 95 N. Y. 17; *McCormick v. Burke*, 2 Dem. (N. Y.) 137; *Matter of Sinzheimer*, 5 Dem.

they are of different degrees of kindred, as in the case of grandchildren and great-grandchildren, the latter representing some deceased grandchild, they take *per stirpes* or according to the stock they represent, and hence the children of a deceased grandchild take only their deceased parents' share, and not equally with the other grandchildren, while the children of living grandchildren are entirely excluded.¹ Such is the rule where the testator provides that each grandchild "shall take his parents' share or title by right of representation," or the like, or where such intent may be gathered from the will.² But under a gift to "children and grandchildren," or to A, and the children of B,³ or the children of A and

(N. Y.) 321; *Hascall v. Cox*, 49 Mich. 435. But compare *Gordon v. Small*, 53 Md. 550.

1. Schouler on Wills (2d ed.), § 538; 2 Bl. Com. 218; 2 Jarm. on Wills (5th ed.) *101, *106, 112; *Kean v. Hoffecker*, 2 Harr. (Del.) 103; *Cureton v. Moore*, 2 Jones Eq. (N. Car.) 204. For further illustration, see the following cases: *Allender v. Kepling*, 62 Md. 7; *Huston v. Crook*, 38 Ohio St. 328; *McKelvey v. McKelvey*, 43 Ohio St. 213; *Ferrer v. Pyne*, 89 N. Y. 281; *Vincent v. Newhouse*, 83 N. Y. 505; *Lemacks v. Glover*, 1 Rich. Eq. (S. Car.) 141; *Allen v. Allen*, 13 S. Car. 512; *Harris v. Philpot*, 5 Ired. Eq. (N. Car.) 324; *Gerrish v. Hinnan*, 8 Oregon 348; *Peale's Estate*, 11 Phila. (Pa.) 147; *John's Estate*, 11 Phila. (Pa.) 144; *Wistar v. Scott*, 105 Pa. St. 200; *Clifton v. Holton*, 27 Ga. 321; *Huggins v. Huggins*, 72 Ga. 825; *Kelley v. Vigas*, 112 Ill. 242; *De Laurencel v. De Boom*, 67 Cal. 362; *Hayes v. King*, 37 N. J. Eq. 1; *Walker v. Hill*, 22 N. J. Eq. 520; *Niles v. Almy* (Mass. 1894), 36 N. E. Rep. 582; *Hamletts v. Hamlett*, 12 Leigh (Va.) 350; *Minot v. Taylor*, 129 Mass. 160; *Morrill v. Phillips*, 142 Mass. 240.

2. Schouler on Wills (2d ed.), § 538; *Wessenger v. Hunt*, 9 Rich. Eq. (S. Car.) 459. See *Farmer v. Kimball*, 46 N. H. 435; *Dible's Estate*, 81 Pa. St. 279; *Huston v. Crook*, 38 Ohio St. 328; *Kimbrow v. Johnston*, 15 Lea (Tenn.) 78; *Kean v. Hoffecker*, 2 Harr. (Del.) 103.

3. *Wells v. Newton*, 4 Bush (Ky.) 158; *Clifton v. Holton*, 27 Ga. 321; *Howard v. Howard*, 30 Ala. 391; *Bunner v. Storm*, 1 Sandf. Ch. (N. Y.) 357; *Seabury v. Brewer*, 53 Barb. (N. Y.) 662; *Stokes v. Tilly*, 9 N. J. Eq. 130; *Owen v. Owen*, 13 N. J. Eq. 188; *Burnet v. Burnet*, 30 N. J. Eq. 595; *Pemberton v. Parke*, 5 Binn. (Pa.) 601;

Waller v. Forsythe, Phill. Eq. (N. Car.) 353; *McCartney v. Osburn*, 118 Ill. 404; *Martin v. Gould*, 2 Dev. Eq. (N. Car.) 305; *Dowding v. Smith*, 3 Beav. 541; *Rickabe v. Garwood*, 8 Beav. 579; *Tyndale v. Wilkinson*, 23 Beav. 74; *Lenden v. Blackmore*, 10 Sim. 626; *Payne v. Webb*, L. R., 19 Eq. 26. But see *Green's Estate*, 140 Pa. St. 253; *Osburn's Appeal*, 104 Pa. St. 637; *Roome v. Counter*, 6 N. J. L. 113; *Lachland v. Downing*, 11 B. Mon. (Ky.) 32; *Grandy v. Sawyer*, Phill. Eq. (N. Car.) 8.

A testator directed the residue of his personal estate, after the death of his wife who was tenant for life, to be divided as follows: To his five nephews and nieces, A, B, C, D and E, two shares each, and to their children, one share each; the nephews and nieces surviving the testator. It was held that the residue vested in the nephews and nieces, and their children living at the testator's death, or born in the lifetime of the tenant for life; the children taking *per capita*, but the shares of each of the nephews and nieces being double that of each child. *Cooke v. Bowen*, 4 Y. & C. 244.

In delivering the opinion of the court in *Hoxton v. Griffith*, 18 Gratt. (Va.) 574, Joynes, J., said: "Where a bequest is made to several persons, in general terms indicating that they are to take equally as tenants in common, each individual will, of course, take the same share; in other words, the legatees will take *per capita*. The same rule applies where a bequest is to one who is living, and to the children of another who is dead, whatever may be the relations of the parties to each other, or however the Statute of Distributions might operate upon those relations in case of intestacy. Thus, where property is given 'to my brother A, and to the children of my brother B,' A takes

B,¹ or to the children of A and the children of B,² or to A and B and

a share only equal to that of each of the children of B. So, where the gift is to A's and B's children, or to the children of A and the children of B, the children take as individuals, *per capita*. The substance of this rule of construction is, that, in the absence of explanation, the children in such a case are presumed to be referred to as individuals, and not as a class, and that the relations existing between the parties, and the operation which the statute would have upon those relations in case of intestacy, are not sufficient to control this presumption. The general rule is well established, and has been fully recognized by the decisions of this court. *Brewer v. Opie*, 1 Call (Va.) 212; *Crow v. Crow*, 1 Leigh (Va.) 74; *McMasters v. McMasters*, 10 Gratt. (Va.) 275."

A testator gave land and slaves to his daughter for life, and then "to be equally divided between the children of the said daughter and my sons M. and R." It was held that the property, at the decease of the daughter, should be divided, *per capita*, between M., R. and the children of the daughter. *Waller v. Forsythe*, Phill. Eq. (N. C.) 353.

A testator ordered that the rest of his estate, movable and immovable, including the homestead, should be divided equally between his children individualized by their respective names, and his grandchildren by a deceased daughter, designating them also by their names. The testator also bequeathed to each grandchild special legacies, the same as he had given to each of his children. It was held that each of the grandchildren took the same as each child. *Wells v. Newton*, 4 Bush (Ky.) 158.

Where a bill was filed to settle the construction of a will containing the following residuary clause, viz., "All the residue and remainder of my moneys not above disposed of, that is, of moneys which I have at the time of my decease, I direct to be equally divided among my children and grandchildren living at the time of my decease;"—"whatever personal property is not hereinbefore disposed of I direct to be sold by my executors, and the moneys thereon arising to be divided equally between my son and my two daughters," it was held that, by these

two clauses, a clear distinction was made between moneys and personal property; that the residue of the one was given to all the children and grandchildren equally; what remained of the other not disposed of was to be divided equally between the children. *Brearley v. Lalor*, 15 N. J. Eq. 108.

Under a will, a testator left two thousand pounds "to the children and grandchildren of his brother M., deceased, excepting J." (who was a grandchild of M.), "and her children, she and they not needing it, to be equally divided among those then living" (*i. e.*, at the death of the testator's widow), "saving that his cousin S. should have two shares thereof." It was held that the great grandchildren of M. took equally with children and grandchildren; and that all who were alive at the death of the testator's widow, whether born before or after the death of the testator, were entitled to take. *Pemberton v. Parke*, 5 Binn. (Pa.) 601. Compare *Lachland v. Downing*, 11 B. Mon. (Ky.) 32, where a testator ordered in his will that the rest of his property should be divided between his brothers and sisters, and the children of a deceased sister, "to them and their children forever." It was held that the latter clause gave the children of the devisees named no share in the division, and that the children of the deceased sister were not equal participants with the other devisees, but that a class was intended who took the share of their mother.

1. 2 Jarm. on Wills (5th ed.) * 194; *Weld v. Bradbury*, 2 Vern. 705; *Lugar v. Harman*, 1 Cox 250; *Pattison v. Pattison*, 19 Brew. 638; *Armitage v. Williams*, 27 Beav. 346; *Ward v. Stow*, 2 Dev. Eq. (N. Car.) 509; *Ex p. Leith*, 1 Hill Eq. (S. Car.) 152; *Adams v. Adams*, 2 Jones Eq. (N. Car.) 215. See *Hoxton v. Griffith*, 18 Gratt. (Va.) 574; *West v. Rassman*, 135 Ind. 278; *Budd v. Haines* (N. J. 1894), 29 Atl. Rep. 170; *Thompson v. Young*, 25 Md. 461. But see *Raymond v. Hillhouse*, 45 Conn. 467; *Lowe v. Carter*, 2 Jones Eq. (N. Car.) 377.

2. Gifts to the Children of A and B.—
"In a gift to the children of A and B:
a. If A and B are described as bearing the same relation to the testator, and equal legacies have been given to them, the children of both take as in

their children, or to a class and their children, all take *per capita*.¹ But if the gift to the children is merely substitutional, as in the case of a bequest to A and B, "or their children," the distribution will be *per stirpes*.² The presumption in favor of a *per*

a gift to the children of my brother A and my brother B. *Mason v. Baker*, 2 K. & J. 567. See *Whicker v. Mifflord*, 3 Bro. P. C. 442. *b.* If they do not bear the same relation to the testator, and A has children at the date of the will, while B is unmarried, the gift goes to B and the children of A. *Stummvoll v. Hales*, 34 Beav. 124. *c.* So, too, if A is described as deceased; for instance, if the gift be to the children of the late A, and B, B and the children of A will take. *Lugar v. Harman*, 1 Cox 250; *Hawes v. Hawes*, 14 Ch. Div. 614. But see *In re Davies' Will*, 29 Beav. 93. This is a *fortiori* the case where B is referred to as a legatee. *In re Ingle's Trusts*, L. R., 11 Eq. 578. *d.* A gift for 'the benefit of the children of A and of B,' goes to the children of A and of B. *Peacock v. Stockford*, 3 De G. M. & G. 73." *Theobald on Wills* (2d ed.) 241.

In *Burnet v. Burnet*, 30 N. J. Eq. 595, it was held that a gift to the children of A and B (they being persons who could not have offspring jointly) must be construed according to the plain grammatical sense of the words used, and constitutes a gift to B himself and to the children of A.

2 Jarm. on Wills (5th ed.) *194; *Lincoln v. Pelham*, 10 Ves. Jr. 166. See *Barnes v. Patch*, 8 Ves. Jr. 604; *Walker v. Moore*, 1 Beav. 607; *Bolger v. Mackell*, 5 Ves. Jr. 509; *Heron v. Stokes*, 2 D. & W. 89; *Hill v. Bowers*, 120 Mass. 135; *Britton v. Miller*, 63 N. Car. 268; *Bryant v. Scott*, 1 Dev. & B. Eq. (N. Car.) 156; *Ward v. Stowe*, 2 Dev. Eq. (N. Car.) 509; *Senger v. Senger*, 81 Va. 687; *Hamletts v. Hamlett*, 12 Leigh (Va.) 350; *Wessinger v. Hunt*, 9 Rich. Eq. (S. Car.) 459; *Scott v. Terry*, 37 Miss. 65. See *Allender v. Keplinger*, 62 Md. 7. Compare *Alder v. Beall*, 1 Gill & J. (Md.) 123; *Levering v. Levering*, 14 Md. 30; *Ingram v. Smith*, 1 Head (Tenn.) 427. But compare *Bassett v. Granger*, 100 Mass. 348; *Young's Appeal*, 83 Pa. St. 59.

Where a testatrix, by will, gave "to the children of my brother, Stephen W. Britton, and of my sister, Mary F. Miller, all of my property of every description, to them and their heirs for-

ever," it was held that the children of Stephen and Mary took *per capita*. *Britton v. Miller*, 63 N. Car. 268. Compare *Hamletts v. Hamlett*, 12 Leigh (Va.) 357, where a testator bequeathed the residue of his estate, after his wife's death or marriage, to be equally divided among James, Mary, Patsey, Nancy, and Narcissa, who were the testator's children, the children of his son George, the children of his daughter Elizabeth, the children of his son Bedford, deceased, and the children of his daughter, Obedience; his five children legatees were all married, and had, in all, thirty-one children living at his death; his son Bedford left three children, and his son George and daughters Elizabeth and Obedience were married, and these four had, in all, eighteen children living at the testator's death; and the three last had five children born after his death and during his widow's life. It was held that the grandchildren took *per stirpes* and not *per capita*.

1. 2 Jarm. on Wills (5th ed.) *195; *Cunningham v. Murray*, 1 De G. & S. 366; *Abbay v. Howe*, 1 De G. & S. 470; *Northey v. Strange*, 1 P. Wms. 340; *Murray v. Murray*, 3 Ir. Ch. Rep. 120; *Law v. Thorp*, 4 Jur. N. S. 447; *Farmer v. Kimball*, 46 N. H. 435; *Soteldo v. Clement* (Ohio C. P.), 29 L. J. 384. But see *Ferry v. Langley*, 1 Mackey (D. C.) 140.

2. Schouler on Wills (2d ed.), § 540; 2 Jarm. on Wills (5th ed.) *195, *196; *Price v. Lockley*, 6 Beav. 180; *Minchell v. Lee*, 17 Jur. 727; *Armstrong v. Stockham*, 7 Jur. 230; *Shailer v. Groves*, 6 Hare 162; *Burrell v. Baskerville*, 11 Beav. 525; *Congreve v. Palmer*, 16 Beav. 435; *Timins v. Stackhouse*, 27 Beav. 434; *In re Sibley's Trusts*, 5 Ch. Div. 494. But compare *Atkinson v. Bartrum*, 28 Beav. 219.

"A single gift, however, to several or their issue, though it would import a stirpetal distribution among the families, would not prevent all the issue of each family from taking *per capita inter se*. *Gowling v. Thompson*, 19 L. T. N. S. 242; *In re Sibley's Trusts*, 5 Ch. Div. 494. In ascertaining the *stirpes*, reference is to be made to the original *stirpes* pointed out by the testator, and not to

capita distribution yields readily in favor of any indication of a contrary intent.¹ Under a gift to two or more for their lives as

the *stirpes* existing at his death, so that there will be as many primary shares as there are original *stirpes* who, at the testator's death, have descendants living. *Gibson v. Fisher*, L. R., 5 Eq. 51. See, however, *Robinson v. Shepherd*, 12 W. R. 234; 10 Jur. N. S. 53; 4 De G. J. & S. 129." *Theobald on Wills* (2d ed.) 256.

1. 2 Jarm. on Wills (5th ed.) *195; *Hawkins on Wills* 114, note. See *Brett v. Horton*, 4 Beav. 239; *Crone v. Odell*, 1 Ball & B. 449; *Noccholds v. Locke*, 3 K. & J. 6; *Nettleton v. Stephenson*, 18 L. J. Ch. 191; *Archer v. Legg*, 31 Beav. 187; *Bivens v. Phifer*, 2 Jones (N. Car.) 436; *Roper v. Roper*, 5 Jones Eq. (N. Car.) 16; *Rogers v. Brickhouse*, 5 Jones Eq. (N. Car.) 301; *Adams v. Adams*, 2 Jones Eq. (N. Car.) 215; *Lockhart v. Lockhart*, 3 Jones Eq. (N. Car.) 205; *Spivey v. Spivey*, 2 Ired. Eq. (N. Car.) 100; *Walker v. Griffin*, 11 Wheat (U. S.) 375; *Rushmore v. Rushmore* (Supreme Ct.), 12 N. Y. Supp. 776; *Carter v. Lowell*, 76 Me. 342; *Hoxton v. Griffith*, 18 Gratt. (Va.) 574; *Burnet v. Burnet*, 30 N. J. Eq. 599; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Osburn's Appeal*, 104 Pa. St. 637; *Young's Appeal*, 83 Pa. St. 59; *Ashburne's Estate*, 159 Pa. St. 545; *Shrie's Estate*, 162 Pa. St. 369; *Alder v. Beall*, 11 Gill & J. (Md.) 123; *Balcom v. Haynes*, 14 Allen (Mass.) 204; *Leland v. Adams*, 12 Allen (Mass.) 286; *Minot v. Taylor*, 129 Mass. 160; *Ferrer v. Pyne*, 81 N. Y. 281; *Vincent v. Newhouse*, 83 N. Y. 505; *Woodward v. James*, 115 N. Y. 359; *Randolph v. Bond*, 12 Ga. 362; *Billinslea v. Abercrombie*, 2 Stew. & P. (Ala.) 24; *Seay v. Winston*, 7 Humph. (Tenn.) 472; *Collier v. Collier*, 3 Rich. Eq. (S. Car.) 555; *Britton v. Johnson*, 2 Hill Eq. (S. Car.) 430; *Levering v. Levering*, 14 Md. 30; *Fields v. Fields*, 93 Ky. 619; *Geery v. Skelding*, 62 Conn. 499; *Conklin v. Davis*, 63 Conn. 377; *White v. Holland*, 92 Ga. 216.

The general rule in the interpretation of wills is, that persons described as a class take in the same way as if each individual embraced in the class were designated by his proper name, though, where such an interpretation would have the effect to break up every division of the property that might be made under the will, and require a new

one whenever, and as often as, a child might be born in any one of the four families, the testator will be presumed not to have intended a division *per capita* but *per stirpes*. *Roper v. Roper*, 5 Jones Eq. (N. Car.) 16.

A testator made a bequest of his property "to be equally divided, share and share alike, between my children and their legal heirs, that is to say, to M., G., F., R. and H., each a share, and the children and heirs of P. and of S. and of N., each a share. The subsequent clause of the will, which gave to his daughter A., to whom he had given no outset, \$2,000, contained this comment: "This is my view, making her equal with my other children." It was held that this latter clause expressly declared an intention on the testator's part to make his children equal, and that consequently the legatees take *per stirpes*. *Fisher v. Skillman*, 18 N. J. Eq. 229.

Instances Where Children Take per Stirpes.—A testatrix ordered "all my landed estate in M. to be equally divided between my nephew R. and the children of F." After giving certain government claims "to be equally divided between R. and the surviving children of F.," she added: "Should any of the children of F. die without heirs, the property left them shall be divided among the survivors." F., the niece, was dead when the will was made. It was held that R. took one moiety, and the children of F. the other moiety, of the M. land. *Hoxton v. Griffith*, 18 Gratt. (Va.) 574.

A testator gave, by his will, the income of his estate for eighteen years to his three sons, and made provision during that time for a granddaughter, the child of a deceased son. At the expiration of that time he ordered that his property should be sold and divided, "one-half of the same between" the three sons, "and the other half to be divided between my grandchildren," namely, his granddaughter aforesaid and the children of his three sons, in equal proportions. "Should either of said grandchildren have deceased at that time, the part that would have come to him or her, had they lived, to go to the others of the same family, if living; if not, to their parents." It was held that after the sale the granddaughter should

receive one-fourth of the whole property. *Leland v. Adams*, 12 Allen (Mass.) 286.

A testator, A, after bequeathing a pecuniary legacy "to the heirs of my sister G.," gave the rest of his estate "to my brothers M., R. and F., and my sisters H. and S., and the heirs of G., and their heirs respectively," to be divided in equal shares between them. It was held that the heirs of G. took as a class one-sixth of the residue. *Balcom v. Haynes*, 14 Allen (Mass.) 204.

A testator, by his will, gave to his children M., N., O. and R. certain specific legacies which he had previously conveyed to them, and ordered that those who had received a part of the estate should account therefor to the other children, and concluded as follows, viz: "Then it is my will that all the balance of my property not given away shall be equally divided between the heirs of M., N., O. and R., to them and their heirs forever." It was held that "the heirs of A." took *per stirpes* as a class. *Spivey v. Spivey*, 2 Ired. Eq. (N. Car.) 100.

A bequeathed to his deceased "son M.'s children" a negro; to his deceased "son J.'s children" another negro; to his "daughter I.," and to each of his other four children, naming them, certain negroes; and, "tenthly, all the rest of my estate not yet disposed of I give to be equally divided among my above-named heirs." It was held that under the tenth clause, the legatees took *per stirpes* and not *per capita*. *Collier v. Collier*, 3 Rich. Eq. (S. Car.) 555.

Under a will devising certain property to be divided equally between two individuals named, and the lawful children of another, the children take *per stirpes* and not *per capita*, where it appears by evidence *aliunde* that the first two persons were sisters and the latter a brother of the testatrix, and that the testatrix was very fond of her sisters, had a favorite among the children in each of the three families, and did not desire her brother to have any property on account of his conduct and his financial embarrassment. *White v. Holland*, 92 Ga. 216.

"A gift over of the share of any child dying before attaining a vested interest in possession, not to the other members of the class, but to the brothers and sisters of the child so dying, will import a stirpital distribution. *Archer v. Legg*, 31 Beav. 187. See too *Ayscough v. Savage*, 12 W. R. 373. Sim-

ilarly, a gift to several and their issue, or to the children and grandchildren of A, goes to all the children and grandchildren coming into being before the period of distribution *per capita*. *Barnaby v. Tassell*, L. R., 11 Eq. 363; *Lea v. Thorp*, 6 W. R. 480; 4 Jur. N. S. 447; 27 L. J. Ch. 649. In the same way a gift, after a life interest, to surviving children and their issue, goes to all the children and issue who survive the period of distribution *per capita*. *In re Fox's Will*, 35 Beav. 163; 13 W. R. 1013; *Cancellor v. Cancellor*, 11 W. R. 16; 2 D. & S. 199. *Shailer v. Groves*, which, as reported in 6 Hare 162, might be cited in favor of a different construction, is there wrongly reported. See 11 Jur. 485; 16 L. J. Ch. 367. A direction that parents and children are to be classed together, and share in equal proportions, will not import a stirpital distribution. *Turner v. Hudson*, 10 Beav. 222. But the word 'respective' has a strong stirpital force. *Davis v. Bennett*, 4 De G. F. & J. 327; *Ayscough v. Savage*, 13 W. R. 373. As to the word 'devolve,' see *Stonor v. Curwen*, 5 Sim. 264. And if the issue of a *stirpes* are treated as taking among them only one equal share, the stirpital construction will be adopted. *Brett v. Horton*, 4 Beav. 239; *Hunt v. Dorsett*, 5 De G. M. & G. 570. A gift to several, and their issue *per stirpes*, or a direction that issue are to take only their parents' share, is sufficient to show that the issue were not meant to take in competition with the original takers. *Pearson v. Stephen*, 2 Dow & Cl. 328; 5 Bligh. N. S. 203; *Johnson v. Cope*, 17 Beav. 561. Whether a direction that issue are to take only the share their ancestor would have taken will have the effect of making the distribution stirpital throughout, seems not to be settled. Where the direction is that the issue are to take a parent's share, and the word 'parent' is used in a recurring or sliding sense, so as to apply to successive generations of issue, it is clear that the distribution will be stirpital throughout. *Ross v. Ross*, 20 Beav. 645; *In re Orton's Trust*, L. R., 3 Eq. 375; *Palmer v. Crutwell*, 8 Jur. N. S. 479. So, too, where the direction is that the children or grandchildren are to take an original share between them. *Powell v. Powell*, 28 L. T. N. S. 730. But a mere direction that the share of any of the original takers dying is to go to his issue would, it seems, not

tenants in common, without right of survivorship, with remainder to their children, it seems to be the better opinion that the children take *per stirpes*,¹ but if the tenants for life take jointly, or as tenants in common with right of survivorship, the children take *per capita*;² so also, if the general distribution among children is postponed until after the death of the last surviving tenant for life, even though the life interest does not survive.³

have the effect of preventing remoter issue from taking that share with issue less remote *per capita* between them. *Birdsall v. York*, 5 Jur. N. S. 1237; *Southam v. Blake*, 2 W. R. 446; *Weldon v. Hoyland*, 4 De G. F. & J. 564. *Robinson v. Sykes*, 23 Beav. 40, which is *contra*, was on a marriage settlement. If the gift is to several, and their issue *per stirpes*, the stirpital distribution will be carried throughout, so that no children of remoter issue can take in competition with the parents. *Dick v. Lacy*, 8 Beav. 214; *Gibson v. Fisher*, L. R., 5 Eq. 51." *Theobald on Wills* (2d ed.) 252.

1. 2 Jarm. on Wills (5th ed.) *196, citing *Pery v. White*, Cowp. 777; *Taniere v. Pearkes*, 2 Sim. & Stu. 383; *Willes v. Douglas*, 10 Beav. 47; *Flinn v. Jenkins*, 1 Coll. 365; *Arrow v. Mellish*, 1 De G. & S. 355; *Doe v. Royle*, 13 Q. B. 100; 66 E. C. L. 100; *In re Lavenck's Estate*, 18 Jur. 304; *Bradshaw v. Mellong*, 19 Beav. 417; *Hunt v. Dorsett*, 5 De G. M. & G. 570; *Coles v. Witt*, 2 Jur. N. S. 1226; *Turner v. Whittaker*, 23 Beav. 196; *Archer v. Legg*, 31 Beav. 187; *Milnes v. Aked*, 6 W. R. 430; *Wills v. Wills*, L. R., 20 Eq. 342.

For, otherwise, it would follow that the different shares would go to different classes of children; for after the death of the tenant for life who first died, another might have more children, who would be entitled to participate in a share of any tenant for life who died afterward. 2 Jarm. on Wills (5th ed.) *196.

2. 2 Jarm. on Wills (5th ed.) *197, citing *Malcolm v. Martin*, 3 Bro. C. C. 50; *Pearce v. Edmeades*, 3 Y. & C. 246; *Stevenson v. Gullan*, 18 Beav. 590; *Parker v. Clarke*, 6 De G. M. & G. 110; *Parfitt v. Hember*, L. R., 4 Eq. 443. *Compare Shant v. Kidd*, 19 Beav. 310; *Begley v. Cook*, 3 Drew. 662; *Taaffe v. Connee*, 10 H. L. Cas. 533.

3. 2 Jarm. on Wills (5th ed.) *197, citing *Nockolds v. Locke*, 3 K. & J. 6.

The following distinctions have been adopted by *Theobald*: "First. It seems clear that a gift to A and B, as tenants in common, for their lives, and then at their death, or at their deaths, or at the death of A and B, to their children, goes, upon the death of each tenant for life, to his children. *Flinn v. Jenkins*, 1 Coll. 365; *Taniere v. Pearkes*, 2 Sim. & Stu. 383; *Willes v. Douglas*, 10 Beav. 47; *Arrow v. Mellish*, 1 De G. & S. 355; *Turner v. Whittaker*, 23 Beav. 196; *Sarel v. Sarel*, 23 Beav. 87. See too *Doe v. Royle*, 13 Q. B. 100; 66 E. C. L. 100; *Brown v. Jarvis*, 2 De G. F. & J. 168. If the gift is after the deaths of tenants for life to their children and grandchildren, the families take *per stirpes*, but the children and grandchildren take *per capita, inter se*. *Barnaby v. Tassell*, L. R., 11 Eq. 363. But if the testator goes on to explain what he means by 'their children,' by adding, 'that is to say, the children of A and B,' they take *per capita*. *Abrey v. Newman*, 16 Beav. 431. Second. If the gift be to 'A and B for their lives, and at their death,' not to 'their children' but to 'the children of A and B,' there seems less reason for contending that the children are to take *per stirpes*. However, in *Wills v. Wills*, L. R., 20 Eq. 342, the stirpital construction was adopted. See *Milnes v. Aked*, 6 W. R. 430; *Sutcliffe v. Howard*, 38 L. J. Ch. 472; *In re Nott's Trusts*, 20 W. R. 569. In such a case, a superadded direction, that 'if there is but one child the whole is to go to such only child,' would afford an argument that the distribution was meant to be *per capita*. *Pearce v. Edmeades*, 3 Y. & C. 246; 2 W. R. 672; *Swabey v. Goldie*, 1 Ch. Div. 380. See too *Peacock v. Stockford*, 7 De G. M. & G. 129. Third. If the gift to the children is not till after the death of the survivor of the tenants for life, it would seem the distribution would be *per capita*; at any rate if the gift is to the children of A and B, and not merely to 'their chil-

Under a gift to descendants, *prima facie* all living at the time of distribution take *per capita*,¹ yet the word when used as a word of purchase and coupled with a gift to the ancestor, has a substitutional and representative sense, so that in a gift to several and their descendants, descendants would not take in competition with their ancestor.² Under a gift to relatives, persons capable of taking within the Statute of Distributions, take *per capita* and not in the proportions fixed by the statute.³ Under a gift to

dren.' *Malcom v. Martin*, 3 Bro. C. C. 50; *Pearce v. Edmeades*, 3 Y. & C. 246; *Stevenson v. Gullan*, 18 Beav. 590; *Nockolds v. Locke*, 3 K. & J. 6; *Swabey v. Goldie*, 1 Ch. Div. 380. See *Alt v. Gregory*, 8 De G. M. & G. 221. Perhaps *Smith v. Streatfield*, 1 Meriv. 358, comes under this head." *Theobald on Wills* (2d ed.) 254, 255.

1. *Theobald on Wills* (2d ed.) 262; *Crosley v. Clare*, Ambl. 397; *Butler v. Stratton*, 3 Bro. C. C. 367; *Corbett v. Laurens*, 5 Rich. Eq. (S. Car.) 301; *Pearce v. Richard* (R. I. 1893), 26 Atl. Rep. 38. See *Wistar v. Scott*, 105 Pa. St. 200. But the expression "descendants or representatives," imports a distribution *per stirpes*. *Rowland v. Gorsuch*, 2 Cox 187.

2. *Theobald on Wills* (2d ed.) 263; *Tucker v. Billing*, 2 Jur. N. S. 483. See *Jones v. Torin*, 6 Sim. 255; *Smith v. Pepper*, 27 Beav. 86; *Best v. Stonehewer*, 2 De G. J. & S. 537; *Baskin's Appeal*, 3 Pa. St. 304; *McNeilledge v. Galbraith*, 8 S. & R. (Pa.) 43; *Thompson v. Young*, 25 Md. 450; *Grandy v. Sawyer*, Phill. Eq. (N. Car.) 8. Compare *Ort's Appeal*, 35 Pa. St. 267.

A testator, after making certain bequests, ordered thus: "Then my will is, that the remaining part of my goods, stocks, etc., shall be impartially appraised; and after such appraisement made, that the same shall be equally divided between all the heirs." It was held that the testator, by this language, and his intention as gathered from the whole will, meant his own heirs, who could only be ascertained by resorting to the Statute of Distribution; and that taking the statute for the rule, the remaining part of his property bequeathed descended to his children and grandchildren, *per stirpes*; the rule under the statute not only designating who are to take, but also the *quantum* of the estate to be taken; and that by "all the heirs" the testator meant his children and his grandchildren, who, in his eye and by intendment of the law,

constituted but one heir. *Baskin's Appeal*, 3 Pa. St. 304.

3. *Theobald on Wills* (2d ed.) 263, citing *Tiffin v. Longman*, 15 Beav. 275; *Eagles v. Le Breton*, L. R., 15 Eq. 148.

Property to Be Equally Divided Between Her Relations and Mine.—In *Young's Appeal*, 83 Pa. St. 59, a testator devised "the residue of my estate, real, personal, and mixed, to my beloved wife, for and during her life; and further, I will that at her decease such moneys or property as she may possess be equally divided between her relations and mine, or such of them as she shall believe most worthy." The testator's wife survived him, and died, leaving a will, in which she directed the estate to be equally divided between her late husband's relations and her own, one half to go to six of her relations, share and share alike, and the other half to nineteen of her husband's relations, in proportions named in her will. The court below held that the wife had power to appoint the beneficiaries under the will of her husband, but that she should have distributed the funds among the appointees *per capita*. It was held (*reversing* the court below) that the division of the property made by the wife was in accordance with the true intent of the testator. In this case *Mercur, J.*, said: "After the expiration of the life estate of his wife, he directs the property to 'be equally divided between her relations and mine.' He and his wife were childless. There was no issue of either to whom the property could be transmitted.

"It may have been the joint product of their industry and economy. This or some other moving cause prompted him to direct that the property be 'equally divided' between families of different blood. The language clearly points to one general division, one separation of the fund. Two classes were in his mind. One class was his

"legal heirs," or next of kin, it has been held that the Statute of Distributions is to be taken as the guide in ascertaining both the beneficiaries and the proportions in which they are to take.¹

d. RULE WHERE THE NUMBER OF OBJECTS IS ERRONEOUSLY REFERRED TO.—Where the testator has described the class as consisting of a specified number, which varies from the actual number, the numerical statement is wholly disregarded.²

relations, the other class was his wife's relations. The property was to be equally divided 'between' these two classes, and each class to take one-half. His relations one-half, his wife's relations the other half. Neither the language nor the spirit of the will indicates that each relation should have an equal share. To reach such a result would require all the relations of each, the testator and his wife, to be thrown together in one class, regardless of their relative number. So, if the wife had twenty and the testator two, her relations would take ten times as much as his relations. That would be a most manifest disregard of the direction for an equal division between the two families."

So, under a bequest "to the heirs of my late husband and my heirs equally," each class of heirs take *per stirpes* one-half of the sum bequeathed. *Bassett v. Granger*, 100 Mass. 348.

1. *Schouler on Wills* (2d ed.), § 539; *Hawkins on Wills* *95. See *Bullock v. Downes*, 9 H. L. Cas. 1; *Woodward v. James*, 115 N. Y. 359; *Richards v. Miller*, 62 Ill. 417; *Baskin's Appeal*, 3 Pa. St. 304; *Harris' Estate*, 74 Pa. St. 452; *Fissel's Appeal*, 27 Pa. St. 57; *Hoch's Estate*, 154 Pa. St. 417; *Lowe v. Carter*, 2 Jones Eq. (N. Car.) 377; *Bailey v. Bailey*, 25 Mich. 185; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Bassett v. Granger*, 100 Mass. 348; *Cook v. Catlin*, 25 Conn. 387; *Lyon v. Acker*, 33 Conn. 224; *Raymond v. Hillhouse*, 45 Conn. 467; *Heath v. Bancroft*, 49 Conn. 220; *Lachland v. Downing*, 11 B. Mon. (Ky.) 34. See *Hodges v. Phelps*, 65 Vt. 303. Compare *Bisson v. West Shore R. Co.*, 66 Hun (N. Y.) 604.

Where a testatrix directed her real and personal estate to be equally divided "between the children of my brother John, deceased, and the children or heirs of my sister Rosanna, deceased, and the children or heirs of my sister Catherine, deceased, and the children or heirs of my sister Julian, deceased, and my brother

Jacob, or his heirs or legal representatives," it was held that the children described took by classes and not *per capita*. *Fissel's Appeal*, 27 Pa. St. 55. See *Alder v. Beall*, 11 Gill & J. (Md.) 123; *Harris' Estate*, 74 Pa. St. 452; *Roome v. Counter*, 6 N. J. L. 114.

Next of Kin.—In England, the words "next of kin" mean those nearest in equal degree to the *propositus*, and are not equivalent to "next of kin according to the Statute of Distributions." *Hawkins on Wills*, § 97, citing *Elmsley v. Young*, 2 Myl. & K. 780; *Withy v. Mangles*, 4 Beav. 358; *Avison v. Simpson*, Johns. 43; *Rooke v. Atty. Gen'l*, 31 Beav. 313. See *NEXT OF KIN*, vol. 16, p. 703.

2. 2 Jarm. on Wills (5th ed.) *190; *Stebbing v. Walkey*, 2 Bro. Ch. 85; *Gervy v. Hibbert*, 19 Ves. Jr. 125; *M'Kechie v. Vaughan*, L. R., 15 Eq. 289; *Berkeley v. Palling*, 1 Russ. 496; *Lane v. Green*, 4 De G. & S. 239; *Daniell v. Daniell*, 3 De G. & S. 337; *Harrison v. Harrison*, 1 R. & M. 72; *In re Proctor's Estate*, 2 Pa. Dist. Rep. 474. See *Thompson v. Young*, 25 Md. 450; *Shepard v. Wright*, 5 Jones Eq. (N. Car.) 22; *Kalbfleisch v. Kalbfleisch*, 67 N. Y. 360.

Thus a testator, in the eighth item of his will, bequeathed to his grandson by name the sum of \$500, "in addition to his share of the residue" of his estate as thereafter given. In the thirteenth item he bequeathed to him by name a gold watch and certain stock. In the twelfth item he provided: "As to all the rest and residue of my estate, real and personal," etc., "I give and bequeath the same to be divided equally *per capita* between my grandchildren as follows, to wit, the children of my deceased daughter, Sarah, except, etc.; the children of my deceased daughter, Jane, except, etc.; the child of my deceased daughter, Catherine Culbertson, etc.; they, however, to receive only such portion of this residue as shall be necessary to equalize them with the bequests with my other grandchildren,

estimating the bequests heretofore given to their mother and them." Catherine had two children, viz., a son, the devisee of the eighth and thirteenth items, and a daughter, who was one of the plaintiffs. It was held that the daughter was entitled as well as the son to a part of the residuary estate. *Urie v. Irvine*, 21 Pa. St. 310.

"The ground on which the court has proceeded is that it is a mere slip in expression, and the circumstance that the testator knows the true number of children, is not a sufficient reason for departing from the rule. Thus, where a testatrix bequeathed to the three children of her niece, A, £500 each, knowing that A had nine children, all of the children were held entitled to a legacy." 2 Jarm. on Wills (5th ed.) *192; *Daniell v. Daniell*, 3 De G. & S. 337; *Scott v. Fenoulhett*, 1 Cox 79. So in *Harrison v. Harrison*, 1 R. & M. 72, where a testator bequeathed "to the two sons and the daughter of A B £50 each," and at the date of the will and the death of the testator, A B had one son and four daughters; each of these five children was held entitled to a legacy of £50.

"Of course, if the number mentioned by the testator agree with the number existing at the date of the will, there is no ground for extending the gift to an after born child. "On the same principle as that which governed the preceding cases, it has been decided, that where a testator bequeathed the residue of his personal estate to be divided equally among his seven children, A, B, C, D, E and F (naming only six), and it turned out that he had eight children when he made his will, but from other parts of his will it appeared that he considered one of his children as fully provided for, the seven other children were entitled." 2 Jarm. on Wills (5th ed.) *194. See *Sherer v. Bishop*, 4 Bro. C. C. 55; *In re Emery's Estate*, 3 Ch. Div. 300. See also *Garth v. Meyrick*, 1 Bro. C. C. 30; *Humphreys v. Humphreys*, 2 Cox 184; *Eddels v. Johnson*, 1 Giff. 22.

The following distinctions have been deduced by Theobald from the English authorities:

"If there is a gift to the six children of A, who has only six living at the date of the will, the legacy goes to them. *Sherer v. Bishop*, 4 Bro. C. C. 55. And a seventh child *en ventre* at the time will not be admitted to a share. *In re Emery's Estate*, 24 W. R. 917.

But if the number does not correspond with the number living at the date of the will, all the children then living will take, whether the gift is of a lump sum or of a distinct sum to each, in which latter case each child will be entitled to a legacy of that sum. *Garvey v. Hibbert*, 19 Ves. Jr. 125; *Stebbing v. Walkey*, 2 Bro. C. C. 85; 1 Cox 250; *Lee v. Pain*, 4 Hare 249; *Harrison v. Harrison*, 1 R. & M. 72; *Morrison v. Martin*, 5 Hare 507; *Yeats v. Yeats*, 16 Beav. 170. See *Newman v. Piercey*, 4 Ch. Div. 46; *Lee v. Lee*, 10 Jur. N. S. 1041; *Spencer v. Ward*, L. R., 9 Eq. 507; *In re Bassett's Estate*, L. R., 14 Eq. 54. The fact that a blank is left for the insertion of the names of the legatees makes no difference. *McKechnie v. Vaughan*, L. R., 15 Eq. 289. In such cases evidence of intention is not admissible to show that the testator meant certain of his children, or the children of a particular marriage, who may correspond in number with the number mentioned in the will. *Daniell v. Daniell*, 3 De G. & S. 337; *Matthews v. Foulshaw*, 12 W. R. 1141. Thus, under a bequest to the two children of my son Joseph, who had four living at the date of the will, two by a first and two by a second marriage, all the children took, and evidence of the intention to benefit the children of the first marriage was not admitted. *Matthews v. Foulshaw*, 12 W. R. 1141. On the same principle, a gift to the five daughters of A, who has one daughter and five sons; goes to the daughter. *Selsey v. Lake*, 1 Beav. 151. See *Berkeley v. Palling*, 1 Russ. 496. But a gift of £100 apiece to the four sons of A, who had three sons and a daughter, includes the daughter, the intention being to give four legacies. *Lane v. Green*, 4 De G. & S. 239. If there is anything to indicate which of the children the testator meant—for instance, an allusion to their residence—the rule of course does not apply. *Wrightson v. Calvert*, 1 J. & H. 250. See *Hampshire v. Peirce*, 2 Ves. 216. So where the gift was to the three children of W., widow of W., and the widow of W. had, at the date of the will, married again, and there were two children by W. and six by her second marriage then living, it was held that the two children by the first marriage were alone intended to take. *Newman v. Piercey*, 4 Ch. Div. 41. It appears never to have been decided whether, when the number of children

18. Estates in Fee and in Tail—*a*. WHAT SUFFICIENT TO PASS THE FEE.—A limitation to the devisee and his heirs still continues to be the most apt and proper expression to pass the fee, although even before the passage of the English Wills Act, and analogous statutes in the *United States*, under which every devise, unless a contrary intent appear, is construed to pass the fee, or at least whatsoever estate the deviser can lawfully convey, expressions less technical, which clearly manifested such an intent, were held sufficient.¹

living at the date of the will is erroneously stated, children born after the date of the will and before the testator's death would be included." Theobald on Wills (2d ed.) 241.

1. Theobald on Wills (2d ed.) 325; 2 Jarm. on Wills (5th ed.) *267 *et seq.*

Under the English Wills Act, 1 Vict., ch. 26, § 28, and analogous statutes in most of the *United States* (as to which, see Stimson's Am. Stat. Law, § 2808 *et seq.*), questions relative to estates in fee, without words of limitation, have ceased to be of practical interest. See, in this connection, the following cases upon the subject: *Alabama*: Parish v. Parish, 37 Ala. 591; Whorton v. Moragne, 62 Ala. 201; *Connecticut*: Holmes v. Williams, 1 Root (Conn.) 332; White v. White, 52 Conn. 518; *Delaware*: Dodd v. Dodd, 2 Houst. (Del.) 76; *District of Columbia*: French v. Campbell, 2 Mackey (D. C.) 321; *Florida*: Merritt v. Brantly, 8 Fla. 276; *Georgia*: Hollingshead v. Alston, 13 Ga. 277; Cook v. Walker, 15 Ga. 457; *Illinois*: Sidons v. Cockrell, 131 Ill. 653; Wolfer v. Hemmer, 144 Ill. 554; *Indiana*: Cleveland v. Spilman, 25 Ind. 95; *Iowa*: Sherman v. Wooster, 26 Iowa 272; Lowrie v. Ryland, 65 Iowa 584; *Kentucky*: Lillard v. Robinson, 3 Litt. (Ky.) 415; Chinn v. Respass, 1 T. B. Mon. (Ky.) 25; Lachland v. Downing, 11 B. Mon. (Ky.) 32; Carroll v. Carroll, 12 B. Mon. (Ky.) 637; *Maine*: Russell v. Elden, 15 Me. 193; Josselyn v. Hutchinson, 21 Me. 339; Varney v. Stevens, 22 Me. 331; Deering v. Tucker, 55 Me. 284; Bromley v. Gardner, 79 Me. 246; Chapman v. Chick, 81 Me. 109; *Maryland*: Moody v. Elliott, 1 Md. Ch. 290; Torrance v. Torrance, 4 Md. 11; Negroes Chase v. Plummer, 17 Md. 165; Burke v. Chamberlain, 22 Md. 298; Vansant v. Money, 4 Har. & J. (Md.) 313; Ownings v. Reynolds, 3 Har. & J. (Md.) 141; Beall v. Holmes, 6 Har. & J. (Md.) 205; Hammond v. Hammond, 8 Gill & J. (Md.) 436; Mew-

ton v. Griffith, 1 Har. & G. (Md.) 111; Edelen v. Smoot, 2 Har. & G. (Md.) 285; *Massachusetts*: Godfrey v. Humphrey, 18 Pick (Mass.) 537; Gibbens v. Curtis, 8 Gray (Mass.) 392; Parker v. Parker, 5 Met. (Mass.) 134; Tracy v. Kilborn, 3 Cush. (Mass.) 557; Goodwin v. McDonald, 153 (Mass.) 481; *Mississippi*: Sims v. Conger, 39 Miss. 231; *Missouri*: Small v. Field, 102 Mo. 105; *New Hampshire*: Leavitt v. Wooster, 14 N. H. 550; Lummus v. Mitchell, 34 N. H. 39; *New Jersey*: Herbert v. Smith, 1 N. J. Eq. 141; Van Wagenen v. Baldwin, 7 N. J. Eq. 211; Ackerman v. Vreeland, 14 N. J. Eq. 23; Den v. Snitcher, 14 N. J. L. 53; Den v. Young, 24 N. J. L. 775; *New York*: Harvey v. Olmsted, 1 N. Y. 483; Jennings v. Conboy, 73 N. Y. 230; Roseboom v. Roseboom, 81 N. Y. 356; Brown v. Evans, 34 Barb. (N. Y.) 594; Harris v. Slaght, 46 Barb. (N. Y.) 470; Grout v. Townsend, 2 Hill (N. Y.) 554; Bradstreet v. Clarke, 12 Wend. (N. Y.) 602; Jackson v. Merrill, 6 Johns. (N. Y.) 185; Jackson v. Wells, 9 Johns. (N. Y.) 222; Jackson v. Bull, 10 Johns. (N. Y.) 148; Jackson v. Babcock, 12 Johns. (N. Y.) 389; Jackson v. Wilson, 12 Johns. (N. Y.) 318; Jackson v. Housel, 17 Johns. (N. Y.) 281; Ferris v. Smith, 17 Johns. (N. Y.) 221; *North Carolina*: Turner v. Kittrell, 1 Wins. Eq. (S. Car.) 38; McKrow v. Painter, 89 N. Car. 437; *Ohio*: Piatt v. Sinton, 37 Ohio St. 353; Flickinger v. Saum, 40 Ohio St. 600; *Pennsylvania*: Martin v. McDevitt, 10 Phila. (Pa.) 19; Morrison v. Semple, 6 Binn. (Pa.) 94; Harper v. Blean, 3 Watts (Pa.) 471; Frame v. Stewart, 5 Watts (Pa.) 433; McIntyre v. Ramsey, 23 Pa. St. 317; Fulton v. Moore, 25 Pa. St. 468; Williams v. Leech, 28 Pa. St. 89; Hall v. Dickinson, 31 Pa. St. 76; Schoonmaker v. Stockton, 37 Pa. St. 461; Brown's Estate, 38 Pa. St. 289; Jaurerche v. Proctor, 48 Pa. St. 466; Snider v. Baer, 144 Pa. St. 278; *Rhode*

Island: *Harris v. Dyer* (R. I. 1894), 28 Atl. Rep. 971; *Carpenter v. Brown*, 6 R. I. 383; *Atkinson v. Staigg*, 13 R. I. 725; *South Carolina*: *Moon v. Moon*, 2 Strobb. Eq. (S. Car.) 327; *Smith v. Hilliard*, 3 Strobb. Eq. (S. Car.) 211; *Carr v. Jeannerett*, 2 McCord. (S. Car.) 66; *Bowers v. Newman*, 2 McMull. (S. Car.) 472; *Hall v. Goodwyn*, 2 Nott & M. (S. Car.) 383; *Tennessee*: *Pillow v. Rye*, 1 Swan (Tenn.) 185; *King v. Miller*, 11 Lea (Tenn.) 633; *United States*: *Abbott v. Essex Co.*, 18 How (U. S.) 202; *Page v. Wright*, 4 Wash. (U. S.) 194; *Vermont*: *Hart v. White*, 26 Vt. 260; *Virginia*: *Kennon v. M'Roberts*, 1 Wash. (Va.) 96; *Shermer v. Richardson*, Wythe (Va.) 6; *Wyatt v. Sadler*, 1 Munf. (Va.) 537; *Wisconsin*: *Dew v. Kuehn*, 64 Wis. 293.

At common law a devise of real estate containing no words of limitation, in the absence of a contrary intent, conveys a life estate only to the devisee. *McLellan v. Turner*, 15 Me. 436; *Varney v. Stevens*, 22 Me. 331; *Harvey v. Olmsted*, 1 N. Y. 483; *Hill v. Brown* (1894), App. Cas. 125.

In *Indiana, Florida*, and some other states, the old rule prevails, although slight indications of an intent to pass the fee will be sufficient. *Roy v. Rowe*, 90 Ind. 54; *Mills v. Franklin*, 128 Ind. 444. See *Lennen v. Craig*, 95 Ind. 167; *Morgan v. McNeeley*, 126 Ind. 537; *Robinson v. Randolph*, 21 Fla. 629.

Where the land is devised expressly for life, the gift will not be enlarged merely by the absence of the gift over. *Evan's Appeal*, 51 Conn. 435.

Instances at Common Law.—By his will, executed prior to the Act of 1822, ch. 162, a testator devised certain real and personal property to his wife, to her use for the benefit of her and her children under age, and after they came of age to his wife during her natural life and no longer, and after her decease, the whole to be divided equally, share and share alike, between the seven children (naming them) of the testator, or equally between such as shall then be living. It was held that the children took estates for life only, there being no words of inheritance, or any language used from which the intention of the testator to pass a fee could be clearly ascertained. *Moody v. Elliott*, 1 Md. Ch. 290.

But see the following cases, where an intent to the contrary appeared: Thus, where a testator, by his will, after making certain specific bequests, ordered

that all the rest of his estate, real and personal, should be sold by his executors, and converted into money as soon as convenient after the death of the testator, and the proceeds to be distributed among his children in the proportion of two shares to his son to one to a daughter, and that in the event of the death of any of the children, his legacy should not lapse, but should be divided among his or her issue in like proportions, and in default of issue, then among the surviving children of the testator, it was held that the children of the testator took an absolute estate and not a life interest merely, though there were no words of inheritance in their respective shares. *Herbert v. Smith*, 1 N. J. Eq. 141.

The introductory part of a will contained the following words: "As for my worldly estate, after my death, be disposed of in the manner following." By the third clause, the testator bequeathed to his son G., without words of inheritance, "thirty acres of land on which he now lives, my young black mare, \$200 in six months after my decease, and one-sixth of the personal property not disposed of." By the fourth clause he gave and bequeathed to his son M. the home farm and a share of the personal estate, in precisely the same language with the bequest to G., but subject to a charge thereon. There was no residuary clause in regard to the real estate, as there was in respect to the personal. It was held that, looking at the entire will, it was clear the testator intended to give his son G. an estate in fee simple in the twenty-nine acres, although there were no words of perpetuity in the devise. *Harris v. Slaght*, 46 Barb. (N. Y.) 470.

A. being seised of three tracts of land, F., C. and O., and entitled to an equity of redemption in a fourth, made his will, and after stating that "as touched his temporal estate he desires the same may be employed as follows," in the first place directed that all his just debts be paid; he then devised to his oldest son all his lands in F. and C., with some negroes and stock; to his other son all his lands in O., with some negroes and stock; to his wife and daughter, all the rest of his estate, real and personal; but no words of inheritance were annexed to any of the devises. It was held that the sons took estates in fee in the lands devised to them. *Kennon v. M'Roberts*, 1 Wash. (Va.) 96.

Passing of Fee By the Word "Estate."

—In a will at common law the word "estate" carries a fee where no contrary intent appears. *Hammond v. Hammond*, 8 Gill & J. (Md.) 441; *Ferris v. Smith*, 17 Johns. (N. Y.) 221; *Den v. Schenck*, 8 N. J. L. 29; *Morehouse v. Cotheal*, 22 N. J. L. 430; *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *Hart v. White*, 26 Vt. 260.

"I give unto my son R. all my real estate excepting such part as I give and grant unto my two daughters as hereafter mentioned." After making a devise to said daughters, he adds: "My will is, that if any of my children should happen to die without any issue alive, that such share or dividend shall be divided by the survivor of them." It was held that under the will, R. took a fee simple defeasible on specific conditions, that if he had no issue at his death, and his sisters survived him, they should take the estate. When the sisters died, the condition became impossible, and at that time it became an absolute fee simple in R. *Den v. Schenck*, 8 N. J. L. 29.

A testator began his will by expressing a desire "to dispose of all his worldly estate," etc.; then the clause materially affecting the question, was as follows: "I give to my wife Nancy T. Moon, the tract of land whereon I now live, containing two hundred acres, more or less; also two negroes (to wit: my man Stephen and my girl Harriet), during her natural life or widowhood," remainder over, etc. It was held that these subjects were disjoined, and that the general devise of the land carried the fee. *Moon v. Moon*, 2 Strobb. Eq. (S. Car.) 327.

In *Hill v. Brown* (1894), App. Cas. 125, it was held that although the words "estate" "property," or their equivalent, in the operative part of the devise, would enlarge the gift, when used in another part of the will, as words of reference only, they would not have that effect.

Fee Simple Implied from Personal Charge—On Devisees.—The following are cases in which it was held that at common law, where there are no words of limitation or inheritance in a devise of land, and the estate, with or without the personal property, is charged with the payment of a debt or legacy, the devisee takes but an estate for life, but if the charge be upon the devisee personally, he takes an estate in fee. *McLellan v. Turner*, 15 Me. 436; *Var-*

ney v. Stevens, 22 Me. 331; *Harvey v. Olmsted*, 1 N. Y. 483; *Snyder v. Nesbeth*, 77 Md. 576.

A testator, whose will took effect in 1822, after making sundry devises, and among others, to his son M., devised the residue of his real estate, without words of perpetuity, to his son R., on condition that he should pay his debts, and a legacy to his daughter; and added that, if R. should die with issue at his decease, the real estate should be equally divided among the heirs of his said son M. It was held that R. took a fee by implication, on account of the charge upon him of the debts and legacy. *Heard v. Horton*, 1 Den (N. Y.) 105.

Instances Under Statute.—A will contained the following words: "I give and bequeath unto my son R., my home plantation, including all the lots purchased thereto, and my will is that if he shall die without issue, then at his decease the said plantation, with all the improvements thereon, shall be divided into equal parts, the one half thereof I give and bequeath to G. and S. in trust, that they do convey and assign the said equal half part," etc. It was held that, by the Act of 1784, *New Jersey Rev. Laws* 60, the testator intended that G. should have the whole plantation in fee simple in case he had issue, and that, at all events, he should be the absolute owner of one half of it. *Den v. Snitcher*, 14 N. J. L. 53.

A testator, by his will, devised in consecutive clauses, first to A., then to C., each one half of certain lands, containing — acres, to themselves for life, with the power of disposing, and, in default, with remainder over. Afterward, by a codicil to said will, he employed the following language: "I do hereby revoke that portion of my will wherein I bequeathed to the within-named A. and C. the three tracts of land between them," and afterward continued: "I bequeath to the said A. the place whereon she now lives, adjoining Neuman's land, containing three hundred acres, under the contingencies, limitations, and restrictions mentioned in my said will;" and "I revoke that part of my said will wherein I leave to the said C. that land below Silver Bluff, being a portion of the three tracts of land, and, in lieu thereof, I leave her that whole tract adjoining the point, containing upwards of three hundred acres, the lowermost part of said land. The land between the two parcels I left

to the said A. and C., I leave to the said M., son of the said G." It was held that the devise to the said C. in the codicil was not merely a substitution of one tract of land for another, to be held by her for life only, and subject to the limitations of the original devise to her by the will of the testator, but by act of 1824 was a devise in fee. *Bowers v. Newman*, 2 McMull. (S. Car.) 472.

Where a Contrary Intent Is Manifest.—In *Carroll v. Carroll*, 12 B. Mon. (Ky.) 638, a bequest was made in the following language: "I give and bequeath to my beloved wife, Priscilla Carroll, the land on which I now live, and all other land I now have or may have hereafter; also, all my slaves, stock of all kinds, farming utensils of all descriptions, household and kitchen furniture, including all my estate, both real and personal. But should she and my executors hereafter named see proper to dispose of any part of any kind, they are at liberty to do so, and apply the proceeds thereof among my children or legatees hereafter named as may seem to them just and equitable, according to the following manner: I give to the children of my daughter Polly Creekbaum as one legatee, they being first charged with seventy-seven dollars, being the amount given to her by me in her lifetime." In this case the court, by Simpson, C. J., said: "The will proceeds in the same manner to point out which of his children the estate shall be given to, and how much each one is to be charged with, on account of advances previously made. The testator subsequently made a codicil, or, as he termed it, an appendage to his will, that reads as follows: 'It is my desire, in addition to what is bequeathed to my wife, that she and my executor are hereby authorized to sell and dispose of any of my real and personal estate they may think proper, and that my wife have as much of the proceeds of such sale as she may desire for her own use and benefit, and the overplus, if any, to be applied in manner as I have directed in the first part of the will on that subject.'"

No principle was more fairly established by the common law than that a devise of real estate without words of limitation or inheritance, conferred upon the devisee an estate for life only. But the courts in many cases, where the estate devised was not expressly defined, adopted certain rules of construction, to enlarge the estate to

a fee simple where such appeared or might reasonably be inferred, to have been the intention of the testator. But this technical principle of the common law has been changed in this as well as in nearly every other state in the Union, by legislative enactments. By the eleventh section of our statute of 1796, to reduce into one the several acts for regulating conveyances (1 *Kentucky Stat. Law* 443), it was enacted that 'every estate in land, which shall hereafter be granted, conveyed, or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law.' The effect of this enactment is to change the rule of construction, and make an indefinite devise, without any words of perpetuity annexed, pass an estate in fee simple to the devisee. But it does not wholly preclude the question from arising upon wills which contain an indefinite devise without words of limitation. Whether an estate in fee simple passes to the devisee, or only an estate for life, it is still a question of intention, but the rule of construction is reversed. Formerly, an estate for life only would pass by an indefinite devise, unless a contrary intention could be inferred from the will. Now an estate in fee will pass by such a devise, unless an intention to pass a less estate appear by construction or operation of law. The operation of an indefinite devise is enlarged, where it stands alone, and unaffected, by anything contained in the context. But the effect of such a devise still depends upon the intention of the testator, to be gathered from his whole will, according to the settled rules of legal construction. . . .

So, in the present case, the devise to the wife being indefinite and not expressly for life, it would have vested in her the fee-simple title to the estate devised, if a contrary intention did not certainly and manifestly appear. As the testator designated such of his children as were to be his legatees, and fixed the amount with which they were to be charged in the division of the estate, on account of previous advancements, and directed the sale money to be paid to them, if his wife and his executors chose to sell any part of the property, unless she desired to use a part of it, which she was permitted to do, no doubt

b. EXPRESSIONS WHICH PASS AN ESTATE TAIL—(1) *Devise to A, and the Heirs of His Body*.—A limitation to the devisee and the heirs of his body is the most apt and proper expression to pass an estate tail to the devisee.

(2) *Devise to A, and His Issue*.—See ISSUE, vol. 11, p. 879.

(3) *Devise to A for Life and After His Decease to His Issue*.—See ISSUE, vol. 11, p. 886.

(4) *Devise to A, or to A for Life, or to A and His Heirs, and if He Die Without Issue Over*.—See ISSUE, vol. 11, pp. 899, 921.

(5) *Devise to A and His Children—Rule in Wild's Case*.—A simple devise to A and his children, where A has no children at the time of the devise, gives him an estate tail, under the rule in Wild's case.¹ But if there are any children living at the time

can exist that he intended them to have the property devised, after the death of his wife. The law, therefore, although there is no express devise over, vests in them, by implication, an estate in fee in remainder, in the property devised, after the death of the wife. To give effect to this implied devise over, the devise to the wife is limited by operation of law to an estate for life. Thus, the intention of the testator, instead of being defeated, is effectuated, the accomplishment of which purpose is the prime object of all the rules of construction which have been adopted on the subject." See *Hammond v. Hammond*, 8 Gill & J. (Md.) 436.

1. *Theobald on Wills* (2d ed.) 334; *Wild's Case*, 6 Rep. 17; *Clifford v. Koe*, L. R., 5 App. Cas. 447. See *Williams v. Duncan*, 92 Ky. 125; *Butler v. Ralston*, 69 Ga. 485; *Ellet v. Paxson*, 2 W. & S. (Pa.) 436; *Wheatland v. Dodge*, 10 Met. (Mass.) 504; *Small v. Field*, 102 Mo. 105; *Hubbard v. Selser*, 44 Miss. 712; *Wiley v. Smith*, 3 Ga. 551. For discussion of the rule in Wild's Case, and American authorities thereon, see ISSUE, vol. 11, pp. 879-884.

Thus, a testator made the following devise: "I leave in the hands of my executors, in trust, all the remainder of my land, etc., and I leave in the hands of my executors, in trust, one negro man, named Sam. The aforesaid land and negro above named in this item, left in trust for my sons G. and F., and their heirs. The house and lot in S., etc., I leave in trust with my executors, for my son G. and his children. I leave two lots, etc., with my executors, in trust for my son F. and his children; and if my sons G. and F. should die without having children, in that case the portion of property I leave for them

in trust with my executors, returns back to my estate, to be equally divided among all the heirs named in this will." Neither G. nor F. had at the time any child. It was held, that G. and F. took an estate tail, with remainder to the heirs named in the will. *Wiley v. Smith*, 3 Ga. 551.

"The rule applies, though the testator may expressly give the parent a power of appointing the property in question among his children. *Seale v. Barter*, 2 Bos. & P. 485; *Clifford v. Brooke*, 1 R., 10 C. Y. 179; L. R., 2 Ir. 184; *nom. Clifford v. Koe*, L. R., 5 App. Cas. 447. See *In re Moyles' Estate*, L. R., 1 Ir. 155." *Theobald on Wills* (2d ed.) 334.

In *Seale v. Barter*, 2 Bos. & P. 485, the testator devised all his estates to his son J. S., and his children lawfully to be begotten, with power for him to settle the same by will or otherwise on such of them as he should think proper; and for default of such issue then to his daughter E. S., and her children lawfully to be begotten, with a similar power; and in default of such issue, to J. S. and E. S. equally between them; and he further provided that a settlement of £200 per annum should be made on any woman whom his son should happen to marry; and that his estates should be chargeable therewith. At the time of making the devise, J. S. was married, but had no child. It was held that J. S. took "an estate tail, with a power to settle the estates on all or any of his issue in such a way as he should appoint; and thereby determine the estate tail so far as it should be inconsistent with such settlement." In this case Lord Alvanley said: "On the part of the defendants it has been contended, that admitting the

of the devise, the word "children" is *prima facie* construed a word of purchase, and A and the children take concurrently.¹

(6) *Devise to A and His Sons in Tail Male, and for Want of Such Issue Over.*—By analogy to the rule in Wild's case, a devise to A and his sons in tail male, and for want of such issue male

general doctrine that a devise to a man and his children, he having no children at the time of the devise, must embrace all the posterity of the devisee, yet that it appears from the circumstances of this particular case that the testator did not intend so to limit his estate; and in the course of the argument the power given to John Seale to settle the estate on such of his children as he should think proper was mainly relied upon, and contended to be inconsistent with a devise of an estate tail to John Seale himself. It was urged that the power would be altogether unnecessary if an estate tail were already given, since it would be in the power of the tenant in tail to dispose of the whole estate in such manner as he should think fit, by cutting off the entail. But it may be observed that the power had some operation, since it enabled the devisee to dispose of the estate to his children without going through the forms of a recovery. Independent, however, of the operation of this power, I think there is a fallacy in the argument; for it supposes that the testator knew the legal consequences of all the words which he had used, and all the privileges attached to a tenancy in tail. The same argument was urged in the great case of *Perryn v. Blake*; and in the Exchequer Chamber, Mr. Baron Perrot exposed the fallacy of it; and it was agreed that a testator cannot be presumed to know the different privileges annexed to the several estates of tenant for life or tenant in tail. The true question to be considered is, whether the testator meant to give the estate to John Seale and his posterity? Probably, if it had been asked of the testator whether he meant that his son should have a power to defeat the limitation, he would have answered, that he did not understand the effect of an estate tail, but that he wished the estate to go to his son and his posterity. If he meant to give his estate to his son and his posterity generally, it is an estate tail; on the other hand, if he meant to give it first to his son, and afterwards to select the sons and daughters of his son in order to

give the estate to them, the son took only an estate for life. Now, we are of opinion, upon all the authorities, that the words 'children lawfully to be begotten,' in this case, are not to be considered as words of purchase, but that the intention of the testator was to give his estate to his son and the issue of his body generally. And though perhaps the power would not have been added had the testator known the full effect of the words which he has used, yet we do not think the power sufficient to control the effect which, according to the authorities referred to, has always been given to those words. We give no opinion what would have been the case if there had been children born at the time of the devise."

"There may, however, be an intention shown that the parent was not to take an estate tail. Thus, in *Buffar v. Bradford*, 2 Atk. 220, the testator showed that he contemplated the mother and children as taking joint interests at a period subsequent to his death. And in *Grieve v. Grieve*, L. R., 4 Eq. 180, where there was a devise of a house to the testator's nieces and their children, and if they have not any, over, a direction that the furniture was to go with the house, was held sufficient to show that an estate tail could not have been intended." Theobald on Wills (2d ed.) 334.

1. See *infra*, this title, *Concurrent and Successive Interests*.

"If there are any children living at the time of the devise, the term children is *prima facie* not a word of limitation. *Byng v. Byng*, 10 H. L. Cas. 171; *Oates v. Jackson*, 2 Stra. 1172; *Jeffery v. Honynwood*, 4 Madd. 211; *Jones v. Jones*, 13 N. J. Eq. 236; *Wilde's Case*, 6 Coke 16. But this rule bends to evidence of a contrary intention; thus, a direction that certain things are to go as heirlooms with the estate, is sufficient to rebut a joint tenancy, and to show that an estate tail was intended to be given. *Byng v. Byng* 10 H. L. Cas. 171. *Jones v. Jones*, 13 N. J. Eq. 236." Theobald on Wills (2d ed.) 334. See *Allen v. Hoyt*, 5 Met. (Mass.) 324.

over, has been held, where A has no sons, to give him an estate tail.¹

c. DEVISE TO A FOR LIFE, AND AFTER HIS DECEASE TO HIS HEIRS OR THE HEIRS OF HIS BODY—RULE IN SHELLEY'S CASE.—See SHELLEY'S CASE, vol. 22, p. 493.

d. EFFECT OF A GENERAL POWER OF DISPOSITION AFTER A PRIOR LIFE ESTATE.—See REMAINDERS, vol. 20, p. 958.

19. Absolute Interests in Personality—*a*. GIFT TO A AND HIS EXECUTORS OR REPRESENTATIVES.—A gift to A and his executors, or to A and his representatives,² or to A for life, and then to his

1. Theobald on Wills (2d ed.) 335; Wharton v. Gresham, 2 W. Bl. 1083. Compare Sparling v. Parker, 29 Beav. 450.

2. Theobald on Wills (2d ed.) 370; Lugar v. Harman, 1 Cox 250; Taylor v. Beverley, 1 Coll. 108; Appleton v. Rowley, L. R., 8 Eq. 139; Price v. Strange, 6 Madd. 104. See Topping v. Howard, 4 De G. & S. 268; Cox v. Curwen, 118 Mass. 108; Brent v. Washington, 18 Gratt. (Va.) 529.

Representatives, Personal Representatives—Legal Personal Representatives.—“The words representatives, legal representatives, personal representatives, or legal personal representatives, must, in the absence of other controlling words, be taken to mean persons claiming as executors or administrators. *In re Crawford's Trust*, 2 Drew. 230; *Hinchcliffe v. Westwood*, 2 De G. & S. 216; *Dixon v. Dixon*, 24 Beav. 129; *In re Turner*, 2 D. & S. 501; *Smith v. Barneby*, 2 Colly. 728; *Wyndham's Trusts*, L. R., 1 Eq. 290; *Alger v. Parrott*, L. R., 3 Eq. 328; *In re Best's Settlement*, L. R., 18 Eq. 686. If, however, there is an indication of intention that the representatives are to take beneficially and not in any fiduciary capacity, the words can hardly be referred to executors or administrators, and they will generally mean statutory next of kin, including a widow, but not a husband. *Cotton v. Cotton*, 2 Beav. 67; *Smith v. Palmer*, 7 Hare 225; *Holloway v. Radcliffe*, 23 Beav. 163; *King v. Cleaveland*, 26 Beav. 166; 4 De G. & J. 477. It would seem that by analogy to the case of heirs, the statute would fix the proportions as well as the persons, and that *Walker v. Camden*, 16 Sim. 329, would not now be followed.

“1. If the gift is substitutional, as for instance, to A or his legal representatives, or even to A, and if he dies be-

fore me to his representatives, there is an *a priori* improbability that the testator meant to benefit the estate of the legatee if he died in his own lifetime, while the legatee himself could derive no benefit from the legacy unless he survived the testator, and therefore, representatives will be read as equivalent to statutory next of kin. *Bridge v. Abbott*, 3 Bro. C. C. 224; *Cotton v. Cotton*, 2 Beav. 67. See *Hewetson v. Todhunter*, 22 L. J. Ch. 76. And if the gift is to several related persons, or their respective representatives, representatives will mean descendants. *Styth v. Monro*, 6 Sim. 49. See *Horaeppool v. Watson*, 3 Ves. Jr. 383; *Atherton v. Crowther*, 19 Beav. 448; *In re Booth*, 1 W. N. 1877, 129.

“2. Where there is a prior life estate, the reasons for construing ‘legal representatives’ as next of kin do not apply. The substitutional words may be considered as inserted merely *en abundantia cautela*, to provide for the death of the legatee in the lifetime of the tenant for life. *In re Crawford*, 2 Drew. 242; *In re Henderson*, 28 Beav. 656; *Hinchcliffe v. Westwood*, 2 De G. & S. 216; *Chapman v. Chapman*, 33 Beav. 556; *In re Turner*, 2 D. & S. 501. The same is the case where there is a direct gift to A or his personal representatives, but the time of payment is postponed, or a gift to A, and if he dies before the whole is expended, to his representatives. *Thompson v. Whitelock*, 4 De G. & J. 490; *Dixon v. Dixon*, 24 Beav. 129.

“3. If there are words of distribution, such as ‘to and amongst,’ or ‘share and share alike,’ and similar expressions, showing that the ‘representatives’ are to take beneficially, the legacy will go to the statutory next of kin. *King v. Cleaveland*, 4 De G. & J. 477; *Baines v. Ottey*, 1 Myl. & K. 465; *Smith v. Palmer*, 7 Hare 225. This,

executors or administrators or to his personal representatives, gives A the absolute interest.¹ But if the gift is to A expressly for life, and then to his executors or administrators for their own use and benefit, they take beneficially.²

b. GIFT TO A AND HIS HEIRS.—The better opinion is that under a gift to A and his heirs, A takes an absolute interest.³

however, does not apply where, the gift being to the representatives of several persons who take life interests, the words of distribution can be referred to the *stirpes*. *Wing v. Wing*, 24 W. R. 878.

"4. If the words executors and administrators have been used in other parts of the will, this is an argument to show that representatives must mean something else. *Jennings v. Gallimore*, 3 Ves. 146; *King v. Cleaveland*, 4 De G. & J. 477; *Nicholson v. Wilson*, 14 Sim. 549; *Walker v. Camden*, 16 Sim. 329; *Briggs v. Upton*, L. R., 7 Ch. 376.

"5. Where there is a direction to pay to personal representatives, the fact that an executor is appointed would be a strong argument in favor of next of kin. *Robinson v. Smith*, 6 Sim. 47; *Walter v. Makin*, 6 Sim. 148; *Jennings v. Gallimore*, 3 Ves. Jr. 146. See *Briggs v. Upton*, L. R., 7 Ch. 376.

"6. The same result will follow if there are words added to the term 'representatives' inconsistent with the meaning 'executors or administrators,' such as 'personal representatives or next of kin' (a); or 'such persons as would be the personal representatives of my daughter in case she had died unmarried' (b); or, 'legal personal representatives at the time of her death' (c); or, 'next legal or personal representatives' (d). *Phillips v. Evans*, 4 De G. & S. 188 (a); *In re Gryll's Trusts*, L. R., 6 Eq. 589 (b); *Robinson v. Evans*, 22 W. R. 199; 43 L. J. Ch. 82; *Long v. Blackall*, 3 Ves. Jr. 486 (c); *Booth v. Vicars*, 1 Colly. 6; *Stockdale v. Nicholson*, L. R., 4 Eq. 359 (d). Whether, in this latter case, the next of kin proper or the statutory next of kin take, see *Booth v. Vicars*, 1 Colly. 6; *Stockdale v. Nicholson*, L. R., 4 Eq. 359 (d). A gift to personal representatives *per stirpes*, and not *per capita*, has been held to mean descendants. *Atherton v. Crowther*, 19 Beav. 448. For a direction to pay to 'legal representatives according to the course of administration,' see *Jennings v.*

Gallimore, 3 Ves. Jr. 146; *Briggs v. Upton*, L. R., 7 Ch. 376. It would seem that the addition of the word assigns in a substitutional gift to heirs or representatives would make it impossible to construe these words as equivalent to next of kin. *Graffley v. Humpage*, 1 Beav. 46; *Waite v. Temppler*, 2 Sim. 524." *Theobald on Wills* (2d ed.) 283.

See further, upon the point, *Thompson v. Young*, 25 Md. 450; *Johnson v. Johnstone*, 12 Rich. Eq. (S. Car.) 260.

1. *Theobald on Wills* (2d ed.) 370; *Atty. Gen'l v. Malkin*, 2 Ph. 64; *Saberton v. Skeels*, 1 R. & M. 587; *Alger v. Parrott*, L. R., 3 Eq. 328; *Avern v. Lloyd*, L. R., 5 Eq. 383; *Wing v. Wing*, 24 W. R. 878.

2. *Theobald on Wills* (2d ed.) 370; *Sanders v. Franks*, 2 Madd. 418; *Wallis v. Taylor*, 8 Sim. 241. See *Stocks v. Dodsley*, 1 Keen 325.

Gift to Executors in Default of Appointment.—"A gift to A for life with power to appoint by will, and in default of appointment to his executors and administrators, gives an absolute interest and entitles the donee to immediate payment, and it is apparently not necessary that the power shall be released." *Theobald on Wills* (2d ed.) 371; *Devall v. Dickens*, 9 Jur. 550; *Page v. Soper*, 11 Hare 321.

3. *Theobald on Wills* (2d ed.) 371.

Construction of the Word Heirs in Bequests of Personality.—Upon this subject, *Theobald* lays down the following propositions: "1. A bequest of personality to the right heirs, or to the heirs at law, or the next heir of an individual, *prima facie* goes to such heir as *persona designata*, whether the bequest be to the heirs of the testator or of a stranger. *Mounsey v. Blamire*, 4 Russ. 384; *Hamilton v. Mills*, 29 Beav. 193; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524; *In re Rootes*, 1 D. & S. 228; *Southgate v. Clinch*, 27 L. J. Ch. 651; 4 Jur. N. S. 428. The rule applies, *a fortiori*, to a mixed fund. *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524; *Boydell v.*

Golightly, 14 Sim. 327; Todhunter v. Thompson, 26 W. R. 883.

"2. In the same way, if the gift is to A for life with remainder to his heirs, the heir, in the strict sense, is entitled. *In re Dixon*, 4 Prob. Div. 81; *Smith v. Butcher*, 10 Ch. Div. 113, *disapproving* *Mounsey v. Blamire*, 4 Russ. 384. The cases of *Evans v. Salt*, 6 Beav. 266; *Low v. Smith*, 25 L. J. Ch. 503; 2 Jur. N. S. 344; *In re Peppitt's Estate*, 36 L. T. N. S. 500, must be considered overruled, unless they can be supported on the special context in each case.

"3. But the word heirs may be controlled by the context, as in *Re Gamboa's Trust*, 4 K. & J. 757, where a bequest to 'the heirs of my late partner for losses sustained during the time that the business of the house was under my sole control,' went to the next of kin under the statutes; and in *Re Newton's Trusts*, L. R., 4 Eq. 171, where the bequest to 'the heirs and assigns of my deceased sister' was shown to be *quasi* substitutional by other limitations to the testator's living brothers and sisters and their heirs and assigns; and see *In re Steevens' Trusts*, L. R., 15 Eq. 110, as to which case *quare*. Where the intention is to give A the absolute interest, the word heirs has been held equivalent to executors and administrators. *Powell v. Boggis*, 35 Beav. 535, where the gift was to A for life, then to her heirs as she shall give it by will, and if she dies without a will, to her right heirs. And, where the testator directs a division amongst the several heirs of tenants for life, who are related to each other, so that heirs cannot mean next of kin, heirs will mean children. *Bull v. Comberbach*, 25 Beav. 540. See *Roberts v. Edwards*, 33 Beav. 259.

"4. In a gift to A or his heirs, heirs means the persons entitled under the statute. *Vaux v. Henderson*, 1 J. & W. 388; *Gittings v. M'Dermott*, 2 Myl. & K. 69; *Jacobs v. Jacobs*, 16 Beav. 557; *Doody v. Higgins*, 9 Hare App. 32; 2 K. & J. 729; *In re Craven*, 23 Beav. 333; *Powell v. Boggis*, 35 Beav. 535; *Parsons v. Parsons*, L. R., 8 Eq. 260; *Neilson v. Monro*, 27 W. R. 936. If real and personal estate are given together to persons or their heirs, but the realty is not converted, the realty goes to the heir, and the personality to the statutory next of kin. *Wingfield v. Wingfield*, 9 Ch. Div. 658. In a bequest to children or their heirs, followed by a gift over, if all the

children die without issue, the word heirs has been held to mean issue. *Speakman v. Speakman*, 8 Hare 180, and see *Roberts v. Edwards*, 12 W. R. 33. In a bequest to A or the heirs of his body, heirs of the body means such of the persons entitled under the statute as may be descendants of A. *Pattenden v. Hobson*, 17 Jur. 406; 22 L. J. Ch. 697. A widow is included in the persons entitled under the statute, and the statute fixes not only the persons but the proportions in which they take. *In re Steevens' Trusts*, L. R., 15 Eq. 110; *Jacobs v. Jacobs*, 16 Beav. 557; *Doody v. Higgins*, 9 Hare App. 32. A bequest of personality to 'the heirs of next of kin of A,' has been construed as a gift to next of kin. *In re Thompson's Trusts*, 9 Ch. Div. 607." *Theobald on Wills* (2d ed.) 273.

See further, upon the subject, *Eddings v. Long*, 10 Ala. 205; *Peacock v. Albin*, 39 Ind. 25; *Rusing v. Rusing*, 25 Ind. 63; *Lord v. Bourne*, 63 Me. 368; *Morton v. Barrett*, 22 Me. 257; *Mace v. Cushman*, 45 Me. 250; *Daggett v. Slack*, 8 Met. (Mass.) 450; *Tillinghast v. Cook*, 9 Met. (Mass.) 147; *Bassett v. Granger*, 100 Mass. 348; *Holbrook v. Harrington*, 16 Gray (Mass.) 102; *Balcom v. Haynes*, 14 Allen (Mass.) 205; *Houghton v. Kendall*, 7 Allen (Mass.) 76; *Loring v. Thorndike*, 5 Allen (Mass.) 257; *Clarke v. Cordis*, 4 Allen (Mass.) 480; *Haley v. Boston*, 108 Mass. 579; *Bailey v. Bailey*, 25 Mich. 185; *Scudder v. Vandersdale*, 13 N. J. Eq. 109; *Cushman v. Horton*, 59 N. Y. 149; *Heard v. Horton*, 1 Den. (N. Y.) 168; *Whitehead v. Lassiter*, 4 Jones Eq. (N. Car.) 79; *Freeman v. Knight*, 2 Ired. Eq. (N. Car.) 75; *McCabe v. Sprull*, 1 Dev. & B. Eq. (N. Car.) 189; *Kiser v. Kiser*, 2 Jones Eq. (N. Car.) 28; *Corbitt v. Corbitt*, 1 Jones Eq. (N. Car.) 114; *Henderson v. Henderson*, 1 Jones (N. Car.) 221; *Nelson v. Blue*, 63 N. Car. 660; *Ferguson v. Steuart*, 14 Ohio 140; *Heyward v. Heyward*, 7 Rich. Eq. (S. Car.) 289; *Templeton v. Walker*, 3 Rich. Eq. (S. Car.) 543; *Evans v. Godbold*, 6 Rich. Eq. (S. Car.) 26; *Evans v. Harlee*, 9 Rich. (S. Car.) 501; *Hay v. Hay*, 4 Rich. Eq. (S. Car.) 378; *Addison v. Addison*, 9 Rich. Eq. (S. Car.) 58; *Basikin's Appeal*, 3 Pa. St. 305; *Guthrie's Appeal*, 37 Pa. St. 9; *Chew's Appeal*, 37 Pa. St. 23; *Porter's Appeal*, 45 Pa. St. 201; *Ingram v. Smith*, 1 Head (Tenn.) 411; *Ward v. Saunders*, 3 Sneed (Tenn.) 391.

c. GIFT TO A AND THE HEIRS OF HIS BODY.—Under such a limitation, A takes an absolute interest.¹

d. GIFT TO A AND HIS ISSUE.—See ISSUE, vol. 11, p. 879.

e. GIFT TO A FOR LIFE, AND AFTER HIS DECEASE TO HIS ISSUE.—See ISSUE, vol. 11, p. 890.

f. GIFT TO A AS TO A FOR LIFE, OR TO A FOR LIFE AND AFTER HIS DECEASE TO HIS ISSUE, WITH GIFT OVER IN DEFAULT OF ISSUE.—See ISSUE, vol. 11, p. 923.

g. GIFT TO A AND HIS CHILDREN—RULE IN WILD'S CASE.—It has been held that the rule in Wild's Case does not apply to bequests of personality to A and his children.²

1. Theobald on Wills (2d ed.) 371; 2 Jarm. on Wills (5th ed.) *562 and cases cited; *Leventhorpe v. Ashlie*, Rolle's Ab. 831, pl. 1; *Searle v. Searle*, 1 P.Wms. 290; *Wright v. Scott*, 4 Wash. (U. S.) 16; *Goldsby v. Goldsby*, 38 Ala. 404; *Smith's Appeal*, 23 Pa. St. 9; *Pott's Appeal*, 30 Pa. St. 168.

2. Theobald on Wills (2d ed.) 335; *Audsley v. Horn*, 1 De G. F. & J. 226. In this case personality was bequeathed to the testator's daughter during her life, and at her death to her daughter and to the granddaughter's children, but if they should die without issue, then over. The granddaughter was unmarried at the dates of the will and of the testator's death, and had no child till after the death of the testator's daughter. It was held that the granddaughter took a life interest in the subject-matter of the bequest, with remainder to her children. Lord Campbell said: "The appellants mainly rely upon Wild's Case, 6 Rep. 17 (meaning the rule said to have been laid down in Wild's Case as the effect of particular words in a will applicable to real estate), and the general rule that words in a will, which would create an estate tail as to realty, will carry the absolute interest as to personality. This raises the vexed question, whether Wild's Case applies to personality. This question underwent much discussion in the case of *Stokes v. Heron*, 2 D. & W. 89, in which, when it came by appeal before the House of Lords, I took a part. As, in disposing of that case, there was no necessity for deciding that question, I forebore from giving any opinion upon it, and, along with Lord Cottenham, I wished the question still to be considered as open. Now I am prepared deliberately to say that, in my opinion, Wild's Case, 6 Rep. 17, does not apply to personal property. The

general rule, that words in a will which create an estate tail in realty will give an absolute interest in personality, is founded upon the desire to give effect to the intention of the testator as far as the rules of law will permit. But the rule ought not to prevail where it would entirely defeat the intention of the testator, and where, without any violation of the rules of law, the intention of the testator may be carried into effect. The resolution in Wild's Case, 6 Rep. 17, as to realty, entirely depends upon the desire to benefit the children as the testator intended, because an estate tail in the parent is the only medium by which they can take; and were it not for the power of cutting off the entail (which, in construing wills, is disregarded), the children must take. But as to personality, for the purpose of benefiting the children, the application of the rule is wholly unnecessary, and the application of it would entirely defeat the intention of the testator, for it would deprive the children of all right to any benefit under the will. With respect to personality, there are no technical rules arising from the feudal law to prevent the intention of the testator being literally carried into effect. Here the testator could not mean that Amelia and her children should take jointly; and he no doubt did mean that she should take for her life, and that her children should take at her death. Therefore, the same reason which, with respect to realty, requires that, under such words as are supposed in Wild's Case, 6 Rep. 17, the parent should take an estate tail, requires that, when they are applied to personality, the parent should take only an estate for life. Where an estate tail is given by such words applied to realty, an exception arises to the rule that words which give

h. RULE THAT WORDS WHICH CREATE AN ESTATE TAIL IN REALTY, CREATE AN ABSOLUTE INTEREST IN PERSONALTY.—The general rule of construction that words which would create an estate tail in a devise of real estate, create an absolute interest in personalty, cannot be received without some qualification,¹ for the inclination to construe the words "issue," "child," "son," and other informal expressions as words of limitation, is much weaker in reference to personal than real estate;² while the application of the rule in *Wild's Case*³ is extremely questionable⁴ and the rule in *Shelley's Case* does not apply.⁵

i. SUBSEQUENT RESTRICTIONS—GIFTS FOR A PARTICULAR PURPOSE.—If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. But if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee.⁶

an estate tail in realty, will give an absolute interest when applied to personalty; and this may be considered an exception which proves the rule, as it is supported by the reason on which the rule rests."

The question, however, is by no means free from doubt, and where the gift is to A and his issue, the better opinion sustains the application of the rule. For authorities upon both sides of the controversy, see *Issue*, vol. 11, p. 880 *et seq.* See also *Cape v. Cape*, 2 Y. & C. 543; *Beales v. Crisford*, 13 Sim. 594; *Shearman v. Angel*, *Bailey Eq.* (S. Car.) 357.

1. For instances in which the will has been recognized, see *Mengel's Appeal*, 61 Pa. St. 248; *Smith's Appeal*, 23 Pa. St. 9; *Eichelberger v. Barnetz*, 17 S. & R. (Pa.) 293; *Deane v. Hansford*, 9 Leigh (Va.) 253; *Goodwyn v. Taylor*, 4 Call (Va.) 305; *Clark v. Clark*, 2 Head (Tenn.) 336; *Duncan v. Martin*, 7 Yerg. (Tenn.) 519; *King v. Beck*, 12 Ohio 390; *Patterson v. Ellis*, 11 Wend. (N. Y.) 259; *Clusin v. Williams*, 29 Mo. 288; *Halton v. Weems*, 12 Gill & J. (Md.) 83; *Dashiell v. Dashiell*, 2 Harr. & G. (Md.) 127;

Kent v. Armstrong, 6 N. J. Eq. 648; *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Darden v. Burns*, 6 Ala. 365; *Henry v. Felder*, 2 McCord Eq. (S. Car.) 323; *McLure v. Young*, 3 Rich. Eq. (S. Car.) 559; *Weeks v. Weeks*, 5 Ired. Eq. (N. Car.) 111; *Bowman v. Tucker*, 3 Humph. (Tenn.) 648.

2. 2 Jarm. on Wills (5th ed.) *572. See *Issue*, vol. 11, p. 868; *Gawler v. Cadby*, Jac. 346; *Malcolm v. Taylor*, 2 R. & M. 416; *Stone v. Maule*, 2 Sim. 490. Compare *Scott v. Scott*, 15 Sim. 47; *Mix v. Ray*, 5 Rich. Eq. (S. Car.) 423; *Bridges v. Wilkins*, 3 Jones Eq. (N. Car.) 342.

3. 6 Co. 16 b.

4. See *supra*, this title, *Gift to A. and His Children—Rule in Wild's Case*.

5. *Jessell*, M. R., in *Smith v. Butcher*, L. R., 10 Ch. Div. 116. See also *Issue*, vol. 11, p. 890, *Shelley's Case*, Vol. 22, p. 493. Compare *Powell v. Boggis*, 35 Beav. 535; *Comfort v. Brown*, L. R., 10 Ch. Div. 146.

6. *Lord Cottenham in Lassence v. Tierney*, 1 Mac. & G. 551.

"Thus, if there is an absolute gift by will, and restrictions are imposed upon

j. EFFECT OF A GENERAL POWER OF DISPOSITION AFTER A PRIOR GIFT TO A, OR TO A FOR LIFE.—See REMAINDERS, vol. 20, p. 955.

k. GIFT OF INCOME INDEFINITELY.—A gift of the income of personal property, without limit as to time, carries the capital, where no other disposition of the capital is made.¹

20. Vesting—Whether a Gift Is Vested or Contingent—*a.* OF CONSTRUING AN INTEREST TO BE VESTED RATHER THAN CONTINGENT.—It is a fundamental rule of construction that in doubtful cases an interest shall, if possible, be construed to be vested in the first instance, rather than contingent, but if it cannot be construed as vested in the first instance, that at least it shall be con-

the legatee's enjoyment by a codicil, the absolute gift remains so far as the restrictions do not extend. *Norman v. Kynaston*, 3 De G. F. & J. 29; *Watkins v. Weston*, 3 De G. J. & S. 434. So where there is a valid appointment to objects of a power with limitations or restrictions which are beyond the power, the invalid restrictions may be rejected. *Stephens v. Gadsden*, 20 Beav. 463; *Gerrard v. Butler*, 20 Beav. 541; *Churchill v. Churchill*, L. R., 5 Eq. 44; *Webb v. Sadler*, L. R., 14 Eq. 533; L. R., 8 Ch. 419. But where there is no absolute gift, the legatees can take no more than is given them. *Savage v. Tyers*, L. R., 7 Ch. 356. The difficulty in these cases lies in ascertaining whether there is an absolute gift in the first instance or not. The question is, whether the original gift is qualified by the words in which it is given, *Scawin v. Watson*, 10 Beav. 200; *Gompertz v. Gompertz*, 2 Ph. 107; *Harris v. Newton*, 25 W. R. 228; 46 L. J. Ch. Div. 268; or whether there is an independent gift with a direction as to its mode of enjoyment. *Campbell v. Brownrigg*, 1 Ph. 301; *Whittell v. Dudin*, 2 J. & W. 279; *Winckworth v. Winckworth*, 8 Beav. 576; *Mayer v. Townsend*, 3 Beav. 443; *McTear v. McDowell*, 11 Ir. Ch. 338; *Welply v. Comick*, 16 Ir. Ch. 74; *Kellett v. Kellett*, L. R., 3 H. L. 160. When an absolute interest is cut down to a life estate, with a power of appointment among children, this does not mean that the absolute interest is to be cut down, only if the donee appoints, but if there are children, the donee is bound to appoint to them. *Butler v. Gray*, L. R., 5 Ch. 26." *Theobald on Wills* (2d ed.) 377.

1. *Theobald on Wills* (2d ed.) 374. See *Humphrey v. Humphrey*, 1 Sim.

N. S. 536; *Watkins v. Weston*, 32 Beav. 238; *Fox v. Carr*, 16 Hun (N. Y.) 566; *Gulick v. Gulick*, 27 N. J. Eq. 498; *McMichael v. Hunt*, 83 N. Car. 344. In *Adamson v. Armitage*, 19 Ves. Jr. 418, Sir William Grant said: "*Prima facie* a gift of the produce of a fund is a gift of that produce in perpetuity; and is consequently a gift of the fund itself, unless there is something upon the face of the will to show that such was not the intention."

"This is the case, though the gift may be to the separate use, or through the medium of a trust. *Elton v. Shepherd*, 1 Bro. C. C. 532; *Phillips v. Chamberlaine*, 4 Ves. 51; *Rawlings v. Jennings*, 13 Ves. Jr. 39; *Boosey v. Gardner*, 18 Beav. 471; *Haig v. Sueiney*, 1 Sim. & Stu. 487; *Humphrey v. Humphrey*, 1 Sim. N. S. 536; *Watkins v. Weston*, 32 Beav. 238; 3 De G. J. & S. 434; *Penny v. Pippin*, 15 W. R. 306. A gift of income during widowhood is a gift for life or during widowhood; but a gift of income to a legatee, so long as she should continue single and unmarried, has been held to be an absolute interest if the legatee did not marry. *Rishton v. Cobb*, 5 Myl. & C. 145. In the same way, a gift of the income of property, with a power super-added of disposing of it by will, is an absolute interest. *Southouse v. Bate*, 16 Beav. 132; *Weale v. Ollive*, 32 Beav. 421. The fact that legacies are given at the decease of the person to whom the income is given indefinitely, will only cut down the absolute interest to the extent of the legacies. *Jenings v. Bailly*, 17 Beav. 118. Upon similar principles, a gift of income to A for life, and then to B indefinitely, gives B the absolute interest. *Clough v. Wynne*, 2 Mad. 188. But a gift of income to B and C and the survivor of them, gives

strued to become vested as early as possible.¹ This is perfectly consistent with the equally well-settled rule that an interest shall

them only life interests. *Blann v. Bell*, 2 De G. M. & G. 775." *Theobald on Wills* (2d ed.) 374.

1. *Smith Ex. Int.*, §§ 200, 201; *Theobald on Wills* (2d ed.) 400. See *Doe v. Considine*, 6 Wall. (U. S.) 458; *McArthur v. Scott*, 113 U. S. 340; *Pike v. Stephenson*, 99 Mass. 188; *Olney v. Hull*, 21 Pick. (Mass.) 311; *Ferson v. Dodge*, 23 Pick. (Mass.) 287; *Bowers v. Porter*, 4 Pick. (Mass.) 108; *Dingley v. Dingley*, 5 Mass. 535; *Furness v. Fox*, 1 Cush. (Mass.) 134; *Eldridge v. Eldridge*, 9 Cush. (Mass.) 516; *Winslow v. Goodwin*, 7 Met. (Mass.) 363; *Knowlton v. Sanderson*, 141 Mass. 323; *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Blanchard v. Brooks*, 12 Pick. (Mass.) 63; *Shattuck v. Stedman*, 2 Pick. (Mass.) 468; *Straus v. Rost*, 67 Md. 465; *Crisp v. Crisp*, 61 Md. 149; *Taylor v. Mosher*, 29 Md. 450; *Waters v. Waters*, 24 Md. 430; *Toms v. Williams*, 41 Mich. 552; *Den v. Demarest*, 21 N. J. L. 525; *Monarque v. Monarque*, 80 N. J. L. 320; *Newberry v. Hinman*, 49 Conn. 132; *Beckley v. Leffingwell*, 57 Conn. 163; *Farnam v. Farnam*, 53 Conn. 280; *Collier's Will*, 40 Mo. 321; *Chew v. Keller*, 100 Mo. 362; *Rogers v. Rogers*, 11 R. I. 38; *Hopkins v. Hopkins*, 1 Hun (N. Y.) 352; *Goebel v. Wolf*, 113 N. Y. 405; *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Black v. Williams*, 51 Hun (N. Y.) 280; *Byrnes v. Stillwell*, 103 N. Y. 453; *Arcularius v. Geisenhainer*, 3 Bradf. (N. Y.) 64; *Tucker v. Ball*, 1 Barb. (N. Y.) 94; *Nodine v. Greenfield*, 7 Paige (N. Y.) 544; *Scott v. West*, 63 Wis. 529; *Baker v. McLeod*, 79 Wis. 541; *Touer v. Collins*, 67 Iowa 369; *Bruce v. Bissell*, 119 Ind. 529; *Davidson v. Bates*, 111 Ind. 391; *Harris v. Carpenter*, 109 Ind. 540; *Miller v. Keegan*, 14 Ind. 502; *Griffin v. Lynch*, 16 Ind. 396; *Davidson v. Hutchins*, 112 Ind. 322; *Linton v. Laycock*, 33 Ohio St. 128; *Stokes v. Van Wyck*, 83 Va. 734; *Cooper v. Hepburn*, 15 Gratt. (Va.) 551; *Peterson's Appeal*, 88 Pa. St. 402; *Womrath v. McCormick*, 51 Pa. St. 504; *Fulton v. Fulton*, 2 Grant's Cas. (Pa.) 28; *Stook's Appeal*, 20 Pa. St. 349; *Buzby's Appeal*, 61 Pa. St. 114; *McCall's Appeal*, 86 Pa. St. 254; *McClure's Appeal*, 72 Pa. St. 414; *Chew's Appeal*, 37 Pa. St. 23; *Lantz v. Trusler*, 37 Pa. St.

482; *Young v. Stoner*, 37 Pa. St. 105; *Letchworth's Appeal*, 30 Pa. St. 175; *Manderson v. Lukens*, 23 Pa. St. 31; *Smith's Appeal*, 23 Pa. St. 9; *Braden v. Cannon*, 1 Grant's Cas. (Pa.) 60; *Weatherhead v. Stoddard*, 58 Vt. 623; *Guyther v. Taylor*, 3 Ired. Eq. (N. Car.) 323; *Brinson v. Wharton*, 8 Ired. Eq. (N. Car.) 80; *Hilliard v. Kearney*, Busb. Eq. (N. Car.) 221; *Clanton v. Estes*, 77 Ga. 352; *Hudgens v. Wilkins*, 77 Ga. 555; *Legwin v. McRee*, 79 Ga. 430; *Wiggins v. Blount*, 33 Ga. 409; *Young v. McKinnie*, 5 Fla. 542; *Savage v. Benham*, 17 Ala. 119; *Foster v. Holland*, 56 Ala. 474; *Farley v. Gilmer*, 12 Ala. 141; *Watkins v. Quarles*, 23 Ark. 191; *Williamson v. Williamson*, 18 B. Mon. (Ky.) 329; *Roberts v. Brinker*, 4 Dana (Ky.) 570; *Bowling v. Dobyns*, 5 Dana (Ky.) 434; *In re Miller's Will*, 2 Lea (Tenn.) 64; *Bridgewater v. Gordon*, 2 Sneed (Tenn.) 5; *McCartney v. Osburn*, 118 Ill. 403; *Scofield v. Olcott*, 120 Ill. 362; *Bunting v. Speaks*, 3 L. R. A. 690; *Cal. Civ. Code*, § 1341; *Williams v. Williams*, 73 Cal. 99; *Doe v. Perryn*, 3 T. R. 484; *Scott v. James*, 4 Miss. 307; *Bankhead v. Carlisle*, 1 Hill Eq. (S. Car.) 357; *Britton v. Johnson*, 2 Hill Eq. (S. Car.) 430; *Rivers v. Fripp*, 4 Rich. Eq. (S. Car.) 276; *Kersh v. Yongue*, 7 Rich. Eq. (S. Car.) 100; *Smith v. Hilliard*, 3 Strobb. Eq. (S. Car.) 211; *Doe v. Considine*, 6 Wall. (U. S.) 458.

"The following reasons may be assigned for this rule:

"1. A contingent interest is generally more liable to be destroyed than one that is vested; and it is to be presumed, that a testator intends that species of limitation which will be most likely to secure the accomplishment of his plans.

"2. 'Testators that create contingent estates,' observes Lord Chief Justice Best (in *Duffield v. Duffield*, 1 Dow. & Cl. 195), 'often forget to make any provision for the preservation of their estates, and for the disposition of the rents and profits of the intermediate period between their deaths and the vesting of their estates. In such cases the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period, and that they have obtained the possession of them from the inattention of, and not from

the bounty of, the testator, or from the mistake of the professional man who drew the will, will make the most they can of them, during the time that they remain heirs, regardless of any injury that the estates may suffer from their conduct.'

"3. 'The rights of the different members of families not being ascertained while estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them.'

"4. 'If the parents' attaining a certain age, be a condition precedent to the vesting estates, by the provision for death of their parents, before they are of that age, children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to. 'But' (adds the learned judge, as to the last-mentioned reason for construing a devise contingent), 'is it wise to encourage the marriage of infants, by making a provision for the children, however improvident, and however much in opposition to the wishes of their guardians such marriages may be contracted? The uncertainty of a provision for a family may occasion a pause, before the most important step in life be taken, which cannot be attended with lasting inconvenience, and may prevent lasting misery. Children will seldom suffer from estates remaining contingent until their parents attain the age of twenty-one, as few to whom such estates are given will have legitimate children before they are of age.'

"5. In other cases, where the interest is contingent on account of the person, and where, as we shall see hereafter, the interest is consequently untransmissible to the representatives of the person, in the event of his death before the condition is fulfilled, the same reason applies, and with more force, because not counterbalanced by the objections urged by the learned judge against construing an interest to be vested, which is apparently made contingent upon the attainment of the age of twenty-one.

"6. Where the vesting is apparently suspended till the attainment of a certain age, and there is no disposition of the *interim* income, and no provision for the maintenance of the person interested, if the interest is held to be contingent, he may be entirely left without the means of being educated

and maintained, or without the means of being educated and maintained in a manner suitable to the fortune which in all probability he will afterwards possess." Smith Ex. Int., §§ 202-209.

In *Duffield v. Duffield*, 1 Dow. & Cl. 195, Best, C. J., said: "In consideration of these circumstances, the judges, from the earliest times, were always inclined to decide that estates devised were vested; and it has long been an established rule for the guidance of the courts of Westminster, in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot construe them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning the doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession."

Instances of Vested Interests.—B. devised all his property to his wife for life; and after her decease, the payment of his debts, and the schooling of his two children, the balance of the estate to be equally divided between them. It was held that the two children took a vested remainder, subject to be divested to the extent of the charges for payment of the debts and schooling. *Bowling v. Dobyns*, 5 Dana (Ky.) 434.

A testator devised property, real and personal, to his wife, for life, and after her decease to his son, for life; "and from and immediately after the death of my wife and son, unto the issue of my said son living at the time of his death, who shall live to attain the full age of twenty-one years, or who, dying before that time, shall leave issue to live until the time at which the parent or parents, if alive, would have reached the full age of twenty-one years;" and in default of such issue, then over. The son died two years after the death of the testator, leaving two sons, R. and M. The wife died in 1844. R. died in 1850, aged twenty years, leaving a son, who died before his father could have arrived at the age of twenty-one. M., the other grandson of the testator, was eighteen years and six months old in May, 1851. It was held that the will gave a vested but defeasible interest, with immediate right to the rents and profits, to R., although he died under twenty-one years of age, and left no

issue which lived until the time when his father, if he had lived, would have been twenty-one years of age. *Rivers v. Fripp*, 4 Rich. Eq. (S. Car.) 276.

The profits of real and personal estate were, by will, to be applied to the support of F. for life, and at her decease the absolute right and title to the property was to be "released and confirmed unto the four present children of F., or the survivor or survivors of them, in equal shares, as tenants in common." The four children all died during the lifetime of the tenant for life. It was held that each one of the four children took a vested, transmissible interest, divested if he or she died in the lifetime of F., and one or more survived F.; but as they all died in the lifetime of F., their rights were not defeated. *Kersh v. Yongue*, 7 Rich. Eq. (S. Car.) 100.

By a will, specific legacies were given by the testator to his children, by name, and having given to his wife the entire residue of his estate, during widowhood, he proceeded as follows, viz., "which property I wish and devise, at the marriage or death of my beloved wife, to be equally divided amongst my children, as above named." It was held that the children took vested remainders upon the decease of the testator. *Bankhead v. Carlisle*, 1 Hill Eq. (S. Car.) 357.

B. devised and bequeathed to his wife all the rest of his estate, both real and personal, during her widowhood; and when she married, such residue was to be equally divided between his children and his wife, share and share alike. It was held that this was a vested remainder in the children, and that, upon the decease of the widow without having married, the representatives of the children, who had died in her lifetime, were entitled to share equally with the surviving children. *Brinson v. Wharton*, 8 Ired. Eq. (N. Car.) 80.

A testator, by his will, ordered that his estate should all be kept together in the hands of his executors until his only daughter should become of age or be married, and then be divided equally between his wife and daughter; but in case the daughter should die without issue, then the whole estate, real and personal, to be given to the wife. It was held that the wife and daughter took vested legacies, each in one half of the testator's property. *Scott v. James*, 3 How. (Miss.) 307.

A testator, after devising to his wife all the income of all his real and personal estate during her natural life, devised to five of his children as follows: "All the property, both real and personal, that may be left at the death of my wife to be divided equally between the last five named children. And made further provision that, if any of the last five named children die before my wife, then the property to be equally divided between the survivors." It was held that the children named took vested remainders. *Blanchard v. Blanchard*, 1 Allen (Mass.) 223.

A testator provided, by means of a trust, for the annual support of his widow during her life, and also during the life of his said widow for the support of his daughter M., and the support, maintenance, and education of his minor children, out of the rents, incomes, dividends, and profits of his estate, real and personal, which he devised to two of his sons and their heirs, etc., upon the trusts and for the uses and purposes limited in the will; and the surplus of the said rents, etc., he devised "in trust that the whole of said surplus be divided annually amongst all my children who may be of the age of twenty-one years, or who may be married," etc. The will was made in 1857; the testator died in 1858, leaving a widow and eight children, of whom two were under the age of twenty-one years when the will was executed; one of these became of age before the death of the testator, the other some time after. Four were married when the will was executed. In 1859 one of the sons died, leaving a widow and children; another, one of the trustees, A. G. W., died in 1863, leaving also a widow and children. The said widow of the deceased trustee, having been appointed his executrix, and having qualified as such, filed a bill for an injunction to prevent such a distribution of the surplus rents, etc., in the hands of the surviving trustee, as would exclude the estate of her husband from a participation therein. It was held that the children of the testator who were of the age of twenty-one years, or married, at the time of his death, took vested interests in their shares of the surplus income from his estates from that time; and that the shares of those who attained twenty-one years, or married after his death, became vested in the happening of either of those events, and the share of A. G. W., survived to

be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead, and however inconsistent with what it may be conjectured would have been the testator's actual meaning, if his attention had been drawn to those consequences.¹ These principles apply to the construction of limitations of both

his personal representatives. *Waters v. Waters*, 24 Md. 430.

1. 1 Jarm. on Wills (5th ed.) *821. See *Holmes v. Craddock*, 3 Ves. 317; *Denn v. Bagshaw*, 6 T. R. 512; *Vick v. Suetter*, 3 El. & Bl. 219; 77 E. C. L. 218; *Wingrave v. Palgrave*, 1 P. Wms. 401; *Richardson v. Wheatland*, 7 Met. (Mass.) 171; *Illinois Land, etc., Co. v. Bonner*, 75 Ill. 316; *Otterback v. Bohrer*, 87 Va. 548; *Bailey v. Love*, 67 Md. 592; *Spencer, Petitioner*, 16 R. I. 25; *Perronneau v. Perronneau*, 1 Desaus. (S. Car.) 521; *Taylor v. Gould*, 10 Barb. (N. Y.) 388; *Striker v. Mott*, 28 N. Y. 82; *Jarvis v. Wyatt*, 4 Hawks. (N. Car.) 227; *Hayes v. Tabor*, 41 N. H. 521.

Thus, in *Denn v. Bagshaw*, 6 T. R. 512, as stated 1 Jarm. on Wills (5th ed.) 821 where the devise was to the testator's only daughter M. for life, and after her decease to the first son of her body, if living at the time of her death, and the heirs male of such first son, remainder to the other sons successively in tail, and in like manner remainder to the testator's nephew in tail. M. had issue, an only son, who died in her lifetime, leaving issue. Whether such issue was entitled, under the devise in tail to this first son, was the question. It was contended for him, that the testator must have intended that the nephew, who was otherwise amply provided for by him, should not take until failure of all the descendants of his daughter; and that to accomplish this intention, the court would either construe the estate of the daughter to be an estate tail, or hold that an estate tail vested in the son on his birth; and that the words, "if living at the time of her death," merely marked the period when the remainder should commence in possession, as in the cases before discussed. But the court (reluctantly, on account of the hardship of the case) decided that the son not having survived his mother, his estate never arose. Lord Kenyon observed that the cases cited for him proceeded on informal words; whereas here correct and technical expressions were used throughout.

A testator, by his will, executed since

the revised statutes took effect, made the following devise: "Fourthly, I do give, devise, and bequeath, to my beloved daughter A, wife of B, and such her child or children as shall at her decease be living, and shall have attained, or shall thereafter attain, the age of twenty-one years, all and singular the rest and residue of my real and personal estate and property of every description, of which I may die seised and possessed, or entitled unto, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, to and for her sole and separate use, to all intents and purposes as though she were a *feme sole* and unmarried." It was held that the remainder to the children was not vested, but contingent. *Taylor v. Gould*, 10 Barb. (N. Y.) 388.

A testator made a devise in the following language: "The whole of my property, personal as well as real estate, stock, and everything else, I give to my wife during her lifetime. My estate, rights, and titles are to be in the occupancy of my daughter G., with the appurtenances thereof. In case she has no children, and should die before her husband, he is to have the benefit of it during his lifetime. At his death, it is to be divided equally among the rest of my children. In case R. has children, it is secured to her and them forever." It was held that the testator's children, other than G., took no vested interest in the farm while it remained uncertain whether she would have a child. *Woodruff v. Cook*, 47 Barb. (N. Y.) 304.

Bequest Under Misconception of Power of Disposition.—The fact that the testator has disposed of the property upon a certain event, only under the erroneous impression that his power of disposition was confined to such contingency, does not affect the construction. *Doe v. Wilkinson*, 2 T. R. 209; 1 Jarm. on Wills (5th ed.) 824.

Exception.—If to construe the devise to be contingent would render nugatory a purpose clearly expressed by the testator, the court will struggle to avoid

real and personal property,¹ although the vesting of the former is governed by the common law, and that of the latter by the rules derived from the civil, which differ from the principles of the common law in many important particulars.²

such construction. 1 Jarm. on Wills (5th ed.) 825; *Bradford v. Foley*, Dougl. 63; *Quick v. Leach*, 13 M. & W. 218.

Suggestions to Persons Taking Instructions for Wills as to Suspending the Vesting.—"Persons taking instructions for wills, in which the vesting is to depend on the devisee or the legatee attaining a particular age or living to a given period, should carefully ascertain that the possibility of his dying in the meantime, leaving issue, is in the testator's contemplation. It is probable that in general this event is overlooked; and that, if the testator's attention were drawn to the circumstance, he would either make the interest vest in the legatee, in case of his dying leaving issue before the prescribed age or period, or else substitute the issue in such event." 1 Jarm. on Wills (5th ed.) *821 (note u).

1. *Smith Ex. Int.*, § 216. See 2 Jarm. on Wills (5th ed.) *821 *et seq.*; *Hawkins on Wills* 226, note; *Teale v. Hathaway*, 129 Mass. 164; *Furness v. Fox*, 1 Cush. (Mass.) 135; *Guyther v. Taylor*, 3 Ired. Eq. (N. Car.) 327; *Reed v. Buckley*, 5 W. & S. (Pa.) 517; *Foster v. Holland*, 56 Ala. 480; *Dale v. White*, 33 Conn. 295; *Johnes v. Beers*, 57 Conn. 295; *Taylor v. Mosher*, 29 Md. 443.

2. *Hawkins on Wills* *223.
Distinction in Theory of Vested Interests in Real and Personal Property.—"The term 'to vest' has several senses, which it is important to distinguish. Originally the word had reference only to real estate. As applied to estates in land 'to vest' signifies the acquisition of a portion of the actual ownership or feudal possession of the land ('*vestire seisinam dare in feodare*, Spelman); the acquisition not of an estate in possession, but of an actual estate. The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus 'vested' is nearly equivalent to 'possessed.' In this, its original, sense, 'vested' has no reference to the absence of conditionality or contingency. If an estate tail

be limited to A, with remainder to B, the estate of B is a 'vested' remainder, not because the failure of issue of A is considered an event certain at some time or other to happen, as has been alleged (*Smith's View of Executory Interests*, section 192)—failure of issue of a person is an event altogether contingent—but because such a remainder vests in B an actual portion of the fee, though the time of its falling into possession is wholly contingent and uncertain. B is invested with a portion of the ownership of the land.

"All remainders, not vested, are in fact contingent, not as being necessarily limited on an uncertain event, but because their taking effect depends on the contingency of their happening to vest during the continuance of the particular estate which supports them, and which may determine at any moment. Thus 'vested' comes to mean the opposite of 'contingent,' or conditional. But the word itself refers, as has been said, not to contingency, but to possession.

"It is obvious that this division into 'vested' and 'contingent' fails when applied to future executory interests in land not taking effect as remainders. An executory devise, after a fee simple, cannot be said to be 'vested' as an estate until it vests in possession; yet it may be limited on an event absolutely certain to happen, and is, therefore, not contingent. When, therefore, *Fearne* (C. R. Introduction, p. 1) divides 'vested estates' into (1) estates vested in possession, and (2) 'estates vested in interest, as reversions, vested remainders, such executory devises, future uses, conditional limitations, and other future interests as are not referred to or made to depend on a period or event that is uncertain,' he uses the expression 'vested interest' in a different sense from that which it bears applied to a remainder. Thus, the word is already losing its original meaning.

"The rules and expressions relative to the vesting of personal estate have been derived in great measure from the civil law. In that system (see *Domat*, L. iv., tit. 2, § 9) legacies not immediately payable are divided into two

b. VESTING OF REALTY—(1) *General Principles*.—In devises of real estate, the rule that an interest is construed to be vested rather than contingent is applied, by ascertaining the persons to take under a specified description or in a given character at the death of the testator and not at the time of taking possession,¹ by

classes: (1) legacies payable at a future time certain to arrive (as to which, *dies legati* was said *cessisse*, though not *venisse*); and (2) conditional legacies, or legacies payable on an event which might never happen. The former class was transmissible to the representatives of the legatee, if he died before the time of payment; the latter were not.

"In speaking of the civil-law rules, it is natural to use the term 'vested' to denote the former class of legacies, and 'contingent' to denote the latter. In the civil law, therefore, 'vested' is equivalent to unconditional and to transmissible; 'contingent' is equivalent to conditional and non-transmissible. But it is obvious that this division is wholly inapplicable to the English law of legacies, which allows future conditional interests to be transmitted to the representatives of the legatee, and which considers some kinds of conditional gifts as 'vested subject to be divested, *i. e.*, subject to a condition subsequent and not precedent. By English law, contingent legacies may be transmissible (as, a legacy to A, if B returns from *Rome*), and vested legacies may be conditional (as, a legacy to A, with a gift over on his death under twenty-one). To retain, therefore, the civil-law definitions of 'vested' and 'contingent,' as equivalent respectively to 'transmissible' and 'non-transmissible,' as is done by Roper (*Rop. on Leg.*, 4th ed.), vol. 1, p. 500, appears to be fallacious.

"The only definition that can be given of the word 'vested' in English law, as applied to future interests, other than remainders, is, that it means 'not subject to a condition precedent; 'what amounts to a condition precedent, the cases only can determine. As applied to remainders in land, the word retains its original sense, denoting the actual possession of an estate in the land. The rules as to the visiting of gifts by will differ according as the subject-matter is personal estate, real estate, or a legacy charged on land." Hawkins on Wills *221.

1. *Hoxie v. Hoxie*, 7 Paige (N. Y.)

187; *Converse v. Kellogg*, 7 Barb. (N. Y.) 590.

Thus, where a testator devised his residuary estate, to be equally divided among the children of his two brothers, and his sister, when they should severally become of age, it was held that the children of the brothers and sister *in esse* upon the decease of the testator took immediate vested estates in possession, as tenants in common, and that the vesting of the estate of each was not dependent upon the contingency of his or her reaching the age of twenty-one. *Hoxie v. Hoxie*, 7 Paige (N. Y.) 187.

A testator devised by will, after the payment of his debts and some other legacies, to his children and their heirs, and to the children of such as should have died, *per stirpes*, the residue of his property to be divided equally among them, but the division was postponed till ten years after the wife's death. It was held that the children of the testator, living at his death, and the descendants of those who had died, took by the will a vested interest in the residuary estate upon the decease of the testator. *Converse v. Kellogg*, 7 Barb. (N. Y.) 590.

The will of the testator contained the following clause: "I will and desire that the clear income of my estate, if anything remain after the application annually or otherwise of the several sums of money hereinbefore charged thereon, shall be invested in such manner as my trustees, or the survivor of them, shall think proper, and so on, from time to time, until a final distribution of my estate be made as hereinafter directed. Upon the death of my son William, I will and desire that a distribution of my estate be made among all my grandchildren, to wit: the children of my late son, James Mosher, and the children of my aforesaid son, William, provided any child he shall leave. All my said grandchildren to take *per capita*; reserving, however, in the hands of said trustees, for future distribution, if necessary, so much of my estate as will be sufficient to countervail or pay the several annuities or sums of

holding that words which apparently impart condition merely postpone the right of possession,¹ by construing conditions to be

money hereinafter provided for, to the several annuitants or persons hereinbefore named, until the same shall have ceased, when a final distribution shall be made in a manner aforesaid," with powers to the trustees to make any sale, disposition, or deed, of his estate and property, that might be requisite and proper for making such final distribution, and otherwise carrying into full effect the provisions of his will. At the date of the will, and at the death of the testator, in March, 1845, he had and left three grandchildren, the children of his deceased son, James, viz.: Imogene, Eliza and Theodore, the first of whom married J. T., Sr., and died in August, 1846, leaving the complainant, her only child and heir-at-law, and her husband who survived her. The testator left one other son, William, who was still living and had never had issue. By the memorandum executed in 1842, and adopted as a codicil in 1843, the testator directed that if his estate should accumulate beyond the amount required to pay the legacies in the will, his executors and trustees in their discretion should appropriate "a part of the surplus to Mrs. Eliza M. Mosher (the widow of his deceased son, James, and the grandmother of the complainant), for the benefit of her children until the estate shall be finally settled." On a bill filed by the child of the testator's deceased grandchild Imogene, it was held, first, that the children of J. M., deceased, the grandchildren of the testator, took under this will vested interests in the corpus of the estate with its accumulations, liable to be divested to the extent of letting in any child or children William might have and leave surviving him. *Taylor v. Mosher*, 29 Md. 444.

1. *Fay v. Sylvester*, 2 Gray (Mass.) 171; *Barton v. Bigelow*, 4 Gray (Mass.) 353; *Tatem v. Tatem*, 1 Miles (Pa.) 309; *Converse v. Kellogg*, 7 Barb. (N. Y.) 590; *Collier's Will*, 40 Mo. 287; *Lowe v. Barnett*, 38 Miss. 329; *Hancock v. Titus*, 39 Miss. 224; *Chighizola v. Le Baron*, 21 Ala. 406; *Kelly v. Gonce*, 49 Ill. App. 82.

After paying debts with his personal estate, the testator devised his real estate to his wife, to be undivided, and enjoyed by her and his children till the youngest arrived at maturity; and if she married, to have £30 per annum,

etc.; and all the children to have an equal share of his real and personal property, etc. It was held that the real estate vested in the children on the decease of the testator, though they did not come into possession till the youngest reached twenty-one, or the widow married. *Tatem v. Tatem*, 1 Miles (Pa.) 309.

A will contained these two clauses: "It is my will and request, that all my property, both real and personal, be kept together for the purpose of raising my children; also, that my wife Jane keep all the property together until they become of age, or marry, and in that case the one becoming of age or marrying to have an equal share, according to the valuation of my estate so left." "It is further my will, that my wife retain all my property, both real and personal, for the purpose above named, until my children become of age or marry, or during her widowhood; but, in case of her intermarriage with another person, it is then my will that the property so left be equally divided between her and the children." It was held that the children took a vested estate in the property immediately upon the decease of testator, and that neither by the first nor second clause was the distributive share of the widow taken away, and that she had a vested interest in such share, whether she married or not. *Hancock v. Titus*, 39 Miss. 224.

A testator ordered all his property to be kept in the hands of his executors until his youngest child should attain full age or marry, but allowing each of his children to have his or her share upon his or her becoming of age; that his executors should cultivate his plantation and apply the net profits, after paying plantation expenses and the clothing and education of his children, in the purchase of such other property as the "wants of his plantation should require," and that when his youngest child should arrive at full age or marry, "an equal division of all his property, real and personal, should be given to each of his children and his wife, allowing her a child's part of everything he should then own." The widow married a second husband and had issue, one child, and died; and before the youngest child of the testator

subsequent rather than precedent so that the interest vests subject to a divesting contingency.¹

(2) *Devise to Testator's Heir.*—In the absence of a contrary intent, a devise by way of remainder to the testator's right heirs or heir at law, vests in the persons who answer the description at his death, and not at the expiration of the particular estates, and it seems that the mere fact that the first life tenant is also testator's heir does not affect the construction.²

(3) *Devise to Youngest or Only Surviving Child, or Persons Sustaining a Particular Character.*—A devise to youngest or only surviving child, or other person sustaining a particular character, vests in favor of the person answering to the description at the testator's death.³

reached full age or married, her said child by the second marriage petitioned for distribution of her portion in the estate. It was held that vested estates were given to the widow and children of the testator, to be enjoyed in severalty when the youngest child arrived at maturity or married. *Lowe v. Barnett*, 38 Miss. 329.

A testator devised and bequeathed the principal part of his property to trustees and their survivor, in trust to invest the same and disburse the income thereof, according to their judgment, for the support and education of all his children, whom he enumerated, and in trust further, when a given child, G., should arrive at the age of twenty-one, then to settle up the testator's estate and divide it equally among his said children. Before G. came of age, two of the other children died, one a minor, the other an adult. Upon a bill praying for directions in the management of the trust, it was held:

1. That the children did not take by appointment under the power conferred upon the trustees, but that each child took a vested interest under the will.

2. That the shares of the two who had died would descend to their heirs at law.

3. That the intention of the testator was merely to postpone the enjoyment of the distributive shares, not their vesting.

4. That it was not material that the property was not to be divided until a future period. *Collier's Will*, 40 Mo. 287.

By a will, the testator gave property, real and personal, "to and among all his sons, born or to be born," by his then wife, "to be equally divided amongst them, their heirs," etc.; and in case

either of the children should die before the testator, leaving issue, such issue were to take the share to which their deceased parent would be entitled, if living; and concluded as follows: "And it is my will that the division of the said plantations, etc., shall not take place until the youngest of my said sons shall attain the age of twenty-one years." It was held that the legacies vested upon the decease of the testator, the division only being postponed. *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 7.

1. *Hawkins on Wills* *237; *Smith Ex. Int.*, § 210. Compare *Kilgore v. Kilgore*, 127 Ind. 276; *Neeley v. Boyce*, 128 Ind. 1; *Scott v. West*, 63 Wis. 529; *Duncan v. Prentice*, 4 Metc. (Ky.) 216; *Passmore's Appeal*, 23 Pa. St. 381.

2. *Smith Ex. Int.*, §§ 210, 212; *O'Keefe v. Jones*, 13 Ves. Jr. 413. See *Stokes v. Van Wyck*, 83 Va. 724; *Whall v. Converse*, 146 Mass. 345; *Childs v. Russell*, 11 Met. (Mass.) 16. See *Chomondeley v. Clinton*, 2 J. & W. 1, where there was a contrary intent.

The effect of a remainder to "heirs at law then surviving" will depend upon whether the word "surviving" is to be referred to the testator's death or to the death of the life tenant. See *Wood v. Bullard*, 151 Mass. 335. See *infra*, this title, *Survivorship—Words of Survivorship—To What Period Referred*.

In some cases it seems to have been held that a remainder to "right heirs" is subject to the rules peculiar to gifts to classes. *Ballentine v. Wood*, 42 N. J. Eq. 552. Compare *Richardson v. Wheatland*, 7 Met. (Mass.) 175.

3. *Smith Ex. Int.*, § 214; *Driver v. Frank*, 3 M. S. S. 25; *Stert v. Platel*, 5 Bing. N. Cas. 434; 35 E. C. L. 165.

Thus in *Stert v. Platel*, 5 Bing. N.

(4) *Devise to A At, When, If, or Provided, He Attains Twenty-One.*—In regard to the construction of the words at, if, when, provided, the following distinctions are sustained by the weight of authority:

1. Where there is no intermediate disposition of the estate or of the rents and profits thereof, and no gift over, a devise to A, or to A and his heirs, if or when he attains twenty-one, is contingent.¹

2. Under a devise to A, at, when, or if he attain twenty-one, if there is an intermediate disposition during minority to some third person, A takes an indefeasibly vested interest subject to the term, the gift being read as a devise to the third person for the term with remainder to A.²

Cas. 434; 35 E. C. L. 165, stated in Smith Ex. Int., § 214, a testator devised to A. H., for life; remainder to trustees to preserve, etc.; remainder to R. H., son of A. H., for life; remainder to trustees to preserve, etc.; remainder to the first and other sons of R. H., in tail male; with similar remainders to A. D. H., another son of A. H., and to his first and other sons. The will then proceeded thus: "And, in default of such issue, I devise the same premises unto such person, bearing the surname of H., as shall be the male relation nearest in blood to the said R. H., and to his heirs forever." It was held that the interest under the ultimate limitation, vested, at the death of the testator, in the person then answering that description; no particular time was pointed out, and the general rule requiring that a remainder should be construed to be vested, rather than contingent.

1. *Briscoe v. Wickliffe*, 6 Dana (Ky.) 161; *Bigelow v. Bigelow*, 19 Grant Ch. (U. C.) 554; *Illinois Land, etc., Co. v. Bonner*, 75 Ill. 316; *Colt v. Hubbard*, 33 Conn. 281; *Travis v. Morrison*, 28 Ala. 494.

"Cases, however, where the condition as to attaining a certain age forms part of the original devise, must be distinguished from those cases where the condition is contained in a separate direction; thus, where there has been an immediate devise followed by a clause directing that the devisee 'is not to be of age to receive this' till he attains a certain age, or that it is to become his property on attaining twenty-five, the devisee has taken a vested interest subject to be divested. *Snow v. Poulton*, 1 Keen 186; *Attwater v. Attwater*, 18 Beav. 330. "So, too, a devise to A, provided she lives to attain

twenty-one, has been held vested subject to be divested. *Simmonds v. Cocks*, 29 Beav. 455, where the devise was after a life estate. Of course, when there is an express direction as to the period of vesting, nothing can vest before the appointed time; though, on the other hand, the question of vesting is not affected by a direction merely referring to the period of possession. *Russell v. Buchanan*, 2 C. & M. 561; 7 Sim. 628; *Montgomery v. Woodley*, 5 Ves. Jr. 522; *Shrimpton v. Shrimpton*, 31 Beav. 425." *Theobald on Wills* (2d ed.) 402. See REMAINDERS, vol. 20, p. 850.

Where land is devised to executors until the children marry, and when they marry with consent, conveyance to be made to them, a child takes a vested interest which passes to its devisee on its death unmarried. *Toner v. Collins*, 67 Iowa 369. So where a gift over to children is to take effect twenty years from the testator's death, or when the youngest child attains a particular age, whichever happens first, all take vested interests. *Meyer v. Eisler*, 29 Md. 28. See *Linton v. Laycock*, 33 Ohio St. 128.

2. *Theobald on Wills* (2d ed.) 402; *Hawkins on Wills* *237; *Boraston's Case*, 3 Rep. 19a; *Goodtitle v. Whitby*, 1 Burr. 228; *In re Moltram*, 10 Jur. N. S. 915; *Doe v. Ewart*, 7 Ad. & El. 636; 34 E. C. L. 187; *Manfield v. Dugard*, 1 Eq. Ab. 195, pl. 4; *Phipps v. Ackers*, 9 Cl. & F. 591; *Illinois Land, etc., Co. v. Bonner*, 75 Ill. 316; *Sammis v. Sammis*, 14 R. I. 129; *Roome v. Phillips*, 24 N. Y. 465; *Meyer v. Eisler*, 29 Md. 28. Compare *Deichman v. Arndt*, 49 N. J. Eq. 106; *Watkins v. Quarles*, 23 Ark. 188; *Scott v. Logan*, 23 Ark. 351. See *Lowe v. Barnett*, 38

3. Under a devise to A, at, when, or if he attain twenty-one, with a limitation over in case of death under age, A takes a vested interest subject to be divested upon his death under age.¹

Miss. 329; *Hancock v. Titus*, 39 Miss. 224; *Rivers v. Fripp*, 4 Rich. Eq. (S. Car.) 276; *Johnson v. Valentine*, 4 Sandf. (N. Y.) 36; *Danforth v. Talbot*, 7 B. Mon. (Ky.) 629; *Grigsby v. Breckinridge*, 12 B. Mon. (Ky.) 629.

Thus, a devise was made by the testator to his wife until the son became twenty-one years old, then to him absolutely or, in case the mother marry, then her interest to cease, without any devise over in case of the decease of the son, or the marriage of the mother before the son's attaining the age of twenty-one. It was held that the son took a vested interest. *Grigsby v. Breckinridge*, 12 B. Mon. (Ky.) 629. *Simpson, C. J.*, in delivering the opinion of the court, in this case, said: "The doctrine is well settled, that when a devise is made in words that are apparently creative of a future estate, and that even import a contingency, such words, if a prior interest has been carved out of the estate, will be construed as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing out the determination of that interest, and not as designed to protract the vesting."

1. *Theobald on Wills* (2d ed.) 403; *Hawkins on Wills* *240; *Edwards v. Hammond*, 3 Lev. 132; *Brunfield v. Crowder*, 1 Bos. & P. N. R. 313. See *Doe v. Nowell*, 1 M. & S. 327; *Hunt v. Moore*, 14 East 601; *Whitter v. Bremridge*, L. R., 2 Eq. 736; *Ackers v. Phipps*, 3 Cl. & F. 691; 9 Cl. & F. 583; *Beeckman v. Schermerhorn*, 3 Sandf. Ch. (N. Y.) 181; *Roome v. Phillips*, 24 N. Y. 465; *Hughes v. Hughes*, 12 B. Mon. (Ky.) 115; *Packard v. Packard*, 16 Pick. (Mass.) 191; *Rivers v. Fripp*, 4 Rich. Eq. (S. Car.) 278; *Richardson v. Penicks*, 21 Wash. L. Rep. 707. But see *Sager v. Galloway*, 113 Pa. St. 500, where such devise was held contingent.

Instances Illustrating the Rule.—A person bequeathed his property, both real and personal, to the children of his brother M., "providing either of them shall live to the age of twenty-one," and "if neither of them live to be twenty-one, it is my desire that my sister L. and sister B.'s children to have

it between them equally." It was held that the bequest to the children of M. vested at the death of the testator, subject to be divested by the death of all these first takers before the age of twenty-one. *Raney v. Heath*, 2 Patt. & H. (Va.) 206.

A testator, after directing that B. should have a decent support out of his estate, so long as she remained at the house where she lived, gave to his two sons his real and personal estate, to be divided equally between them, if they should arrive at the age of maturity; otherwise to go to one of them. It was held that the sons took a vested interest in fee, determinable, as to the one who might die first, upon his dying under twenty-one. *Packard v. Packard*, 16 Pick. (Mass.) 191.

L., after giving a life estate to her husband of all her real and personal estate, devised premises to the intestate, her son, "if he should live until he is twenty-one, or marry," "and my husband should have departed this life," and in case of his (the son's) death under twenty-one, unmarried, then to M. The intestate died under twenty-one unmarried, after his father's death. It was held that the fee had vested in the intestate, as a present gift subject to the life estate of his father. *Kelso v. Cumming*, 1 Redf. (N. Y.) 392. Compare *Mackie v. Alston*, 2 De-saus. (S. Car.) 362, where the testator devised all his residuary estate, real and personal, to his daughter forever, when she should attain the age of twenty-one years, or marry, whichever should happen first. If she died before, he then devised over. The contingency was annexed to the estate, and so not vested.

"The argument in favor of vesting is still stronger, if the gift over is upon death before the given time, without issue. *Finch v. Lane*, L. R., 10 Eq. 501. The attainment by the devisees of the given age, is a certainty, provided they live long enough; if, however, the contingency is some other event, as remainder to A, if he survives B, the estate is not vested till the event happens, notwithstanding the gift over. *Doe v. Scudamore*, 2 Bos. & P. 289; *Price v. Hall*, L. R., 5 Eq. 399.

4. The two preceding rules apply to devise by way of executory trust.¹

5. A devise to A for life, and from and after his decease, to his son, if he shall have attained twenty-one, or as soon as he shall arrive at that age, with a gift over in default of his having a son, has been held to give the son a vested remainder in fee, subject to be divested by his death under age.²

6. It seems also that a devise to A for life, and after his decease, to B, if or provided he attain twenty-one, gives B a vested remainder, subject to be divested in case of death under age.³

And of course the gift over can have no effect where there is an express direction as to the time of vesting. *Russell v. Buchanan*, 2 C. & M. 561; 7 Sim. 628." *Theobald on Wills* (2d ed.) 403.

1. *Stanley v. Stanley*, 16 Ves. Jr. 491; *Phipps v. Ackers*, 9 C. & F. 583; *Bull v. Pritchard*, 5 Hare 571.

2. *Andrew v. Andrew*, 1 Ch. Div. 417; *Roome v. Phillips*, 24 N. Y. 463. But see *Alexander v. Alexander*, 16 C. B. 59; 81 E. C. L. 58.

In *Andrew v. Andrew*, 1 Ch. Div. 417, James, L. J., said: "There is a long category of cases, from very early times down to a very recent decision of the Master of the Rolls, in which the words 'if,' 'when,' 'so soon as' have been held from the context not really to import contingency in the sense of a condition precedent to the vesting, but to mean a proviso or condition subsequent, operating as a defeasance of an estate vested. And we should be well warranted by the authorities in so dealing with this case, inasmuch as the limitations were plainly intended to make a complete settlement of the property to a man for life, then to that man's eldest son on his attaining the age of twenty-one, with a remainder over to the other descendants (which would necessarily take effect on that son's dying under the prescribed age), with an ultimate remainder over to another branch of the family. But all doubt and difficulty are in this case removed by the fact that the gift is actually expressed to be what, without the express words, we should have implied it to be, viz., that the gift is expressed to be 'from and after' the death of the tenant for life. A man cannot have an estate 'from the death' if he is not to have it for several years after the death, and possibly not at all; and to construe the words as contingent we should have to strike out the word

'from,' and that, in order to make for the testator a most unreasonable will. But, taking the word 'from' in its natural meaning, and taking the words apparently contingent to have the meaning which has been given to them in so many cases, the whole thing becomes sensible and intelligible. Arriving at the conclusion that the estate to the son is a vested estate, liable to be divested if he should die under the age of twenty-one, that conclusion will dispose of every question now before us; for an indefinite devise with a gift over in the event of the devisee dying under the age of twenty-one, must be, on principle and authority, a devise in fee. An estate for life would necessarily determine by death at any time, and it would be absurd to attach to such an estate a defeasance in the event of death under the age of twenty-one."

A testator bequeathed a life interest in real estate to one, and, after termination thereof, devised the estate to his son, when he should "become twenty-one years of age, and become married and have children; and in case of his decease before that period, and after my father's decease," then over to other persons. It was held that, on the death of the devisee for life, the son's estate vested, and that he had the right to absolute possession upon attaining the age of twenty-one; or, also, if, before reaching that age, he should marry and have children, though in this latter case the estate would be subject to be divested upon the son's decease before he arrived at the age of twenty-one. *Roome v. Phillips*, 24 N. Y. 463.

3. *Simmonds v. Cock*, 29 Beav. 455. See *Andrew v. Andrew*, 1 Ch. Div. 410; *Theobald on Wills* (2d ed.) 403. But compare *Blagrove v. Hancock*, 16 Sim. 371; *Van Camp v. Fowler* (Supreme Ct.), 13 N. Y. Supp. 1.

(5) *Gifts to Classes*—(See REMAINDERS, vol. 20, p. 854).—A remainder to a class of children, if they attain twenty-one, or equally at twenty-one, is contingent,¹ unless there is a gift over, in which case, in analogy to a similar gift to an individual, it is held to be vested subject to be divested in case of death under age.² A devise to children who shall attain twenty-one, or to such children as shall attain twenty-one, is contingent whether there be a gift or not.³

1. Stewart, C. C., in *Browne v. Browne*, 3 Sm. & Gif. 568; *Alexander v. Alexander*, 16 C. B. 59; 81 E. C. L. 58. So a direction that real estate be reserved to children, to be divided among them when the youngest shall attain twenty-one, has been held contingent. *Kingman v. Harmon*, 131 Ill. 171; *McCarty v. Osburn*, 118 Ill. 408; *contra*, where the devise is distinct from direction to divide. *Scott v. Logan*, 23 Ark. 357; *Lowe v. Barnett*, 38 Miss. 329.

2. *Randall v. Doe*, 5 Dow. 202. See *Browne v. Browne*, 3 Sm. & Gif. 568; *Rivers v. Fripp*, 4 Rich. Eq. (S. Car.) 276; *Meyer v. Eisler*, 29 Md. 28.

In *Randall v. Doe*, 5 Dow. 202, the testator devised probate estates to J. R., and on his decease "to and amongst his children lawfully begotten, equally, at the age of twenty-one, and their heirs, as tenants in common; but if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one years; and in case my said nephew shall die without lawful issue, or such lawful issue shall die before twenty-one," then over. It was held that the children of J. R. took a vested remainder.

Pennsylvania.—The fact that there is a gift over does not affect the construction. *Sager v. Galloway*, 113 Pa. St. 500.

Effect of Intermediate Gift—Boraston's Case.—In *Meyer v. Eisler*, 29 Md. 28, it was held that a devise of residue, consisting of real and personal estate, to trustees to be held in trust until the end of twenty years from the death of the testator, or until the youngest child became of age, whichever happened first, then the whole to be divided among the testator's children, gave the children a vested remainder upon the principle of *Boraston's Case*, 3 Rep. 19, as in the case of a similar limitation to an individual. See also *Collier's Will*, 40 Mo. 287; *Lowe v. Barnett*, 38 Miss. 329; *Han-*

cock v. Titus, 39 Miss. 224. But compare *Kingman v. Harmon*, 131 Ill. 171.

3. Theobald on Wills (2d ed.) 404; *Duffield v. Duffield*, 3 Bligh N. S. 260; *Stephens v. Stephens*, Cas. temp. Talb. 228; *Festing v. Allen*, 12 M. & W. 279; *Holmes v. Prescott*, 10 Jur. N. S. 507; *Rhodes v. Whitehead*, 2 D. & S. 532; *Price v. Hall*, L. R., 5 Eq. 399; *In re Edde's Trusts*, L. R., 11 Eq. 559; *Patching v. Barnett*, 28 W. R. 886; *McBride v. Smyth*, 54 Pa. St. 245. See *Nash v. Nash*, 12 Allen (Mass.) 347; *Thomson v. Ludington*, 104 Mass. 193; *Olney v. Hull*, 21 Pick. (Mass.) 311; *Crook's Estate*, Myr. Prob. (Cal.) 247; *Fairfax's Appeal*, 103 Pa. St. 171; *Campbell v. Robertson*, 62 Ga. 709. But see *Rivers v. Fripp*, 4 Rich. Eq. (S. Car.) 276.

Thus, a testator devised the residue of his property to trustees until his youngest child, who might then be living, should reach twenty-one years of age, and when his youngest child, who might be living, should attain that age, he gave it to such of his children as might then be living, and their heirs. A child who died before that time took nothing under the devise. No vested interest was given, the devisees were contingent, and became vested, when the youngest child living arrived at the age of twenty-one, in such children as were then living. *McBride v. Smyth*, 54 Pa. St. 245.

In *Browne v. Browne*, 3 Sm. & Gif. 568, *Stuart, V. C.*, held that a gift to such children as should attain twenty-one, followed by a gift over, was vested subject to be divested in case of death under age. But this view is hardly consistent with the weight of authority.

The rule that any provision in regard to a particular member of a class, affecting the time of vesting, applies to all the members of the class, is discussed in *Tayloe v. Mosher*, 29 Md. 455.

(6) *An Estate to Commence on Certain Specified Events, Fails Unless All the Events Happen.*—An estate limited to commence in certain specified events, will fail altogether unless those exact events happen. Thus, a gift, "if A shall die, living my wife, without leaving a widow, or any children, after his death and my wife's," to B, will fail if A survives the testator's wife, though he may die without leaving a widow or child.¹

(7) *Devise After Payment of Debts.*—A devise after payment of debts is vested, the words of postponement being construed only as creating a charge.²

c. VESTING OF LEGACIES PAYABLE OUT OF PERSONALTY.—The rules in regard to the vesting of legacies payable out of personalty are derived from the civil law and may be stated as follows:

(1) *When the Gift and Time of Payment Are Distinct.*—Where there is a clear gift distinct from a direction to pay when the legatee attains a given age, the direction to pay will not postpone the vesting; the gift being considered *debitum in presenti; solvendum in futuro*. Thus, a gift to A, payable at twenty-one, or to be paid at twenty-one, is vested, and it makes no difference whether the gift precedes or follows the direction to pay, provided a clear, immediate gift can be found in the will.³ The difficulty

1. Theobald on Wills (2d ed.) 404; Holmes v. Cradock, 3 Ves. Jr. 317; Shulman v. Smith, 6 Dav. 22; Dicken v. Clarke, 2 Y. & C. Exch. 572. See Grimball v. Patton, 70 Ala. 626; Cheesman v. Wilt, 1 Yeates (Pa.) 411; Black v. McAulay, 5 Jones (N. Car.) 375; Jenkins v. Van Schaak, 3 Paige (N. Y.) 242; Den v. Jacocks, 3 Murph. (N. Car.) 558.

"So if a testator recites that he will be entitled to property in certain events, and disposes of it, if those events happen, the property passes only upon the occurrence of such events, though, in fact, he may be entitled to the property in other events as well. Archbold v. Austin Gourlay, L. R., 5 Ir. 214. But in the case of successive limitations, 'where there is a limitation over which, though expressed in the form of a contingent limitation, is in fact dependent on a condition essential to the determination of the interests previously limited, notwithstanding the words in form import contingency, they mean no more in fact than that the person to take under the limitation over is to take subject to the interests previously limited.' Maddison v. Chapman, 4 K. & J. 719; 3 De G. & J. 536; Webb v. Hearing, Cro. Jac. 415; Pearsall v.

Simpson, 15 Ves. Jr. 29; Franks v. Price, 3 Beav. 182; 5 Bing. N. Cas. 37; 6 Scott 710; Chellen v. Martin, 21 W. R. 671; Edgeworth v. Edgeworth, L. R., 4 H. L. 35. Thus, if the devise is to A for life, remainder to B for life, and on the decease of B, if A be dead, to C in fee, C takes a vested remainder whether B survives A or not. Cases *supra*; see too Key v. Key, 4 De G. M. & G. 73; *In re Betty Smith's Trusts*, L. R., 1 Eq. 79. So a devise in remainder to a person for his life, if he shall be living when the prior limitations determine, is not contingent, nor will subsequent remainders be contingent upon the survivorship of the tenant for life. Leadbeater v. Cross, 2 Q. B. Div. 18. But to admit this construction, the limitation over must involve no incident, but what is essential to the determination of the estates previously limited. Maddison v. Chapman, 4 K. & J. 709; 3 De G. & J. 536." Theobald on Wills (2d ed.) 405.

2. 1 Jarm. on Wills (5th ed.) *820; Carter v. Bamardiston, 1 P. Wms. 509. See Bagshaw v. Spencer, 1 Ves. 142; Bowling v. Dobyn, 5 Dana (Ky.) 434; Neeley v. Boyce, 128 Ind. 1.

3. Theobald on Wills (2d ed.) 410; 1

Jarm. on Wills (5th ed.) 837; Bartholomew's Trusts, 1 M. & G. 354; Shrimpton v. Shrimpton, 31 Beav. 425; Lister v. Bradley, 1 Hare 12; Maher v. Maher, L. R., 1 Ir. 22; Jones v. Habersham, 107 U. S. 177. See Higgins v. Waller, 57 Ala. 400; Young v. McKinnie, 5 Fla. 542; Wardwell v. Hale, 161 Mass. 396; Hathaway v. Leary, 2 Jones Eq. (N. Car.) 264; Snow v. Snow, 49 Me. 164; Verrill v. Weymouth, 68 Me. 318; Willis v. Roberts, 48 Me. 257; Matter of Mahan, 98 N. Y. 372; Bushnell v. Carpenter, 92 N. Y. 273; Loder v. Hatfield, 71 N. Y. 92; Rathbone v. Dyckman, 3 Paige (N. Y.) 10; Wood v. Cone, 7 Paige (N. Y.) 471; Bowman's Appeal, 34 Pa. St. 19; McClure's Appeal, 72 Pa. St. 414; Bayard v. Atkins, 10 Pa. St. 18; Schwartz's Appeal, 119 Pa. St. 337; Lightner v. Lightner, 127 Pa. St. 468; Magoffin v. Patton, 4 Rawle (Pa.) 113; Brown v. Brown, 44 N. H. 281; Nelson v. Pomeroy, 64 Conn. 257; Farnam v. Farnam, 53 Conn. 281; Colt v. Hubbard, 33 Conn. 285; Blackburn v. Hawkins, 6 Ark. 58; Shattuck v. Stedman, 2 Pick. (Mass.) 468; Furness v. Fox, 1 Cush. (Mass.) 134; Warren v. Hembree, 8 Oregon 123; Green v. Green, 86 N. Car. 546; Perry v. Rhodes, 2 Murph. (N. Car.) 140; Caldwell v. Kinkead, 1 B. Mon. (Ky.) 231; Scofield v. Olcott, 120 Ill. 363; Hancock v. Titus, 39 Miss. 224; Lowe v. Barnett, 38 Miss. 229; Tucker v. Ball, 1 Barb. (N. Y.) 94; Kearney v. Kearney, 17 N. J. Eq. 59; Dyson v. Repp, 29 Ind. 482.

Instances Illustrating the Rule.—A testator devised \$6,000 to each of his children, to be paid to them as they attained lawful age, or were married; the residuum to be divided among all his children (naming them) when the youngest should arrive at age, to them, their heirs, etc. If any of the children died under age, the shares of such were to be divided among the survivors and their representatives. One of the children died under age; unmarried and intestate. The personal estate was all needed to pay the testator's debts and legacies to his wife and children, and the residue of the estate was real property; no other provision was made for the support of the minors. It was held that the \$6,000 vested in the deceased child immediately on the decease of the testator, and his administrator was entitled to it, with interest from that time. Magoffin v. Patton, 4 Rawle (Pa.) 113.

Where a testator directed by his will, "All the residue of my property of every description, to be sold, at such time as my executor shall think most advantageous, the whole to be equally divided among my eight grandchildren as they come to lawful age, to wit, G., M., etc.," it was held that the legacy vested in the grandchildren upon the decease of the testator, and became payable on their arriving at full age. Haywood v. Rogers, 8 Ired. Eq. (N. Car.) 278.

A testator, by his will, ordered as follows: "I give and bequeath to S. the sum of \$10,000, to be paid her on her reaching the age of sixteen years." It was held that the legatee took a vested interest in the legacy, liable to be defeated by her death before reaching the age of sixteen years. Kearney v. Kearney, 17 N. J. Eq. 59.

A testator, after ordering his executors to sell all his property, real and personal, and put the proceeds at interest, and after providing for his wife, directed that, after the decease of his wife, the money remaining should continue at interest, and that the interest should be appropriated to the maintenance of his daughter, who was then married, in case she should be left a widow, during her widowhood, and if the interest should be insufficient for that purpose, then the principal was to be applied in the same manner, and that, on the death or marriage of his daughter, all the moneys then remaining should be equally distributed among the children or legal heirs of such daughter, when they should arrive at full age. It was held that the children of the testator's daughter who were *in esse* at the time of her decease, took vested interests in their several shares of the accumulated funds, although the payment of their several shares was postponed until they became of age. Wood v. Cone, 7 Paige (N. Y.) 471.

By a codicil in a will, it was provided that whatsoever might fall to the lot of the testator's son M., "it is not to be given up to him, but is to be held and kept by my executors, and equally divided between his children, and paid over when they severally arrive at lawful age to receive it." One of the children of M. having died under age, without issue and intestate, it was held that the child's share, being a vested estate, passed absolutely to the father upon its death. Wallingford v. DeBell, 15 B. Mon. (Ky.) 551.

in such cases is to determine whether there is a substantive gift, and a direction to pay, or whether the only gift is in the direction to pay.¹ Words directing distribution or division are governed by the same principles as a direction to pay, and if engrafted upon a gift which, without them, would confer an immediate vesting, do not postpone vesting.² But it seems that the principle does not apply where a payment is to be made upon any other event, than the attainment of a given age.³ Thus, a legacy to A,

In *Snow v. Snow*, 49 Me. 159, a legacy to A to come into possession when he should arrive at twenty-one years, or at the death or marriage of the testator's widow, was held contingent. It has been held that the distinction between time annexed to the gift and to the payment is inapplicable to devises of realty. *McCartney v. Ashburn*, 118 Ill. 422. But compare *Kingman v. Harmon*, 13 Ill. 176; *Lowe v. Barnett*, 38 Miss. 329; *Hancock v. Titus*, 39 Miss. 224.

1. Theobald on Wills (2d ed.) 410. See, upon this point, *Shunn v. Hobbs*, 3 Drew. 93; *Chaffers v. Abell*, 3 Jur. 577; *Williams v. Clark*, 4 De G. & S. 472; *Merry v. Hill*, L. R., 8 Eq. 619; *Major v. Major*, 32 Gratt. (Va.) 819; *Atmore v. Walker*, 46 Fed. Rep. 429; *VanCamp v. Fowler* (Supreme Ct.), 13 N. Y. Supp. 1; *Mumford v. Rochester*, 4 Redf. (N. Y.) 451; *Bushnell v. Carpenter*, 92 N. Y. 270; *Goebel v. Wolf*, 113 N. Y. 405; *McClure's Appeal*, 72 Pa. St. 414; *Schwartz's Appeal*, 119 Pa. St. 337; *Foster v. Holland*, 56 Ala. 474; *Furness v. Fox*, 1 Cush. (Mass.) 134; *Warren v. Hembree*, 8 Oregon 123; *Scofield v. Olcott*, 120 Ill. 363.

"Of course, when there is a clear gift, a direction to accumulate the interest and to pay the principal and accumulations at twenty-one will not effect the vesting. *Stretch v. Watkins*, 1 Madd. 143; *Blease v. Burgh*, 2 Beav. 226; *Breedon v. Tugman*, 3 Myl. & K. 289." Theobald on Wills (2d ed.) 410.

Construction by Reference to Other Limitations.—"In doubtful cases the construction may be assisted by reference to other limitations; thus, where there was a gift for the children of a tenant for life, to be paid upon their attaining twenty-five, and if but one child, the whole to become the property of such only child, upon his attaining twenty-five, and be transmissible to his heirs, executors, or administrators, none of the children took vested

interests before twenty-five, the gift, in the event of there being an only child, being clearly contingent. *Judd v. Judd*, 3 Sim. 525. See *Hunter v. Judd*, 4 Sim. 455; *Merry v. Hill*, L. R., 8 Eq. 619. Similarly, if the interest of an only child is clearly vested, this may show that a gift to all the children at twenty-one was meant to be vested, too. *King v. Isaacson*, 2 S. & G. 371. And it may appear from the context that the words 'to be paid' were meant to refer to vesting and not to payment. *Martineau v. Rogers*, 8 De G. M. & G. 328." Theobald on Wills (2d ed.) 410.

2. 1 Jarm. on Wills (5th ed.) *838; *May v. Wood*, 3 Bro. C. C. 471; *Dale v. White*, 33 Conn. 295; *Watkins v. Quarles*, 23 Ark. 179.

3. **Must Be Only a Question of Time.**—"The time when the legacy is to be paid must, however, be certain; that is to say, it must be certain that the time will come if the legatee lives long enough. No doubt it is uncertain whether a legatee will ever attain a given age, but since he must attain it if he lives, this latter contingency is disregarded. 'When the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I find no instance in this court where it has been held that the legacy at all events should be paid.' It becomes, in fact, a legacy upon condition, for *dies incertus conditionem in testamento facit*." Theobald on Wills (2d ed.) 411. See *Scott v. West*, 63 Wis. 566; *Carper v. Crowl*, 149 Ill. 465; *Hall v. Wiggin* (N. H. 1892), 29 Atl. Rep. 671. But compare *Jones v. Habersham*, 107 U. S. 174 (where payment was postponed until the completion of a writing); *Schwartz's Appeal* (Pa. 1888), 13 Atl. Rep. 212 (where payment was to be delayed until the legatee was worth \$8,000.00); *Loder v. Hatfield*, 71 N. Y. 92 (where payment was to be made one year after the legatees married or left a household). See also *Willett v.*

to be paid upon marriage, is contingent,¹ unless interest be given.²

(2) *When the Only Gift Is Founded in the Direction to Pay—Gift to One At, If, On, Upon, When, and After, Twenty-one.*—When the only gift is to be found in the direction to pay or divide,³ or is in the form of a bequest to the legatee, at or if, or as and when he shall attain twenty-one, or from and after attaining twenty-one, time is regarded as annexed to the substance of the gift as distinguished from the payment, and the gift will not vest until the given age is attained.⁴

Rutter, 84 Ky. 317; Pennock v. Eagles, 102 Pa. St. 294; Farnam v. Farnam, 53 Conn. 281; Snow v. Snow, 49 Me. 159.

1. Theobald on Wills (2d ed.) 411, citing Atkins v. Hiccocks, 1 Atk. 500; Ellis v. Ellis, 1 S. & L. 1; Morgan v. Morgan, 4 De G. & S. 164; Cantillon's Minors, 16 Ir. Ch. 301; Corr v. Corr, 1 R., 7 Eq. 397; Malcolm v. O'Callaghan, 2 Madd. 523; Taylor v. Lambert, 2 Ch. Div. 177. See also 1 Jarm. on Wills (5th ed.) *839. But see Loder v. Hatfield, 71 N. Y. 92.

2. Vize v. Stoney, 1 D. & W. 337; Booth v. Booth, 4 Ves. Jr. 399. See Boone v. Sinkler, 1 Bay (S. Car.) 369; Loder v. Hatfield, 71 N. Y. 92.

3. 1 Jarm. on Wills (5th ed.) *840; Leake v. Robinson, 2 Meriv. 363. See Murray v. Tancred, 10 Sim. 465; Mair v. Quilter, 2 Y. & C. C. 465; Boughton v. James, 1 Colly. 26; Walker v. Mower, 16 Beav. 365; Gardiner v. Slater, 25 Beav. 509; *In re* Bartholomew's Estate, 155 Pa. St. 314; Seibert's Appeal, 13 Pa. St. 503; Bowman's Appeal, 34 Pa. St. 23; Burd v. Burd, 40 Pa. St. 185; McClure's Appeal, 72 Pa. St. 414; Pleasonton's Appeal, 99 Pa. St. 363; Moore v. Smith, 9 Watts (Pa.) 407; Gorgar's Appeal (Pa. 1888), 12 Atl. Rep. 418; Scofield v. Olcott, 120 Ill. 363; Fulkerson v. Bullard, 3 Sneed (Tenn.) 260; Phelps v. Phelps, 28 Barb. (N. Y.) 121; Green v. Green, 86 N. Car. 546. Compare Perkins v. Clack, 3 Head (Tenn.) 734. This rule may be controlled by the general intent. Goebel v. Wolf, 113 N. Y. 405.

4. Theobald on Wills (2d ed.) 412. See 1 Jarm. on Wills (5th ed.) *837, *838; Hanson v. Graham, 6 Ves. Jr. 239; Locke v. Lamb, L. R., 4 Eq. 372. See Cruse v. Bailey, 3 P. Wms. 20; Wrangham's Trust, 1 D. & S. 358; Smell v. Dee, 2 Salk. 415; Bruce v. Charlton, 13 Sim. 65; Clayton v.

Somers, 27 N. J. Eq. 230; Delafield v. Shipman, 103 N. Y. 468; Green v. Green, 86 N. Car. 546; Snow v. Snow, 49 Me. 159.

Thus B., by his will, gave to his wife "for her life a tract of land called the Red House, and three slaves; and after her death the land to be sold by my executor and the negroes to be hired out, until my youngest grandchild arrives at lawful age, and then sold and divided equally among my grandchildren, B., M., J. and M. J.; the proceeds of the land to be divided equally among the above mentioned children, or as many as may be living, as they come of age." It was held that the gift of the proceeds of the "Red House" did not vest at that period, but was contingent, and would vest only in those of the four grandchildren who attained their full age, the expression, "or as many as may be living as they come of age," qualifying the previous absolute gift. Haywood v. Rogers, 8 Ired. Eq. (N. Car.) 278.

"Courts of equity, in the construction of wills relating to personal estate, follow the rules of the civil law. By that law, when a legacy is given absolutely, and the payment is postponed to a future definite period, the court considers the time as annexed to the payment, and not to the gift of the legacy, and treats the legacy as *debitum in presenti, solvendum in futuro*. This rule being established, a question was made, whether, in the simple case of a direction to pay a legacy at a future period, without any gift of the legacy independently of that direction, the legacy would be transmissible to the representatives of the legatee dying before the time of payment; and the court, in that simple case, has sometimes considered the time of payment as annexed to the legacy itself, and not merely to the payment of it. But the

(3) *Payment Postponed for Convenience of Testator, or to Let In Some Other Interest.*—If, upon the whole will, the payment or distribution appear to be postponed, on account of the position of the property, or for the convenience of the estate, or to let in some other interest, the vesting will not be deferred even though the only gift is to be found in the direction to pay at a future time.¹ Thus, under a gift to A for life, with a direction afterwards to pay and transfer to his children or the children of someone else, the interests of the children vest on the testator's death.² So if the direction be to distribute after payment of debts.³

(4) *Effect of Severance.*—If the subject-matter of the bequest is to be at once separated from the rest of the estate, and vested in trustees for the benefit of the legatee, in trust to accumulate until the time of payment for the benefit of the legatee, the gift vests at once.⁴

(5) *Gift of Intermediate Interest.*—A gift of the whole *interim* interest upon the legacy, or upon the legatee's presumptive share, vests the principal.⁵

court, in so deciding, has not, I conceive, intended to decide that the gift of a legacy, under the form of a direction to pay at a future time, or upon a given event, was less favorable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a like event; but, in fact, has intended only to assimilate those cases to each other, and to distinguish both from the class of cases to which I first referred, in which there has been a gift of the legacy, and also a direction to pay at a future definite time distinct from that gift." Wigram, V. C., in *Leeming v. Sherratt*, 2 Hare 17. The application of the principle may be controlled by the construction placed upon other parts of the will. *Goebel v. Wolf*, 113 N. Y. 405. A legacy to A, "if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor," has been held vested. *Furness v. Fox*, 1 Cush. (Mass.) 134. See *Eldridge v. Eldridge*, 9 Cush. (Mass.) 516; *Winslow v. Goodwin*, 7 Met. (Mass.) 363.

1. 1 Jarm. on Wills (5th ed.) *841; *Theobald on Wills* (2d ed.) 412; *Hawkins on Wills* *232; *Bennett's Trust*, 3 K. & J. 280; *Strother v. Dutton*, 1 De G. & J. 675; *Hallifax v. Wilson*, 16 Ves. Jr. 171; *Leeming v. Sherratt*, 2 Hare 14; *Packham v. Gregory*, 4 Hare 396; *McArthur v. Scott*, 113 U. S. 378; *Loder v. Hatfield*, 71 N. Y. 92; *Harris v. Fly*, 7 Paige (N. Y.) 421; *Fuller v. Win-*

throp, 3 Allen (Mass.) 51; *Collier v. Grimesey*, 36 Ohio St. 22; *Tayloe v. Mosher*, 29 Md. 444; *Scotfield v. Olcott*, 120 Ill. 363; *McCure's Appeal*, 72 Pa. St. 414; *Little's Appeal*, 117 Pa. St. 27; *Arnold v. Arnold*, 11 B. Mon. (Ky.) 81; *Baker v. McLeod*, 79 Wis. 541; *Scott v. West*, 63 Wis. 565; *Everett v. Mount*, 22 Ga. 323; *Collier's Will*, 40 Mo. 325; *Watkins v. Quarles*, 23 Ark. 179; *Scott v. Logan*, 23 Ark. 351.

2. *Selby v. Whittaker*, 6 Ch. Div. 246; *Hallifax v. Wilson*, 16 Ves. Jr. 171; *Leeming v. Sherratt*, 2 Hare 14; *King v. King*, 1 W. & S. (Pa.) 205. See *Salmon v. Green*, 11 Beav. 453; *M'Lachlan v. Taitt*, 28 Beav. 407; *McClure's Appeal*, 72 Pa. St. 415.

3. *Theobald on Wills* (2d ed.) 412; *McClure's Appeal*, 72 Pa. St. 415; *Little's Appeal*, 117 Pa. St. 27.

4. *Theobald on Wills* (2d ed.) 412; *Love v. L'Estrange*, 5 Bro. P. C. 59; *Saunders v. Vantier*, Cr. & Ph. 240; *Greet v. Greet*, 5 Beav. 123; *Branstrom v. Wilkinson*, 7 Ves. 420; *Lister v. Bradley*, 1 Hare 10; *Ingram v. Suckling*, 7 W. R. 386; *Oddie v. Brown*, 4 De G. & J. 179; *Fisher v. Johnson*, 38 N. J. Eq. 46.

5. *Theobald on Wills* (2d ed.) 412; 1 Jarm. on Wills (5th ed.) *842; *Hanson v. Graham*, 6 Ves. Jr. 239; *In re Hart's Trusts*, 3 De G. & J. 195; *Hardcastle v. Hardcastle*, 1 H. & M. 405; *Bill v. Cade*, 2 J. & H. 122; *Bolding v. Struggnell*, 24 W. R. 339; *Green v. Green*, 86

N. Car. 549; *Newberry v. Hinman*, 49 Conn. 130. See *Loder v. Hatfield*, 71 N. Y. 92; *Warner v. Durant*, 15 Hun (N. Y.) 452; *Gifford v. Thorn*, 9 N. J. Eq. 702; *Scott v. West*, 63 Wis. 529; *Peterson's Appeal*, 88 Pa. St. 397; *Pleasanton's Appeal*, 99 Pa. St. 362; *Foster v. Holland*, 56 Ala. 474.

The rationale of the rule, that an intermediate gift of interest before the time of payment of the legacy is construed as an indication of intention that the legacy be vested, is thus explained in 1 *Jarm. on Wills* (5th ed) 844: "A gift of interest *eo nomine*," it is written, "obviously is difficult to be reconciled with the suspension of the vesting, because interest is a premium or compensation for the forbearance of the principal, to which it supposes a title."

In *Young v. McKinnie*, 5 Fla. 542, it was held that when a testator directs the whole of his property to be kept together for the use and benefit of his wife and children, until the happening of certain events, making no other provision for their support and maintenance, such circumstances are indicative of an intention on the part of the testator to give the principal, and will have the effect to vest the legacy.

The following somewhat refined distinctions have been adopted by the English authorities: "The rule applies, though the interest may be given subject to charges or annuities. *Lane v. Goudge*, 9 Ves. Jr. 225; *Jones v. Mackilwain*, 1 Russ. 220; *Potts v. Atherton*, 28 L. J. Ch. 486. Though the interest may be expressed to be given for maintenance. *In re Hart's Trusts*, 3 De G. & J. 195; *In re Bunn*, 16 Ch. Div. 47. It makes no difference whether the interest is first given up to a given time and then the principal, or *vice versa*, at any rate, if the age fixed is either twenty-one or some later age, but such as to indicate that the testator has fixed upon it only from the probable incapacity of the legatees to manage their property satisfactorily earlier. *Wadley v. North*, 3 Ves. Jr. 364; *Westwood v. Southey*, 2 Sim. N. S. 192; *Bird v. Maybury*, 33 Beav. 351; *Pearman v. Pearman*, 33 Beav. 394; *Pearson v. Dolman*, L. R., 3 Eq. 315. It seems doubtful whether *Spencer v. Wilson*, L. R., 16 Eq. 501, is in harmony with the general current of authority, or even with the views expressed in *Re Peek's Trusts*, L. R., 16 Eq. 225. On the other hand, if the interest is given up to a very advanced age, and

the principal not till then, it is more doubtful whether the bequest would be vested. *Batsford v. Kebbell*, 3 Ves. Jr. 363. See *In re Bunn*, 16 Ch. Div. 47. It seems not to be quite clearly settled whether, where there is a discretion to trustees to apply the whole or part of the interest to the maintenance of the legatees, the bequest will be vested. The better opinion now seems to be that it will. *Eccles v. Birkett*, 4 De G. & S. 105; *Rouse's Estate*, 9 Hare 649; *Fox v. Fox*, L. R., 19 Eq. 286; *Parrott v. Davis*, 38 L. T. N. S. 52. See, however, *Pulsford v. Hunter*, 3 Bro. C. C. 416; *In re Ashmore's Trusts*, L. R., 9 Eq. 99; *In re Grimshaw's Trusts*, 11 Ch. Div. 406. It has been suggested that where the accumulated surplus would go to the same legatees as the interest and capital, the legacy is vested; but where the surplus income is either expressly given over, or would not follow the capital, it is not; so that a gift of residue in such a case would be vested, whereas a particular legacy would not. See *Pearson v. Dolman*, L. R., 3 Eq. 315. But *quære* whether this distinction reconciles the cases.

"But a discretion either to apply the interest to maintenance or to accumulate it will not vest the legacies, *Vawdry v. Geddes*, 1 R. & M. 203; nor, perhaps, will a discretion to apply a whole or part of the interest, not exceeding a fixed sum, to maintenance, *Merry v. Hill*, L. R., 8 Eq. 619; nor will the gift of a fixed sum for maintenance, though it may be equivalent to the interest of the legacy, *Boughton v. Boughton*, 1 H. L. Cas. 406; *Watson v. Hayes*, 5 Myl. & C. 125; *Livesey v. Livesey*, 3 Russ. 287. And the gift of a sum for maintenance out of the personal estate, not exceeding the income of the legacies will have no effect upon vesting. *Wynch v. Wynch*, 1 Cox 433; *Rudge v. Winnall*, 12 Beav. 357. A discretionary power given to trustees to apply the income for the benefit of the legatees, to the exclusion of any one or more of them, will not vest their shares. *In re Barnshaw's Trust*, 15 W. R. 378. Where interest is given only for a portion of the period before the time fixed for payment, if, for instance, legacies are given at twenty-six, with interest for maintenance during minority, it is doubtful whether the gift will be vested; probably it will not without more. See the remarks in *Pearson v.*

(6) *Effect of Gift Over Upon Vesting*.—The better opinion is that a gift over in case of the legatee's death before the period of distribution,¹ or without issue, will not affect the construction;² but a gift over upon death under twenty-one and without issue, will vest a prior gift at twenty-one.³

(7) *Gifts to Classes*.—Bequests to children as a class by way of remainder, vest in the mode peculiar to like remainders of realty.⁴

Dolman, L. R., 3 Eq. 315. In *Davies v. Fisher*, 5 Beav. 201; *Harrison v. Grimwood*, 12 Beav. 192; *Tatham v. Vernon*, 29 Beav. 604, there were other circumstances. And see *In re Hunter's Trusts*, L. R., 1 Eq. 295. It may be noticed that minority properly means the period before the attainment of twenty-one; though, if there is an intention expressed to that effect, it may mean the whole period during which the testator has kept the legatee out of the property. *Milroy v. Milroy*, 14 Sim. 48; *Maddison v. Chapman*, 3 De G. & J. 536; *Fraser v. Fraser*, 1 N. R. 430. Of course, where the interest is not given in the meantime, but is itself given at the same time as the principal, the gift does not vest. *Knight v. Knight*, 2 Sim. & Stu. 490; *Locke v. Lamb*, L. R., 4 Eq. 372. A distinction must be drawn between the gift of a sum to each member of a class at twenty-one, with a gift of the interest upon the several shares in the meantime, and the gift of an aggregate fund to a class as they respectively attain twenty-one, with a direction that the whole interest is to be applied for their maintenance in the meantime; in the latter case, as the fund is to be kept together, and the whole interest applied for maintenance, nothing will vest before twenty-one. *Pulford v. Hunter*, 3 Bro. C. C. 416; *Barker v. Lea, T. & R.* 413; *In re Ashmore's Trusts*, L. R., 9 Eq. 99; *In re Parker*, 16 Ch. Div. 44. Perhaps *In re Grimshaw's Trusts*, 11 Ch. Div. 406, may be supported on this ground." *Theobald on Wills* (2d ed.) 413.

Where Gift of Interest Is Distinct from Principal—Gift of Dividends or Annuity.—When the gift of interest or maintenance is distinct, and the direction is to transfer or pay the principal sum at the specified age, or upon the condition named, the construction remains unaffected thereby; hence a bequest of dividends, or an annuity for the life of the legatee, has been held an exception. *Batsford v. Kebbell*, 3 Ves. Jr. 363; *King v. King*, 1 W. & S. (Pa.)

207; *Pleasanton's Appeal*, 99 Pa. St. 362. Compare *Spencer v. Wilson*, L. R., 16 Eq. 512; *Belding v. Sprugnell*, 24 W. R. 339; *Peterson's Appeal*, 88 Pa. St. 402. *A fortiori* is this the case where the sum given by way of maintenance is less than the dividends on the stock. *Colt v. Hubbard*, 33 Conn. 286.

1. 1 Jarm. on Wills (5th ed.) *841, *842; *Theobald on Wills* (2d ed.) 416; *Shrimpton v. Shrimpton*, 31 Beav. 425; *In re Baxter's Trusts*, 4 N. R. 131; *Malcolm v. O'Callaghan*, 2 Madd. 523; *In re Payne*, 25 Beav. 556. Compare *Ridgway v. Ridgway*, 4 De G. & S. 271; *Bland v. Williams*, 3 Myl. & K. 411; *In re Edmondson's Estate*, L. R., 5 Eq. 389.

2. *Barker v. Lea, T. & R.* 413; *Theobald on Wills* (2d ed.) 417.

3. "The testator seems to imply that the legacy is to go over, not upon failure to attain that age, but only in the events mentioned, and the attainment of the given age is, therefore, not a condition precedent to vesting. *Harrison v. Grimwood*, 12 Beav. 192; *Bland v. Williams*, 3 Myl. & K. 411; *Murkin v. Phillipson*, 3 Myl. & K. 257; *In re Thomson's Trusts*, L. R., 11 Eq. 146. But if the gift is to A for life, then to her children at twenty-one, and if A dies without issue, or without leaving issue, over, the gift over has no effect upon the vesting, since it may have been intended to provide for the death of all the children before the tenant for life. *Walker v. Mower*, 16 Beav. 365; *Wrangham's Trusts*, 1 D. & S. 358; *Kidman v. Kidman*, 40 L. J. Ch. 359. See *Wetherell v. Wetherell*, 1 De G. J. & S. 134. On the other hand, if the gift is to children living the death of the tenant for life, as they attain twenty-one, a gift over on the death of the tenant for life without leaving issue, will afford a strong argument in favor of vesting, since it is ineffectual, if the children survive the parent and die under twenty-one. *Bree v. Perfect*, 1 Colly. 128." *Theobald on Wills* (2d ed.) 417.

4. 2 Jarm. on Wills (5th ed.) *156;

A gift to children who attain twenty-one, or to such children as attain twenty-one, is a gift to a contingent class, and will only vest in those who attain twenty-one, though there may be a gift of interest or other circumstances, which, in a gift to a class upon a contingency, as, for instance, to children at twenty-one, might have the effect of vesting the bequest.¹ Under a gift to a class when the youngest attains twenty-one, all who attain twenty-one take vested interests.² And if there is a clear gift to the class, a direction that the fund is to be divided when the youngest child attains twenty-one, will not postpone vesting.³ If the income is given to the class till the youngest attains twenty-one, and then the principal, they all take vested interests.⁴ It is said to be a rule of construction that any provision in regard to a particular member of a class affecting or defining the time of vesting, or tending to determine whether the estate was intended to be vested or contingent, should be applied to all the members of the class, although the rule is not of universal application.⁵

(8) *Residuary Bequests.*—The fact that the gift is residuary, strengthens the presumption in favor of vesting, since intestacy may be the consequence of holding it contingent.⁶

(9) *Foregoing Rules Yield to a Clear Contrary Intent.*—The foregoing rules apply only in the absence of an intent to the contrary. Hence, if it is clear, from the language of the will, that the

Barnum v. Barnum, 42 Md. 254; Crosby v. Crosby, 64 N. H. 77; Gibbens v. Gibbens, 140 Mass. 102; Scott v. West, 63 Wis. 531; Shuler v. Bull, 15 S. Car. 421; Farnam v. Farnam, 53 Conn. 261. See REMAINDERS, vol. 20, p. 854.

1. Theobald on Wills (2d ed.) 409; Bull v. Pritchard, 1 Russ. 213; Bree v. Perfect, 1 Colly. 128; Leake v. Robinson, 2 Meriv. 363; Stead v. Platt, 18 Beav. 50; Williams v. Haythorne, L. R., 6 Ch. 782; Dewar v. Brooke, 14 Ch. Div. 529; Thomas v. Wilberforce, 31 Beav. 209; Lloyd v. Lloyd, 3 K. & J. 20. See Taylor v. Meador, 66 Ga. 230; McCartney v. Osburn, 118 Ill. 403; Shattack v. Stedman, 2 Pick. (Mass.) 468.

This distinction is analogous to that existing in the case of devises of real estate. See *supra*, this title, *Vesting of Realty—Gifts to Classes*; also REMAINDERS, vol. 20, p. 851.

2. Theobald on Wills (2d ed.) 417; Leeming v. Sherratt, 2 Hare 14; Parker v. Sowerby, 1 Drew. 488; 4 De G. M. & G. 321. See *In re Smith's Will*, 20 Beav. 197; Sansbury v. Read, 12 Ves. Jr. 75; Ford v. Rawlins, 1 Sim. & Stu. 329; *In re Hunter's Trust*, L. R., 1 Eq.

295. But compare McCartney v. Osburn, 118 Ill. 405; Kingman v. Harmon, 131 Ill. 176.

Whether those who die under twenty-one take vested interests is doubtful. Theobald on Wills (2d ed.) 471.

If the gift were to individuals and not to a class, they would take vested interests. Theobald on Wills (2d ed.) 418; Cooper v. Cooper, 29 Beav. 229. See Sigman's Trust, 2 L. T. N. S. 662; McCartney v. Osburn, 118 Ill. 404; Goebel v. Wolf, 113 N. Y. 405.

3. Theobald on Wills (2d ed.) 418; Knox v. Wells, 2 H. & M. 674. See Blason v. Blason, 2 De G. J. & S. 665; Hilliard v. Fulford, 28 L. T. N. S. 892; Male v. Williams (N. J. 1891), 21 Atl. Rep. 854.

4. Theobald on Wills (2d ed.) 418; Greve's Trusts, 3 Giff. 575. See Boulton v. Pilcher, 29 Beav. 633; Dale v. White, 33 Conn. 295.

5. Tayloe v. Mosher, 29 Md. 455.

6. 1 Jarm. on Wills (5th ed.) 851; Booth v. Booth, 4 Ves. Jr. 399. See West v. West, 4 Giff. 198; Jones v. Mackilwain, 1 Russ. 220; Dodson v. Hay, 3 Bro. C. C. 404; Stretch v. Watkins, 1 Madd. 143; Brocklebank v. Johnson, 20 Beav. 205; Tayloe v. Mosher, 29 Md. 451.

attainment of the specified age is a condition precedent to the vesting, the legacy will be contingent, notwithstanding the gift is distinct from the direction to pay. Thus, a gift to A, to be paid in case he reaches the age of twenty-one and not otherwise, is contingent.¹ So where there is an express direction as to the time of vesting, all questions of construction are out of the case.²

(10) *Gift of Interest to A for Life, and at His Death, the Principal to B.*—A gift of the interest of a fund to one for life, and at his death, of the principal to another, gives the latter a vested interest, transmissible to his representatives, in case he dies before the life-tenant. Under such a limitation, the distinction between time annexed to the gift, and time annexed to the payment, is unimportant, as all the interests vest together. The same principle obviously applies to any number of life estates.³

1. 1 Jarm. on Wills (5th ed.) *839; Knight v. Cameron, 14 Ves. Jr. 389; Lister v. Bradley, 1 Hare 10; Heath v. Perry, 3 Atk. 101. See Hunter v. Judd, 4 Sim. 455.

2. 1 Jarm. on Wills (5th ed.) *839; Theobald on Wills (2d ed.) 408; Biddle's Appeal, 99 Pa. St. 525; Hinton v. Milburn, 23 W. Va. 166.

"In many cases, however, 'vested' has been used as equivalent to indefeasible or payable. Thus, if the shares of members of a class are directed to be vested at a certain time, and there is a gift over to the other members of the class of the shares of those dying before that time, without issue, vested will mean payable. Taylor v. Frobisher, 5 De G. & S. 191. So, too, if legatees are treated as taking vested shares before the time fixed for vesting, vested must mean payable. This will be the case, if a time is appointed for vesting, and maintenance is given, if any child entitled on the death of the tenant for life to a vested or presumptive share should be under the age appointed for vesting, where the word presumptive refers to the possibility of accruer. Berkeley v. Swinburne, 16 Sim. 275; Baxter's Trust, 4 N. R. 131; 10 Jur. N. S. 485. Similarly, if, in the event of any child dying before the time of vesting, leaving children, there is a gift of the share such child would have had, if living, to his issue, the direction as to vesting will be referred to payment. *In re Edmondson's Estate*, L. R., 5 Eq. 389; Poole v. Bott, 11 Hare 33. Or, again, it may appear that the testator has used the terms 'vested' and 'paid' interchangeably. *In re Edmondson's Estate*, L. R., 5 Eq. 389;

Williams v. Haythorne, L. R., 6 Ch. 782; *In re Parr's Trust*, 41 L. J. Ch. 170. And when there is a direction to pay legacies at the death of the tenant for life, a subsequent direction as to vesting at twenty-one will be referred to indefeasible vesting or possession. *Barnet v. Barnet*, 29 Beav. 239; *Simpson v. Peach*, L. R., 16 Eq. 209. When there is a gift to children who survive their parent, a direction as to vesting will not make the gift vest in any who do not survive their parent. *In re Payne*, 25 Beav. 556; *Williams v. Haythorne*, L. R., 6 Ch. 782. See *Draycott v. Wood*, 5 W. R. 158. If, however, the proviso as to vesting is intended to introduce a new gift, evidenced by the fact, for instance, that it applies to prior legatees who die leaving issue, and not merely to such of them as survive the tenant for life, it will override the previous contingency of surviving the tenants for life. *Williams v. Russell*, 10 Jur. N. S. 168. A direction that legatees are to be beneficially interested at a certain period, refers only to vesting in possession. *M'Lachlan v. Taitt*, 28 Beav. 407; 2 De G. F. & J. 449." *Theobald on Wills* (2d ed.) 408.

3. *Blamire v. Geldart*, 16 Ves. Jr. 314; *Thomas v. Anderson*, 21 N. J. Eq. 22; *Little's Appeal*, 117 Pa. St. 27; *King v. King*, 1 W. & S. (Pa.) 205; *Patterson v. Hawthorn*, 12 S. & R. (Pa.) 112; *Provenchere's Appeal*, 67 Pa. St. 463; *McClure's Appeal*, 72 Pa. St. 415; *McCall's Appeal*, 86 Pa. St. 254; *Mulhenberg's Appeal*, 103 Pa. St. 587; *Fay v. Sylvester*, 2 Gray (Mass.) 171; *Barton v. Bigelow*, 4 Gray (Mass.) 353; *Gibbens v. Gibbens*, 140 Mass.

(11) *Direction to Pay at Specified Time.*—A legacy to be paid at a specified time in the future, which is sure to arrive eventually, as one year after the death of the life tenant, is not thereby made contingent.¹

d. VESTING OF LEGACIES CHARGED ON LAND.—The vesting of legacies charged on land is governed by principles derived from the common law, and the distinction between a clear gift distinct from the direction to pay, and a gift contained in the direction to pay or divide, does not exist. In the absence of an intent to the contrary, such legacies, whether given at twenty-one, or payable at twenty-one, or other future time, and whether interest be given meantime or not, do not vest until the time appointed for payment,² unless the postponement is for the convenience of the

102; *Barker v. Woods*, 1 Sandf. Ch. (N.Y.) 129; *Van Wyck v. Bloodgood*, 1 Bradf. (N.Y.) 154; *Stuart v. Spaulding*, 30 Hun (N.Y.) 21; *Matter of Tienken* (Supreme Ct.), 15 N.Y. Supp. 470; *Vandewalker v. Rollins*, 63 N.H. 460; *Shuler v. Bull*, 15 S.Car. 421; *Bunch v. Hurst*, 3 Desaus. (S.Car.) 286. Compare *Bates v. Gillett*, 132 Ill. 287.

In *Van Wyck v. Bloodgood*, 1 Bradf. (N.Y.) 167, where the authorities are reviewed, Bradford, Surrogate, said: There is a large class of cases, to which no exception exists, where, by the terms of the gift, the time is connected with some event to happen to the donee, such as marriage or puberty, so as to make a description of the person who is to take, and necessarily to imply, that if the legatee does not sustain the character, the legacy will fail. (*Dawson v. Killet*, 1 Bro. C. C. 119.) Death, in such a case, before the event occurs, in removing the legatee, prevents the happening of the event, and the completion or fulfillment of the description. Such legacies are palpably conditional from the very nature of the case, because the life of the beneficiary is involved and included in the very contingency specified; so that the contingency does not transpire because the legatee dies. But where the time is not connected with an act to be done by, or an event to happen to the legatee, but, on the contrary, with some independent occurrence, such as the death of another person, that being a thing which must happen, and the time, therefore, being in that sense certain, there would seem to be nothing in the mere specification of such a future time, which in itself implies a condition."

Hence, a legacy to take effect upon the life tenant's "decease or remarriage," is vested. *Williams v. Freeman*, 98 N.Y. 577; *Scofield v. Olcott*, 120 Ill. 362; *Thrasher v. Ingram*, 32 Ala. 646.

1. *Blamire v. Geldart*, 16 Ves. Jr. 314; *Pond v. Allen*, 15 R. I. 171. See *Little's Appeal*, 117 Pa. St. 14; *Van Wyck v. Bloodgood*, 1 Bradf. (N.Y.) 167; *Warner v. Durant*, 15 Hun (N.Y.) 450.

2. 1 Jarm. on Wills (5th ed.) *834; *Theobald on Wills* (2d ed.) 406; *Poulet v. Poulet*, 1 Vern. 204; *Chandos v. Talbot*, 2 P. Wms. 601; *Remnant v. Hood*, 2 De G. F. & J. 396; *Parker v. Hodgson*, 1 D. & S. 568. See *Davies v. Huguenin*, 1 H. & M. 730; *Brown v. Wooler*, 2 D. & C. C. 134; *Delavergue v. Dean*, 45 How. Pr. (N.Y. Supreme Ct.) 209; *Birdsall v. Hewlett*, 1 Paige (N.Y.) 34; *Phelps v. Phelps*, 28 Barb. (N.Y.) 121; *Cogburn v. Ogleby*, 18 Ga. 56; *Stone v. Massey*, 2 Yeates (Pa.) 369; *Patterson v. Hawthorn*, 12 S. & R. (Pa.) 114; *Spence v. Robins*, 6 Gill & J. (Md.) 507; *Roberts v. Malin*, 5 Ind. 21; *Lyman v. Vanderspiegel*, 1 Aik. (Vt.) 275; *Smith v. Wiseman*, 6 Ired. Eq. (N.Car.) 540. Compare *Willis v. Roberts*, 48 Me. 257; *Loder v. Hatfield*, 71 N.Y. 92; *Brown v. Grimes*, 60 Ala. 647.

As to gifts of intermediate interest, see *Pearce v. Loman*, 3 Ves. Jr. 135; *Parker v. Hodgson*, 1 D. & S. 568.

Of course the vesting will take place immediately, if such be the testator's declared intention. *Watkins v. Cheek*, 2 Sim. & Stu. 199; *Stone v. Massey*, 2 Yeates (Pa.) 363.

In *Pennock v. Eagles*, 102 Pa. St. 294, the distinction between time annexed to the gift, and the time annexed

estate, or to let in some other interest, in either of which cases the rule does not apply.¹

e. LEGACIES CHARGED UPON BOTH REAL AND PERSONAL ESTATE.—If a legacy is charged upon real and personal estate, the personal estate is the primary fund for payment (see LEGACIES, vol. 13, p. 109 *et seq.*), and so far as the personal estate extends, the vesting is governed by the rules applicable to personal estate; but so far as the legacy is payable out of realty, the rules with regard to legacies charged upon land apply.²

f. LEGACIES CHARGED UPON PROCEEDS OF CONVERTED LAND.—The vesting of legacies charged upon the proceeds of land directed to be converted, is governed by the rules peculiar to legacies payable out of the personal estate.³

to the payment merely, was applied to a legacy charged on land. See also *Loder v. Hatfield*, 71 N. Y. 92.

1. 1 Jarm. on Wills (5th ed.) *834; *Remnant v. Hood*, 2 De G. F. & J. 411; *Evans v. Scott*, 1 H. L. Cas. 43; *Poole v. Terry*, 4 Sim. 294. See *Herbert v. Post*, 26 N. J. Eq. 278; 27 N. J. Eq. 540; *Loder v. Hatfield*, 71 N. Y. 99; *Harris v. Fly*, 7 Paige (N. Y.) 421; *Marsh v. Wheeler*, 2 Edw. Ch. (N. Y.) 163; *Birdsall v. Hewlett*, 1 Paige (N. Y.) 32; *Tucker v. Ball*, 1 Barb. (N. Y.) 94; *Williams v. Conrad*, 30 Barb. (N. Y.) 524; *Pond v. Allen*, 15 R. I. 171; *Fuller v. Winthrop*, 3 Allen (Mass.) 51; *Bowker v. Bowker*, 9 Cush. (Mass.) 519; *O'Byrne v. O'Byrne*, 9 Md. 512; *Maxwell v. McClintock*, 10 Pa. St. 239; *Young v. Stoner*, 37 Pa. St. 108; *Culbertson v. Frost*, 1 Jones Eq. (N. Car.) 281; *Ford v. Whedbee*, 1 Dev. & B. Eq. (N. Car.) 20; *Everett v. Mount*, 22 Ga. 323; *Watkins v. Quarles*, 23 Ark. 179; *Chapman v. Chapman* (Va. 1894), 18 S. E. Rep. 913.

Thus, a devise of real estate to the widow until the testator's eldest son is twenty-one, was then followed by a devise of a farm to said son, subject to bequests of \$1,000 each to the three daughters of the testator, "the interest on which shall be paid them by my said son, from his maturity until they shall respectively marry or attain the age of twenty-one years, at which times, or within six months thereafter, he shall pay to each, as she marries, or arrives at that age, the sum of five hundred dollars, and the remaining five hundred within eighteen months after her marriage or maturity, and these sums and the interest I charge upon the land given to my son." It was held

upon a suit brought by the administrator of one of the daughters, who was two years older than the said son, but died unmarried and before she had attained the age of twenty-one, that the devise was vested and its payment deferred by the provisions of the will, with a view to the convenience of the estate and not in respect of the person of the legatee. *O'Byrne v. O'Byrne*, 9 Md. 512.

Testator Devised as Follows:—"It is my will and desire that my property, including lands, tenements, negroes, horses, and stock of every kind, and everything of value that I may die seised and possessed of, shall be equally divided between my wife, E., my daughter, E. W., and my son, R." It was held that this clause of the will conveyed a present gift to the legatees, and was not controlled by the next clause, in which the testator used the following language: "It is my will and desire that all my property be kept together for the use and benefit of my said wife and children, unless my wife should marry, or my children become of age, in which event or events, I wish the property divided as above;" the sole effect of the latter clause being merely to postpone the division, which postponement was for the convenience of the estate. *Young v. McKinnie*, 5 Fla. 542.

2. *Theobald on Wills* (2d ed.) 407; *Chandos v. Talbot*, 2 P. Wms. 612; *Prowse v. Alington*, 1 Atk. 487; *In re Hudsons*, Dru. 6. See also *Fuller v. Winthrop*, 3 Allen (Mass.) 59.

3. *Theobald on Wills* (2d ed.) 407; *In re Hart's Trusts*, 3 De G. & J. 195. See also *Roberts v. Brinker*, 4 Dana (Ky.) 571.

g. VESTING OF MIXED FUNDS.—The vesting of gifts of mixed funds is governed by the rule applicable to realty.¹

h. WHETHER A CONTINGENCY AFFECTING ONE OF THE SERIES OF LIMITATIONS AFFECTS ALL.—If the ulterior limitations are immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate in contradistinction to the others, the whole will be considered to hinge upon the same contingency.² But where an intention or purpose is expressed with ref-

1. *Sellers v. Reed*, 88 Va. 377; *Raney v. Heath*, 2 Patt. & H. (Va.) 207; *Collier's Will*, 40 Mo. 323; *Fay v. Sylvester*, 2 Gray (Mass.) 171; *Packard v. Packard*, 16 Pick. (Mass.) 191; *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 7.

2. 1 Jarm. on Wills (5th ed.) *830; *Fearnle Cent. Rem.* 235; *Moody v. Walters*, 16 Ves. Jr. 283. See *Folderay v. Colt*, 1 Y. & C. 621; *Lett v. Randall*, 10 Sim. 112; *Fitzberry v. Bonner*, 2 Drew. 36; *Gray v. Golding*, 6 Jur. N. S. 474; *Cattby v. Vincent*, 15 Beav. 198; *Doe v. Ford*, 2 El. & Bl. 970; 75 E. C. L. 968; *Robison v. Female Orphan Asylum*, 123 U. S. 706.

The principle applies, "although the contingency relate personally to the object of the particular estate, and therefore appears not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorize a distinction between them."

1 Jarm. on Wills (5th ed.) *830; *Davis v. Norton*, 2 P. Wms. 390.

It must not be forgotten, however, that the rule is merely one of construction, and will not be followed if in conflict with the intention. Thus, in *Doe v. Ford*, 2 El. & Bl. 970; 75 E. C. L. 968, by marriage settlement, C., the husband, in consideration of the intended marriage and of the fortune of S., the wife, to which C. was to become entitled on the marriage, released land to the use of himself in fee until the marriage; and, after the marriage, to the use of himself for life; remainder to trustees to preserve contingent remainders; and, after the decease of C., in case S. should survive him, to the use of S. for life; remainder to trustees to preserve contingent remainders; and,

after the decease of the survivor of C. and S., in case there should be only one child of the marriage, then living, and no other child then dead leaving issue, to the use of such child in fee; but, in case there should happen to be more than one such child living at the decease of the survivor of C. and S., or any child or children then dead leaving issue, then to the use of all such children of C. and S., and such children's children, respectively, for such estates as C. and S. should jointly appoint, and, in default of such appointment, as the survivor should appoint; and, in default of such appointment, to the use of all the children of the marriage, as tenants in common, and of the heirs of their respective bodies, with cross remainders; and "for default of all such issue," to the use of four brothers and sisters of S., as tenants in common in fee. S. survived C.; there were two children of the marriage, both of whom died, without leaving issue, in the lifetime of S. No appointments were made. It was held by Lord Campbell, C. J., Coleridge and Wightman, J.J., that the remainder to S.'s brothers and sisters took effect, as it was not a limitation in remainder after the determination of the estates given to the children, as tenants in common in tail, by the limitation immediately preceding, but was an independent limitation to take effect in case there was, at the time of the death of the survivor of C. and S., no issue in whom any of the previous limitations could vest. In this case Coleridge, J., said: "It must be admitted that this limitation follows on the preceding ones, which commence with the first particular contingent estate, in unbroken continuity; and no special purpose is mentioned with reference to it, which contradistinguishes it from them; and, therefore, it was contended that all hinged on the same contingency, and that, falling

erence to the particular estate, in contradistinction to the others,¹

the first, the last failed also. But it is clear that this, though the general rule, is not an inflexible one. If there be an unbroken series of limitations, commencing with one which depends on a contingency, it is not unreasonable to infer an intention to make the whole consecutive series one and entire, and therefore all depending on the first contingency. If a testator's or a settlor's language shows that, in disposing of a property, a particular contingency has been present to his mind, and that the limitations, one after another, have been framed with a view to the happening or not, as the case may be, of that event, it is reasonable to infer that that was present to his mind as a condition governing the whole; and then it must operate to prevent, or occasion, as the case may be, the arising of the last, equally with the first, or any intermediate limitation. But this proceeds on intention, not on any technical rule. The decisions will be found to proceed upon the examination, in each case, of the language, to ascertain the intention; and therefore, I think it needless to go through them. The result seems to me to be, that the links may be separated from each other, and must be, where the language of the instrument leads to the inference that the settlor so intended, and, as I said, no technical rule prevents us from giving effect to it. Now, looking at the recital and the limitations themselves in the settlement before us, it seems to me that the settlor may be understood as agreeing with his wife; first, that he and she and then their children, if any, should be provided for; but if they too should die leaving no child or child's child living at their decease, then her family should be next considered. He evidently places these as next in succession to his wife and her children; but to make the provision fail because there were no such children, is directly inconsistent with this intention; it is to make that very event defeat the limitation to them, upon the happening of which it was intended to take effect. Nay, according to this construction, the limitation in question never could take effect in any event. If there were such surviving child, then the contingency does not occur upon the happening of which alone it was, by the express language, to take

effect; and if there be no such child then the construction excludes it because of the failure of that first estate. It would seem strange to adopt a rule of construction, the application of which will make the instrument inoperative in any event. Mr. Rudall almost admitted that his arguments for the plaintiff would have failed if the words had been 'for default of all such children' instead of 'issue.' That difference seems to me immaterial here; and if anything is to turn on a very nice examination of the terms, I would rather say that the settlor, by using the words 'for default of all such issue,' collects all the preceding steps of the series into one, and separates them from that which follows, making the last an alternative to the former."

1. 1 Jarm. on Wills (5th ed.) *831; *Horton v. Whittaker*, 1 T. R. 346. See *Napper v. Sanders*, Hutt. 119; *Bradford v. Foley*, Dougl. 63; *Darby v. Darby*, 18 Beav. 412; *Eaton v. Hewitt*, 2 De G. & S. 184; *Doe v. Ford*, 2 El. & Bl. 970; 75 E. C. L. 968; *Doulty v. Laver*, 14 Jur. 188; *Robison v. Female Orphan Asylum*, 123 U. S. 706. See *Sprull v. Moore*, 5 Ired. Eq. (N. Car.) 284; *Dickinson v. Hoomes*, 1 Gratt. (Va.) 302; *Ingram v. Girard*, 1 Houst. (Del.) 276; *Harris v. Berry*, 7 Bush (Ky.) 114; *Birney v. Richardson*, 5 Dana (Ky.) 429.

As, in *Horton v. Whittaker*, 1 T. R. 346, stated 1 Jarm. on Wills 831, where A., by his will, declared his desire to provide for his sisters; but considering that his sister M., wife of W., was already well provided for during the life of her husband, and therefore would not, unless she happened to survive him, want any assistance to enable her to live in the world, he devised his estate to trustees, in trust during the life of M., to pay there to his (the testator's) sisters T. and B.; and after the decease of W., in case his (the testator's) sister M. should be then living, in trust as to one-third, to the use of the said M. for life; and as to the other two-thirds, to the other two sisters respectively for life; remainder, as to each third, to the respective sons of each successively in tail, with remainders over. M. died in the lifetime of her husband; and the question was, whether the remainders did not fail by this event; but it was held that the contingency affected her

or where the ulterior limitations do not follow the contingent estate in one uninterrupted series, in the nature of remainders, but assume the form of substantive, independent gifts, the contingency is restricted to the particular estate with which it is associated.¹

21. Divesting.—*a.* **DIVESTING CLAUSES STRICTLY CONSTRUED—VESTED GIFT NOT DIVESTED UNLESS EXACT CONTINGENCY HAPPENS—FAILURE OF GIFT OVER.**—Divesting clauses are strictly construed, and an estate once vested will not be divested unless all the events upon which the gift over is to take effect, happen.² Whether the fact that the gift over cannot take effect

own life estate only, and did not extend to the ulterior limitations.

1. 1 Jarm. on Wills (5th ed.) *831; *Lethieullier v. Tracy*, 3 Atk. 774. See *Aislabie v. Rice*, 8 Taunt. 459; *Doe v. Wilkinson*, 2 T. R. 209; *Pearson v. Rutter*, 3 De G. M. & G. 398; *Grey v. Pearson*, 6 H. L. Cas. 103; *Boosey v. Gardener*, 5 De G. M. & G. 122; *Quicke v. Leach*, 13 M. & W. 218; *Sheffield v. Coventry*, 2 De G. M. & G. 551; *Robinson v. Female Orphan Asylum*, 123 U. S. 706; *Yeatman v. Haney*, 79 Tex. 67.

The following distinctions have been adopted by Theobald: "When a particular estate is limited upon a contingency, and the subsequent estates are limited as remainders upon it, the contingency *prima facie* applies to the whole series of limitations. *Doe v. Sheppard*, Dougl. 75; *Toldervy v. Colt*, 1 Y. & C. 240, 627; 1 M. & W. 250.

"Similarly, when an interest is given to a person, and then in a certain event a different interest is given with limitations over, the contingency applies to all the subsequent limitations. *Gray v. Golding*, 6 Jur. N. S. 474; *Cattley v. Vincent*, 15 Beav. 198; *Findon v. Findon*, 24 Beav. 83; *Lett v. Randall*, 10 Sim. 112; *Paylor v. Pegg*, 24 Beav. 105.

"On the other hand, if the subsequent limitations, or any of them, can be looked upon as independent gifts, they will not be liable to the contingency of preceding gifts. *Lethieullier v. Tracy*, 3 Atk. 774; *Ambly v. Boosey v. Gardener*, 5 De G. M. & G. 122; *Doutty v. Laver*, 14 Jur. 188; *Partridge v. Foster*, 35 Beav. 545; *In re Blight*, 13 Ch. Div. 858.

"In the same way, if a particular gift is expressed to be made contingent from motives applicable to that gift only, subsequent gifts will not be contingent. *Horton v. Whittaker*, 1 T. R. 346.

"And if subsequent gifts can be read as given, subject to the prior limitations, they will not be liable to the contingencies of prior gifts. *Sheffield v. Coventry*, 2 De G. M. & G. 551. See *Pearson v. Rutter*, 3 De G. M. & G. 398; 6 H. L. Cas. 61; *Hole v. Davies*, 34 Beav. 345.

"In the same way, when there has been a gift in one event to one set of issue in fee, and upon another event to another set of issue in tail, a gift over in default of such issue may be construed as referring to a failure of all the prior limitations, and not merely as a remainder dependent upon the limitations to the second class of issue taking effect. *Doe v. Ford*, 2 El. & Bl. 970; 75 E. C. L. 968.

"As to whether, in a devise of Whiteacre to A and his issue, and then to B and his issue, and of Blackacre to B and his issue, and then to A and his issue, and, in default of issue of A and B, over, the ultimate gift includes both estates, see *Gordon v. Gordon*, L. R., 5 H. L. 254. See also *Adshead v. Willetts*, 29 Beav. 358." Theobald on Wills (2d ed.) 477.

The subject is also discussed by *Fearne Cont. Rem.* 235.

When the word "item" or "likewise" is used, the effect is to make a *prima facie* case for disconnection from the previously expressed contingency, which the context may either maintain or refute. 1 Jarm. on Wills, § 833; *Lethieullier v. Tracy*, 3 Atk. 774; *Paylor v. Pegg*, 24 Beav. 105.

2. 1 Jarm. on Wills (5th ed.) *827; *Co. Litt.* 219 b.; *Doe v. Cooke*, 7 East 269; *Doe v. Rawding*, 2 B. & Ald. 441; *Doe v. Jessep*, 12 East 288; *Clason v. Clason*, 6 Paige (N. Y.) 541. See *Vuliamy v. Huskisson*, 3 Y. & C. 80; *Wall v. Tomlinson*, 16 Ves. Jr. 413; *Chew's Appeal*, 45 Pa. St. 228; *Grim-*

will preserve the prior interest, even if the divesting contingency happens, is a point upon which authorities differ.¹

b. OF CONSTRUING AN INTEREST TO BE ABSOLUTE RATHER THAN DEFEASIBLE.—In doubtful cases, an interest whether vested or contingent, ought, if possible, to be construed as absolute or indefeasible, in the first instance, rather than as defeasible; but if it cannot be construed to be an absolute interest in the first instance, at all events, such a construction ought to be put upon the conditional expressions which render it defeasible, as to confine their operation to as short a period as possible, so that it may become an absolute interest as soon as it can fairly be so considered.²

c. CONTINGENT INTERESTS SUBJECT TO A CONDITION SUBSEQUENT.—A contingent interest may be subject to a condition subsequent.³

22. Conditions—*a.* **BY WHAT WORDS CREATED—GIFTS TO EXECUTORS AND TESTAMENTARY TRUSTEES—CONDITIONS, LIMITATIONS, CONDITIONAL LIMITATIONS.**—Although the court is never astute to construe a testator's words as importing a condition, if a different meaning can be fairly given them,⁴ yet

ball *v.* Patton, 70 Ala. 626; Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 317; Shadden *v.* Hembree, 17 Oregon 15; Cheesman *v.* Wilt, 1 Yeates (Pa.) 411; Jenkins *v.* Van Schaak, 3 Paige (N. Y.) 242; Den *v.* Jacobs, 3 Murph. (N. Car.) 558; Turner *v.* Whitted, 2 Hawks (N. Car.) 613; Black *v.* McAulay, 5 Jones (N. Car.) 375.

1. Theobald on Wills (2d ed.) 478; 1 Jarm. on Wills (5th ed.) *827; REMAINDERS, vol. 20, p. 942.

2. Smith Ex. Int., § 223. See Weakley *v.* Rugg, 7 T. R. 322; Smith's Appeal, 23 Pa. St. 9; Galloway *v.* Carter, 100 N. Car. 112; Davis *v.* Parker, 69 N. Car. 275; Helliard *v.* Kearney, Busb. Eq. (N. Car.) 221; Burnham *v.* Burnham, 79 Wis. 557; Matter of Whittemore's Estate (Supreme Ct.), 14 N. Y. Supp. 453.

"This would seem clearly deducible from the well-known rule that conditions are odious, and shall be construed strictly; a rule which would appear to apply to those conditions which are termed mixed conditions, as well as to conditions which are simply destructive. For, if it applies to conditions subsequent which are simply destructive and upon which an estate is to be defeated, and made to revert to the heir, who is favored by the law, it would seem to apply also to those conditions which are both destructive and creative, and

upon which an estate is to be divested, and a new estate is to arise in favor of another person, by way of conditional limitation.

"The person claiming under a prior limitation, and his children, being of course the primary objects of the grantor's or testator's bounty or consideration, and the persons claiming under the limitation over being only secondary objects of such bounty or consideration, it is, of course, reasonable to lean in favor of the primary objects, by construing their interest to be absolute in the first instance, or as early as by fair consideration it can be considered to be so, rather than to lean in favor of the secondary objects, by construing the interest of the primary objects to be defeasible.

"The law favors the free uncontrolled use and enjoyment of property, and the power of alienation, whereas the defeasible quality of an interest tends most materially to abridge both." Smith Ex. Int., §§ 224-226.

3. Egerton *v.* Brownlow, 4 H. L. Cas. 1; REMAINDERS, vol. 20, p. 851.

4. Theobald on Wills (2d ed.) 398; Yates *v.* London University College, L. R., 7 H. L. 438; Casper *v.* Walker, 33 N. J. Eq. 35; Edgeworth *v.* Edgeworth, L. R., 4 H. L. Cas. 38. See Tarver *v.* Tarver, 9 Pet. (U. S.) 174; Wood *v.* Conrey, 62 Md. 542; Sheets' Estate, 52

Pa. St. 257; *Urich v. Merkel*, 81 Pa. St. 332; *Bonner v. Young*, 68 Ala. 35; *Skipwith v. Cabell*, 19 Gratt. (Va.) 758; *Pearcy v. Greenwell*, 80 Ky. 616; *McElwaine v. Holyoke First Congregational Soc.*, 153 Mass. 238; *Casey v. Casey*, 55 Vt. 518; *Brown v. Concord*, 33 N. H. 285; *Den v. Hance*, 11 N. J. L. 244; *Newell v. Nichols*, 75 N. Y. 78; *Leslie v. Marshall*, 31 Barb. (N. Y.) 560; *Likefield v. Likefield*, 82 Ky. 589. "Thus, a devise upon condition 'that the devisee makes certain payments within' a given time will, as a rule, be construed as a trust, and not as a condition. *Young v. Grove*, 4 C. B. 668; 56 E. C. L. 668; *Wright v. Wilkin*, 9 W. R. 161; 10 W. R. 403. See *Atty. Gen'l v. Wax Chandlers Co.*, L. R., 6 H. L. Cas. 1; *Merchant Taylors Co. v. Atty. Gen'l*, L. R., 6 Ch. 512. And see *Bird v. Harris*, L. R., 9 Eq. 204; *Foot v. Cunningham, Jr.*, 11 Eq. 306.

"In some cases a condition apparently precedent has been read as forming part of the original limitation. Thus, a devise to M. and the heirs of her body, on condition that she marry and have issue male by S., was held to give an estate in special tail to M. *Page v. Hayward*, 2 Salk. 570.

"Similarly, an estate to arise upon a condition which cuts down a previous estate will, if possible, be construed as a remainder by looking upon the condition as forming part of the limitation of the previous estate. Thus, a devise to A for life if she should not marry again, but if she did, to B, will be construed as a devise to A for life or till marriage. *Luxford v. Cheeke*, 3 Lev. 125; *Lady Fry's Case*, 1 Vent. 203; *Gordon v. Adolphus*, 3 Bro. P. C. 306.

"So, too, if the gift for life is made 'subject to the proviso hereinafter contained,' the proviso is incorporated into the original limitation. *Webb v. Grace*, 2 Ph. 701.

"And a bequest to A for life, if she should so long remain unmarried, will be construed in the same way. *Heath v. Lewis*, 3 De G. M. & G. 954.

"On the other hand, if the condition is so penned that it cannot be connected with the previous limitation for life, it must take effect as a condition. *Sheffield v. Orrery*, 3 Atk. 282. See *Allen v. Jackson*, 1 Ch. Div. 399.

"In such a case, however, it may appear that the original estate was only meant to last till the condition takes

effect, if, for instance, the rents are directed to be paid to a woman, which could only be done till her marriage, the estate not being given to her separate use. *Meeds v. Wood*, 19 Beav. 215.

"Upon the same principle, the ordinary limitation to trustees to preserve contingent remainders is a vested remainder, the prior estate being looked upon as lasting till forfeiture by the prior taker. *Smith v. Parkhurst*, 18 Viner, fol. 413; 3 Atk. 135; 4 Bro. P. C. 353." *Theobald on Wills* (2d ed.) 398.

Trust or Charge Distinguished from Condition.—In *Woodward v. Walling*, 31 Iowa 533, a clause in a will was in substantially the following form: "I give and bequeath to my son, Elisha J., my real estate (describing it) during his natural life, and after his decease to descend to his heirs, provided, however, that the said Elisha J. shall provide a home for his sister, Oriel, till her marriage, and then to give her an outfit equal to what her sisters have received at their marriage, provided, however, that if the said Elisha J. does not accept of the provisions of this will within eighteen months from the date hereof, then said property to revert to his sister Oriel." *Held*, while by the terms of the will an estate was devised over to the daughter upon the noncompliance with the second proviso or condition by the son, that the first condition did not thus operate as a limitation upon the estate devised to him and his heirs, and therefore that a breach or non-performance of such condition did not have the effect of divesting his title under the will, but merely operated as a trust or charge upon the estate for its performance.

In this case, the court, by Beck, J., said: "There are two distinct and separate conditions embodied in the instrument; the first imposing upon the defendant the obligation to furnish to plaintiff a home and outfit; the second, that he accept the provisions of the will in eighteen months. The language under which plaintiff claims a devise over to her in case of non-performance of the condition, is so intimately and entirely coupled with the words of the last condition that it would be a great violence to the rules of our language, to make it extend to the first condition. The second condition, with the devise over, make one sentence full and complete. We know of no rule of construction, or principle of our language, which will permit us to make the

no precise form of words is necessary to create a condition in a

adjunct of this sentence which declares the devise over to plaintiff, qualify, limit, or in any manner affect the preceding sentence containing the devise to defendant and the first condition. The devise over to plaintiff is only on condition of the failure of defendant to accept under the will. That this is the effect of the language there can be no ground on which to build a doubt; that such was the intention of the deviser cannot be questioned, for the language and structure of the will can express nothing else.

"We come now to consider the first condition. Under the rule just stated, the forfeiture of this condition, if there were a devise over dependent thereon, would divest defendant of the title. But, as we have seen there is no devise over coupled with this condition, we must then inquire whether the non-performance of the condition produces the same effect, namely, divests defendants of the title conferred by the will.

"When there is no limitation over, in a devise upon a condition, raising an estate in another upon its breach, the condition or proviso is not always construed as a limitation whereby the first estate devised may be defeated. *Greenleaf's Cruise*, tit. 16, ch. 2, § 34. As the intention of the testator must be followed, the estate devised upon condition will be defeated or upheld after the condition broken, as such intention may be discovered in the language and construction of the will. It appears quite plain to us, that the testator in the will before us did not intend that the estate devised to the defendant should terminate upon his failure to perform the condition first expressed. The language of the instrument fails to convey any such intention. That such intention existed we cannot presume, for the law does not favor forfeitures, and will not, by implication or construction, create them. That the intention did not exist in the mind of the testator appears quite certain, from the fact that the question was before her, and contemplated by her, and yet no such intention is expressed. The question of forfeiture of the estate on account of the non-performance of the condition we know was contemplated by the testator, because she provided for a forfeiture upon the failure of the devisee

to perform another condition subsequently expressed. Here are two conditions distinctly and separately prescribed. The non-performance of one, it is declared, shall defeat the estate. But it is not so expressed as to the other. The subject of the forfeiture of the estate upon breach of conditions being in the mind of the deviser, we must presume that it was the intention of the deviser that forfeiture should extend only to the case wherein it is prescribed. Such would be the construction applied to all written instruments containing like expressions. A limitation, too, whereby an estate may be determined, must be clearly expressed in order to be enforced as such. 2 *Redfield on Wills* 668, § 18. It certainly ought not to rest upon construction which will do violence to the rules of our language, and is not in accord with the usual manner of expressing our intentions.

"The condition under consideration, being for the benefit of plaintiff, without any expressed intention that its breach shall work a forfeiture of the estate, should be regarded as creating a trust or charge upon the land in her favor, to be enforced as other trusts and charges, and not as a limitation upon the estate devised. This is the doctrine announced in many cases arising under similar conditions. An extended review of these cases is not called for; a simple citation of those which have come under our observation is deemed sufficient. *Fox v. Phelps*, 17 Wend. (N. Y.) 393; *Doe v. Woods*, Busb. (N. Car.) 290; *Taft v. Morse*, 4 Met. (Mass.) 523; *Ward v. Ward*, 15 Pick. (Mass.) 511; *Sheldon v. Purple*, 15 Pick. (Mass.) 528; *Hanna's Appeal*, 31 Pa. St. 53; *Lockett v. White*, 10 Gill & J. (Md.) 480; *Sands v. Champlin*, 1 Story (U. S.) 376; *Veazey v. Whitehouse*, 10 N. H. 409; *Jennings v. Jennings*, 27 Ill. 518. It is our opinion that the first condition expressed in the will does not operate as a limitation upon the estate therein devised to defendant and his heirs, and therefore, that a breach or non-performance of such condition does not operate to divest the title held under the will." *Compare Hogeboom v. Hall*, 24 Wend. (N. Y.) 146; *Lindsey v. Lindsey*, 45 Ind. 552; *Hanna's Appeal*, 31 Pa. St. 53.

will, and any expression which clearly manifests such an intention will be sufficient.¹

1. 2 Jarm. on Wills (5th ed.) *1; 1 Roper on Leg. (3d ed.) 645. See Tattersall v. Howell, 2 Meriv. 26; Maud v. Maud, 27 Beav. 615; Finlay v. King, 3 Pet. (U. S.) 346; Lindsey v. Lindsey, 45 Ind. 552; Brown v. Evans, 34 Barb. (N. Y.) 594; Rushmore v. Rushmore (Supreme Ct.), 12 N. Y. Supp. 776; Dustan v. Dustan, 1 Paige (N. Y.) 509; Morgan v. Darden, 3 Den. (N. Y.) 203; Fox v. Phelps, 17 Wend. (N. Y.) 393; Matter of Hohman, 37 Hun (N. Y.) 250; Booth v. Baptist Church, 126 N. Y. 242; Tilley v. King, 109 N. Car. 461; Sims v. Smith, 6 Jones Eq. (N. Car.) 347; Huckabee v. Swoope, 20 Ala. 491; Buck v. Paine, 75 Me. 582; Wheeler v. Walker, 2 Conn. 106; Vanmeter v. Vanmeters, 3 Gratt. (Va.) 148; Crawford v. Patterson, 11 Gratt. (Va.) 364; Brown v. Concord, 33 N. H. 285; Worman v. Teagarden, 2 Ohio St. 380; Haggood v. Houghton, 22 Pick. (Mass.) 480; Tower's Appropriation, 9 W. & S. (Pa.) 103; Plant v. Weeks, 39 Mich. 117.

Gifts to Executors.—A general or specific legacy given by a testator to his executors, whether under the title of executor or not, is *prima facie* given to them in that character, and, therefore, they are not entitled to it if they decline or are incapable of undertaking the office. Theobald on Wills (2d ed.) 287; Reed v. Devaynes, 2 Cox 285; Calvert v. Sebbon, 4 Beav. 222; Hanbury v. Spooner, 5 Beav. 630; *In re* Hawkins' Trusts, 33 Beav. 570; Piggott v. Green, 6 Sim. 72; Slaney v. Watney, L. R., 2 Eq. 418.

In *America*, the rule has been recognized, although the force of the presumption is weakened by the fact that the executor is entitled to commissions. Billingslea v. Moore, 14 Ga. 370; Morris v. Kent, 2 Edw. Ch. (N. Y.) 175; Rothmahler v. Myers, 4 Desaus. (S. Car.) 215. See Kirkland v. Narramore, 105 Mass. 31.

To entitle the executor to take the legacy, it is sufficient if he either prove the will, which he may do at any time before the estate is fully administered, or act as executor. Theobald on Wills (2d ed.) 287; Hollingsworth v. Grasett, 15 Sim. 52; Angermann v. Ford, 29 Beav. 349; Harrison v. Rowley, 4 Ves. Jr. 212; Lewis v. Mathews, L. R., 8 Eq. 277.

In *Lewis v. Mathews*, L. R., 8 Eq. 281, Makins, V. C., said: "As a general rule, there must be unequivocal evidence of an intention to act, and that evidence is best given by the probate of the will."

It seems, however, that if the legacy is directed to be paid within twelve months, and there is nothing to show that the executor refuses to act, he is entitled to his legacy if he survives the twelve months. *Brydges v. Wotton*, 1 Ves. & B. 134. But if the executor acts fraudulently, the mere taking out probate will not entitle him to his legacy. *Harford v. Browning*, 1 Cox 302.

The presumption that a legacy to an executor is given to him in that character for his trouble, may be rebutted:

"1. If some other motive is expressed, as if the gift is to 'my friend and executor.' *In re* Denby, 3 De G. F. & J. 350; *Dix v. Reed*, 1 Sim. & Stu. 237; *Burgess v. Burgess*, 1 Colly. 367; *Bubb v. Yelverton*, L. R., 13 Eq. 131.

"2. If the gifts to the executors are unequal in amount, or a legacy is given to one and not the other. *Cockerell v. Barber*, 2 Russ. 585; *Jewis v. Lawrence*, L. R., 8 Eq. 345; *Wildes v. Davies*, 1 S. & G. 475.

"3. If the gift is after a life interest. *In re* Reeves' Trusts, 4 Ch. Div. 841.

"4. If there is a direction that in the event of the executor's death before the testator, his legacy is to go to his next of kin. *In re* Banbury's Trusts, 1r. R., 10 Eq. 408.

"5. The presumption does not arise if the gift is of residue. *Parsons v. Saffery*, 9 Pr. 578; *Griffith v. Pruen*, 11 Sim. 202; *Christian v. Devereux*, 12 Sim. 264." Theobald on Wills (2d ed.) 287, 288.

Testamentary Trustees — Gifts to.—The above principles applicable to gifts to one who is executor, apply as well to gifts to testamentary trustees. *Hollingsworth v. Grasett*, 15 Sim. 52.

But in the case of a bequest to a testamentary trustee, the legacy does not vest if he die after probate without doing any act to accept the trust, although before the executor had settled the estate. *Kirkland v. Narramore*, 105 Mass. 31.

Conditions—Limitations—Conditional Limitations.—"By the common law, a condition annexed to real estate could

be reserved only to the grantor or deviser and his heirs. Upon a breach of the condition, the estate of the grantee or devisee was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the deviser, who alone had the right to take advantage of a breach. 2 Bl. Com. 156; 4 Kent's Com. (6th ed.) 122, 127. Hence arose the distinction between a condition and a conditional limitation. A condition, followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it, is termed a conditional limitation.

"A condition determines an estate after breach, upon entry or claim by a grantor or his heirs, or the heirs of the deviser. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

"There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may be material to notice. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains, after the gift or grant takes effect, continues in the grantor and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and

which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or deviser immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or deviser. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu*; and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or deviser or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

"One material difference, therefore, between an estate in fee on condition and on a conditional limitation, is briefly this: that the former leaves in the grantor a vested right, which by its very nature is reserved to him, as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not, therefore, fetter and tie up estates, so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free

b. CONDITIONS PRECEDENT AND SUBSEQUENT DISTINGUISHED.—A condition precedent is one which must be performed before the interest affected by it can vest. A condition subsequent is one by which an interest already vested may be divested,¹ or a contingent interest defeated before vesting.² Whether a condition is precedent or subsequent is a question of construction, in regard to which very little help can be derived from decided cases. It may, however, be observed, that as between a contingent remainder and a vested remainder, subject to a divesting contingency, the question depends upon whether the condition is incorporated into the gift to, or description of, the remainder-man, or is added as a separate clause after words which have already given a vested interest.³ The fact that the condition requires something to be done which may take time, is a circumstance in favor of construing it as a condition subsequent.⁴ On the other hand, the fact that the condition involves

and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory, and depending on a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

"Such limitations include certain estates in remainder, as well as gifts and grants, which, when made by will, are termed executory devises, and when contained in conveyances to uses, assume the name of springing or shifting uses." Bigelow, J., in *Brattle Square Church v. Grant*, 3 Gray (Mass.) 146.

Where, in a testamentary writing, the words "in the event of its becoming necessary," equivalent to "if it become," or "provided it become," etc., were employed, it was held that a conditional bequest and not a limitation was intended by the testator. *Mackay v. Moore, Dudley* (Ga.) 94. See further, upon the subject, 4 Kent's Com. *127; 1 Greenleaf's Cruise, tit. 16, ch. 2, § 30; *Newell v. Nichols*, 75 N. Y. 78; *Hooper v. Cummings*, 45 Me. 359; *Bangor v. Warren*, 34 Me. 324; *Den v. Hance*, 11

N. J. L. 244; *Woodward v. Walling*, 31 Iowa 535.

1. 2 Jarm. on Wills (5th ed.) *2. See *Woodcock v. Woodcock*, Cro. El. 795; *Popham v. Bampfield*, 1 Vern. 79; *Davis v. Angel*, 31 Beav. 223; 4 De G. F. & J. 524; *Finlay v. King*, 3 Pet. (U. S.) 346; *Tilley v. King*, 109 N. Car. 461; *Whitehead v. Thompson*, 79 N. Car. 450; *Misenheimer v. Sifford*, 94 N. Car. 592; *Wellons v. Jordan*, 83 N. Car. 371; *Cox v. Bird*, 65 Ind. 281; *Matter of Whittemore's Estate* (Supreme Ct.), 14 N. Y. Supp. 453; *Rushmore v. Rushmore* (Supreme Ct.), 12 N. Y. Supp. 776; *Tappan's Appeal*, 52 Conn. 412; *Irvine v. Irvine* (Ky. 1891), 15 S. W. Rep. 511; *Nevins v. Gourley*, 95 Ill. 206; 97 Ill. 365; *Hammond v. Hammond*, 55 Md. 575; *Jenkins v. Merritt*, 17 Fla. 304; *Marwick v. Andrews*, 25 Me. 525; *Birmingham v. Lesan*, 77 Me. 494; *Webster v. Morris*, 66 Wis. 366.

Equity Will Relieve Against Conditions Precedent.—Where there is no gift over, and the parties can be placed in the same situation as if the condition had been performed, equity will relieve against even a condition precedent. Otherwise, if there is a gift over, or the parties cannot be placed *in statu quo*. *Hollinrake v. Lister*, 1 Russ. 508; *Taylor v. Popham*, 1 Bro. C. C. 168.

2. *Egerton v. Lord Brownlow*, 4 H. L. Cas. 1, stated in note to **REMAINDERS**, vol. 20, p. 851.

3. See **REMAINDERS**, vol. 20, p. 850.

4. *Theobald on Wills* (2d ed.) 399; *Popham v. Bampfield*, 1 Vern. 79; *Peyton v. Bury*, 2 P. Wms. 626; *Duddy v.*

something in the nature of a consideration, is a circumstance in favor of construing it as a condition precedent.¹

c. TIME OF PERFORMANCE—IGNORANCE OF THE EXISTENCE OF CONDITION AS AN EXCUSE FOR NON-PERFORMANCE.—Conditions, whether precedent or subsequent, must be performed within a reasonable time.²

A condition subsequent not performed, owing to the ignorance of the devisee or legatee of its existence, nevertheless works a forfeiture where the property is given over, both in the case of real and personal estate,³ unless the devisee is also the heir, who has a title independent of the will.⁴ Upon the same principle it has been held that a legacy not claimed within the time specified by the will is subject to a clause of forfeiture, although the legatee

Gresham, L. R., 2 Ir. 443; Cannon v. Apperson, 14 Lea (Tenn.) 553. See Hammond v. Hammond, 55 Md. 575; Jenkins v. Merritt, 17 Fla. 304; Marwick v. Andrews, 25 Me. 525; Merrill v. Emery, 10 Pick. (Mass.) 571.

1. Theobald on Wills (2d ed.) 400; Ackerly v. Vernon, Wills 153; *In re* Welstead, 25 Beav. 612; Booth v. Baptist Church, 126 N. Y. 242; Tilley v. King, 109 N. Car. 461; Marston v. Marston, 47 Me. 495; Cannon v. Apperson, 14 Lea (Tenn.) 553; Merrill v. Wisconsin Female College, 74 Wis. 417. But see Hammond v. Hammond, 55 Md. 575; Lindsey v. Lindsey, 45 Ind. 553. See further, upon the general question of construction, Yale College v. Runkle, 10 Biss. (U. S.) 300; Finlay v. King, 3 Pet. (U. S.) 346; Robbins v. Gleason, 47 Me. 259; Stark v. Smiley, 25 Me. 201; Birmingham v. Lesan, 77 Me. 494; Platt v. Platt, 42 Conn. 330; Tappan's Appeal, 52 Conn. 412; Casey v. Casey, 55 Vt. 518; Dunbar v. Dunbar, 3 Vt. 472; Barruso v. Madan, 2 Johns. (N. Y.) 145; Minot v. Prescott, 14 Mass. 496; Bradstreet v. Clark, 21 Pick. (Mass.) 389; Hayden v. Stoughton, 5 Pick. (Mass.) 528; Ward v. Ward, 15 Pick. (Mass.) 511; Webster v. Morris, 66 Wis. 366; Meakin v. Duvall, 43 Md. 372; West v. Biscoe, 6 Har. & J. (Md.) 468; Creswell v. Lawson, 7 Gill & J. (Md.) 240; Maddox v. Negroes Price, 17 Md. 413; Smith v. Jewett, 40 N. H. 530; Veazey v. Whitehouse, 10 N. H. 409; Calkins v. Smith, 41 Mich. 409; Johnson v. Warren, 74 Mich. 491; Conrad v. Long, 33 Mich. 78; Ely v. Ely, 20 N. J. Eq. 43; Reynolds v. Denman, 20 N. J. Eq. 218; Jackson v. Kip, 8 N. J. L. 241; Burnett v. Strong, 26 Miss. 116; Cheairs v.

Smith, 37 Miss. 646; Stone v. Hoxford, 8 Blackf. (Ind.) 452; Cross v. Carson, 8 Blackf. (Ind.) 138; Petro v. Cassidy, 13 Ind. 289; Lindsey v. Lindsey, 45 Ind. 552; Sammis v. Sammis, 14 R. I. 124; Clapp v. Clapp, 6 R. I. 129; Campbell v. McDonald, 10 Watts (Pa.) 179; Merrill v. Wisconsin Female College, 74 Wis. 415; Jennings v. Jennings, 27 Ill. 518; Nevins v. Gourley, 95 Ill. 206; Woodward v. Walling, 31 Iowa 533; Laurens v. Lucas, 6 Rich. Eq. (S. Car.) 217; Bowman v. Long, 23 Ga. 247; Vaughan v. Vaughan, 30 Ala. 329; Kirkman v. Mason, 17 Ala. 134; Rhett v. Mason, 18 Gratt. (Va.) 541.

2. Drew v. Wakefield, 54 Me. 295; Ross v. Tremain, 2 Met. (Mass.) 495; Carter v. Carter, 14 Pick. (Mass.) 424; Ward v. Patterson, 46 Pa. St. 372.

In regard to gifts dependent upon marriage with consent, see *infra*, this title, *Conditions in Restraint of Marriage—Performance and Waiver*.

3. 2 Jarm. on Wills (5th ed.) *14; Theobald on Wills (2d ed.) 45; *In re* Hodges' Trusts, L. R., 16 Eq. 92; Porter v. Pry, 1 Vent. 197; Ostley v. Earl of Essex, L. R., 18 Eq. 290; Burgess v. Robinson, 3 Meriv. 7; Carter v. Carter, 3 K. & J. 618.

Conditions Precedent.—Non-performance of a condition precedent which must be performed during life of testator, is not excused by the fact that the legatee was not informed that a legacy would be given upon the condition. Merrill v. Wisconsin Female College, 74 Wis. 415. See Johnson v. Warren, 74 Mich. 494.

4. Doe v. Beauclerk, 11 East 667; Doe v. Crisp, 8 Ad. & El. 778; 35 E. C. L. 522; Martin v. Ballou, 13 Barb. (N. Y.) 119.

received no notice of the legacy or of the death of the testator,¹ But if there is no gift over and the parties can be placed in the same situation as if the condition had been strictly performed, equity will grant relief.²

d. IMPOSSIBLE, IMPOLITIC, IMMORAL, OR ILLEGAL CONDITIONS.—As regards realty, if the condition upon which a devise depends is impossible, impolitic, immoral, or illegal, in its creation, or afterwards so becomes, otherwise than by the act of the testator, the devise is itself void;³ if it becomes impossible by the act of the testator, the condition is itself discharged.⁴ As regards personalty, by the rule of the civil law which has been adopted by courts of equity, where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by act of God, or where it is illegal, as involving *malum in se*, both gift and condition are void.⁵ Legacies charged on

1. Theobald on Wills (2d ed.) 451; Burgess v. Robinson, 3 Meriv. 7; Tulk v. Houlditch, Ves. & B. 248; Powell v. Rawle, L. R., 18 Eq. 243. See Stover's Appeal, 77 Pa. St. 282.

As to filing a bill for administration, see Tolner v. Marriott, 4 Sim. 19.

2. Hollinrake v. Lister, 1 Russ. 508.
3. 2 Jarm. on Wills (5th ed.) *9, *12; Theobald on Wills (2d ed.) 400; Shep. Touch. 132; Co. Litt. 206 b. See Priestley v. Holgate, 3 K. & J. 268; Egerton v. Brownlow, 4 H. L. Cas. 1; Caldwell v. Cresswell, L. R., 6 Ch. 278; Boyce v. Boyce, 16 Sim. 476; Carter v. Carter, 39 Ala. 579; Johnson v. Clarkson, 3 Rich. Eq. (S. Car.) 305.

4. Co. Litt. 206 b., § 334; Theobald on Wills (2d ed.) 400. See Gath v. Burton, 1 Beav. 478; Dailey v. Langworthy, 3 Bro. P. C. 359.

5. 2 Jarm. on Wills (5th ed.) *12, *13. See Brown v. Peck, 1 Eden 140; Wren v. Bradley, 2 De G. & S. 49; Wilkinson v. Wilkinson, L. R., 12 Eq. 604; Culin's Appeal, 20 Pa. St. 243; Stover's Appeal, 77 Pa. St. 282; Smith v. Dunwoody, 19 Ga. 237; Pinckard v. McCoy, 22 Ga. 28; Lusk v. Lewis, 32 Miss. 297; Five Points House v. Amerman, 11 Hun (N. Y.) 161; Cooper v. Clason, 3 Johns. Ch. (N. Y.) 521.

Thus, in Carter v. Carter, 39 Ala. 579, it was held that a devise or legacy, the vesting of which was made to depend on the precedent condition, that certain slaves, which belonged to the

father of the legatees, should be manumitted by him or suffered to go at large and enjoy the proceeds of their own labor, was defeated by such void condition.

A testator, who died in 1849, left of force his will bearing date Oct. 2, 1840, in the following language, to wit: "After all my debts are paid I will and bequeath to my brother F. all of my property, on certain conditions made with him. Should he decline taking it, I will and bequeath it to the Rev. B., on the same conditions. I appoint my said brother F. my executor." Shortly after testator's death, F. qualified as executor. With the will were found several unattested papers signed by the testator, and bearing dates subsequent to the date of the will, in which he, the testator, expressed his desire, and declared it to be one of the conditions mentioned in his will, that his slaves should be emancipated, if it could be done without evasion of the law, and in which he ordered certain legacies to be paid, and, in a certain contingency, distribution of his whole estate. To a bill filed by the next of kin to the testator, claiming that a trust resulted to them, F. answered and stated that he had never, before testator's decease, seen either his will or any of the papers accompanying it, "although testator had at different times conversed with him upon the first and principal subject mentioned in the papers accompanying

land are governed by the rules peculiar to realty;¹ a legacy charged on both real and personal property will, so far as it is payable out of each species of property, be governed by the rules applicable to that species.² If the performance of a condition subsequent is impossible or illegal at the time of its creation, or afterwards becomes impossible, either by the act of God or of the law, or of the grantee, the devise or legacy to which it is annexed becomes absolute.³

e. CONDITIONS IN RESTRAINT OF MARRIAGE—(1) As to Real Estate.—It seems to be the better opinion that as the principles governing this species of property are derived from the common law, a condition subsequent in reasonable restraint of marriage, annexed to an estate for life or in fee, is valid;⁴ and as the doctrine

his will (the emancipation of his slaves), and relied implicitly upon this defendant's integrity for carrying out his intentions as far as he could without practicing any evasion of the law."

It was held that the conditions upon which F. held the estate being, as stated in his answer, for the benefit of the slaves of testator, were void by the provisions of the act of 1841. *Johnson v. Clarkson*, 3 Rich. Eq. (S. Car.) 305.

1. 2 Jarm. on Wills (5th ed.) *9.

2. 2 Jarm. on Wills (5th ed.) *13; *Reynish v. Martin*, 3 Atk. 335.

3. 2 Jarm. on Wills (5th ed.) *10, *12;

4 Kent's Com. 125; 1 Rop. Leg. 783; *Theobald on Wills* (2d ed.) 450; Co. Litt. 206 a.; 2 Bl. Com. *156; *Thomas v. Howell*, 1 Salk. 170; *Walker v. Walker*, 2 De G. F. & J. 255; *Wilkinson v. Wilkinson*, L. R., 12 Eq. 604; *Collett v. Collett*, 35 Beav. 312. See *Davis v. Gray*, 16 Wall. (U. S.) 230; *Jones v. Habersham*, 3 Woods (U. S.) 443; *Parker v. Parker*, 123 Mass. 584; *Merrill v. Emery*, 10 Pick. (Mass.) 507; *Jones v. Doe*, 2 Ill. 276; *George v. George*, 47 N. H. 27; *Hammond v. Hammond*, 55 Md. 575; *Hutchins' Estate*, 9 Phila. (Pa.) 300; *Culin's Appeal*, 20 Pa. St. 243; *McLachlan v. McLachlan*, 9 Paige (N. Y.) 534; *Merriam v. Wolcott*, 61 How. Pr. (N. Y. Supreme Ct.) 377; *Potter v. McAlpine*, 3 Dem. (N. Y.) 108; *Laurens v. Lucas*, 6 Rich. Eq. (S. Car.) 217; *Conrad v. Long*, 33 Mich. 78; *Morse v. Hayden*, 82 Me. 227; *Jordan v. Dunn*, 13 Ont. 267; *Burnham v. Burnham*, 79 Wis. 557.

Thus, in *O'Brien v. Barkley* (Supreme Ct.), 60 N. Y. St. Rep. 520, it was held that a provision in a will that the devise, unless the devisee shall live apart from her husband, shall go to third per-

sons, is a condition subsequent, and void as against public policy.

So where the gift is on condition that the legatees support and care for A, if A refuse the legatee's offer of support the gift becomes absolute. *Livingston v. Gordon*, 84 N. Y. 136. And the better opinion is that such is the case even where there is a gift over. *Theobald on Wills* (2d ed.) 450; 2 Jarm. Wills (5th ed.) 12; *Collett v. Collett*, 35 Beav. 312; *Sutcliffe v. Richardson*, L. R., 13 Eq. 606. See *Livingston v. Gordon*, 84 N. Y. 136.

Void Conditions Subsequent.—Upon the same principle, if the condition subsequent be void, the original gift becomes absolute. *Jones v. Habersham*, 3 Woods (U. S.) 443. In this case, *Bradley, Circ. J.*, in considering the terms of a devise containing conditions subsequent, said: "This gift is objected to on account of the condition against alienation. . . . The condition is nothing but a condition subsequent, and, if void, does not vitiate the gift."

4. *Theobald on Wills* (2d ed.) 453. See *Jones v. Jones*, 1 Q. B. Div. 279; also observations of *Jessel, M. R.*, in *Bellairs v. Bellairs*, L. R., 18 Eq. 510; *Haughton v. Haughton*, 1 Moll. 611; *Phillips v. Medbury*, 7 Conn. 573; *Gilson, C. J.*, in *Com. v. Stauffer*, 10 Pa. St. 354.

Such is undoubtedly the case where the restraint is partial only, as where the condition required marriage with consent, *Salters v. Jewks*, 2 Ch. Rep. 95; *Theobald on Wills* (2d ed.) 454; *Hogan v. Curtin*, 88 N. Y. 171; or forbids marriage under age, or with persons of a particular family or nationality. *Theobald on Wills* (2d ed.) 454, citing *Stackpole v. Beaumont*, 3 Ves.

of conditions *in terrorem* does not apply to realty, the condition is good even though there is no gift over.¹ But a condition in general restraint of marriage is void, if imposed upon a tenant in tail, as repugnant to the nature of the estate.²

(2) *Personalty*.—In the case of personalty, a condition subsequent in general restraint of marriage is void.³ The rule is derived from the civil law by which all conditions in restraint of marriage were absolutely void, and marriage simply was a sufficient compliance with a condition requiring marriage with consent or with a particular individual, or any other restrictive circumstance.⁴ By the English law, however, the principle has been so

Jr. 89; *Perrin v. Lyon*, 9 East 170; *Duggan v. Kelly*, 10 J. R. Eq. 295; *Hodgson v. Halford*, 11 Ch. Div. 959; *Jenner v. Turner*, 29 W. R. 99; *Haughton v. Haughton*, 1 Moll. 611; *Phillips v. Ferguson*, 85 Va. 509.

But with regard to the validity of conditions in general restraint of marriage, annexed to devises of realty, authorities differ. On the one hand, it may be said that the invalidity of such conditions in regard to personalty is due to principles derived from the civil law, and introduced into the administration of personalty by ecclesiastics, not recognized by the common law in regard to realty. In fact, the rules derived from the civil law were merely rules of construction, as appears from the fact that the testator could evade the rule by throwing the sentence into the form of a limitation, which would be impossible if the rule were really founded upon any broad principle of public policy. See observations of Sir G. Jessel, M. R., in *Bellairs v. Bellairs*, L. R., 18 Eq. 516. On the other hand, Jarman and other writers are of opinion that conditions in general restraint of marriage are void upon the broad ground of public policy, applicable alike to real and personal property, since to give either man or woman property subject to such a condition is to encourage illicit connections. 2 Jarm. on Wills 50; notes to *Scott v. Tyler*, 2 Lead. Cas. Eq. (4th Am. ed.), pt. I, 475, 501; *Story Eq. Jur.*, § 280 *et seq.*; *Lord Ellenborough*, in *Perrin v. Lynn*, 9 East 170; *Lord Blackburn*, in *Jones v. Jones*, 1 Q. B. Div. 279. See *Hogan v. Curtin*, 88 N. Y. 171; *Waters v. Tazewell*, 9 Md. 291; *Williams v. Cowden*, 13 Mo. 211; *Maddox v. Maddox*, 11 Gratt. (Va.) 804; *Phillips v. Ferguson*, 85 Va. 511; *Randall v. Marble*, 69 Me. 310; *Otis v. Prince*, 10 Gray (Mass.) 581.

If the condition be precedent, a breach prevents vesting, even though the condition be in general restraint of marriage. *Phillips v. Ferguson*, 85 Va. 511.

1. *Haughton v. Haughton*, 1 Moll. 611.

As to whether the rule applies where real and personal estate are given together, see *Duddy v. Gresham*, 2 L. R. 443.

2. *Haughton v. Haughton*, 1 Moll. 611. See *Hogan v. Curtin*, 88 N. Y. 172.

3. *Theobald on Wills* (2d ed.) 453; *Morley v. Rennoldson*, 2 Hare 570.

4. 2 Jarm. on Wills (5th ed.) *44. In *Stackpole v. Beaumont*, 3 Ves. Jr. 96, *Lord Loughborough* said, in regard to the recognition of the doctrine by courts of equity: "It is impossible to reconcile the authorities, or range them under one sensible, plain, general rule. There can be no ground in the construction of legacies for a distinction between legacies out of personal and out of real estate. The construction ought to be precisely the same. I do not see more importance, in reality, in the distinction between conditions precedent and subsequent. The case of all these questions is plainly this: In deciding questions that arise upon legacies out of land, the court very properly followed the rule that the common law prescribes and common sense supports, to hold the condition binding where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the court felt the difficulty, upon the supposition that the ecclesiastical court had adopted a positive rule from the civil law upon legatory questions, and the inconvenience of proceeding by a different rule in the concurrent

far modified that a condition subsequent in partial restraint of marriage, as conditions not to marry a particular person,¹ or not to marry under twenty-one,² or other reasonable age,³ or without consent, are sustained if there is a gift over;⁴ but without a gift

jurisdiction (it is not right to call it so), in the resort to this court instead of the ecclesiastical court, upon legatory questions; which after the Restoration was very frequent, and in the beginning embarrassed the court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the ecclesiastical court is impossible to be accounted for, but upon this circumstance, that in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned; but only looked into the books, and transferred the rules, without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how, in a Christian country, they should have adopted the rule of the Roman law with regard to conditions as to marriage.

"First, where there is an absolute unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law where divorce is not permitted. Next, the favor to marriage, and the objection to the restraint of it, was a mere political regulation applicable to the circumstances of the Roman empire at that time, and inapplicable to other countries. After the civil war, the depopulation occasioned by it led to habits of celibacy. In the time of Augustus the Julian law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy (it is an odd expression), and for the encouragement of all persons who would contract marriage, it necessarily followed that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore it became a rule of construction that these conditions were null. It is difficult to apply that to a country where there is no law to restrain individuals from exercising their own discretion as to the time and circumstances of the marriage their children or objects of bounty may contract."

Is the English Rule One of Policy or Merely of Construction?—Upon this question Sir G. Jessel, M. R., said, in *Bellairs v. Bellairs*, L. R., 18 Eq. 516: "Now if the rule were really one of policy you never could evade it by a change in the form of words. But it is admitted you can so evade it; that if you put it in the form of limitation—if, for example, you had given this life interest to this young lady until she married, and then upon marriage had given it over—it is not disputed that that would have been good. Therefore, it seems to be a rule of construction. The reason of the rule may have been policy; but the actual question the court has to decide is whether, according to the construction, it is a condition or a limitation, and if it is found to be a condition, then the reason which made that condition *in terrorem* only may have been founded on policy or supposed policy; but it is the construction that decides that it is to be *in terrorem*, and therefore, strictly speaking, it is a question whether the testator has absolutely prohibited the marriage, or whether he has intended merely to threaten that which he knows cannot be carried into effect, because the court construes it to be *in terrorem*. I think, therefore, the rule is rather to be considered an arbitrary rule of construction than to be founded on public policy, and I should hold, if it were merely a gift of money arising from the sale of real estate, that it is governed by the rules applicable to personal legacies."

1. *Jarvis v. Duke*, 1 Vern. 19. See *Randall v. Payne*, 1 Bro. C. C. 55; *Davis v. Angel*, 4 De G. F. & J. 524; *Finlay v. King*, 3 Pet. (U. S.) 346; *Graydon v. Graydon*, 23 N. J. Eq. 230. Conditions not to marry a man of a particular religion or nationality, fall within the same class. *Duggan v. Kelly*, 10 Ir. Eq. 295; *Perrin v. Lyon*, 9 East 170; *Hodgson v. Halford*, 11 Ch. Div. 959.

2. *Stackpole v. Beaumont*, 3 Ves. Jr. 89. See *Shackelford v. Hall*, 19 Ill. 212.

3. *Younge v. Furse*, 8 De G. M. & G. 756.

4. Lord Thurlow, in *Scott v. Tyler*, 2 Bro. C. C. 488. See *Sutton v. Jewks*,

over, such conditions are held merely *in terrorem* and void.¹ With regard to conditions precedent, it has been held that a bequest to A, if he marries B, only takes effect in that event, and the fact that he married C in the testator's lifetime, and with his approval, is immaterial.² A condition precedent requiring consent to marriage generally, without limitation of age, is good, if there is a gift over;³ but if not, it is considered *in terrorem* merely and void.⁴ A condition precedent in partial restraint of marriage, as not to marry under a certain age, or requiring consent to marriage if under a certain age, is good, even though there is no gift over.⁵

2 Ch. Rep. 95; *Ashton v. Ashton*, Pre. Ch. 226; *Chauncy v. Graydon*, 2 Atk. 616; *Hemmings v. Munckley*, 1 Bro. C. C. 303; *Creagh v. Wilson*, 2 Vern. 573; *Dashwood v. Balkeley*, 10 Ves. Jr. 230; *Cleaver v. Spurling*, 2 P. Wms. 526; *Charlton v. Coombes*, 11 W. R. 1038; *Tricker v. Kingshorn*, 7 W. R. 652; *Hogan v. Curtin*, 88 N. Y. 171; *Collier v. Slaughter*, 20 Ala. 263; *Gough v. Manning*, 26 Md. 347.

Such partial restriction, however, must not be unreasonable or of such character as to amount to a total prohibition. Thus, conditions not to marry a man of a particular profession, or not seised of an estate in fee, have been held void. 1 Eq. Cas. Ab. 110, pl. 1 n.; *Relly v. Mouck*, 3 Ridg. P. C. 205.

1. *Theobald on Wills* (2d ed.) 454; *Marples v. Bainbridge*, 1 Madd. 317; *Reynish v. Martin*, 3 Atk. 330; *Wheeler v. Bingham*, 1 Wils. 135; *Stackpole v. Beaumont*, 3 Ves. Jr. 89; *Hogan v. Curtin*, 88 N. Y. 171; *Shackelford v. Hall*, 19 Ill. 212; *Gough v. Manning*, 26 Md. 347.

2. *Davis v. Angel*, 4 De G. F. & J. 524. But see *Smith v. Cowden*, 2 Sim. & Stu. 358.

When Consent in Testator's Life Satisfies Condition.—"But where the condition is marriage with consent, whether precedent or subsequent, the consent of the testator to a marriage in his lifetime satisfies the condition. *Clarke v. Berkeley*, 2 Vern. 720; *Parnell v. Lyon*, 1 Ves. & B. 479; *Wheeler v. Warner*, 1 Sim. & Stu. 304; *Tweedale v. Tweedale*, 7 Ch. Div. 633. See *Violett v. Brookman*, 5 W. R. 342.

And the condition does not apply to a subsequent marriage. *Hutcheson v. Hammond*, 3 Bro. C. C. 128; *Crommelin v. Crommelin*, 3 Ves. Jr. 227.

But in such a case the consent of a testator to a marriage to take place

after his death does not obviate the necessity for the consent of the persons named in the will. *Lowry v. Patterson*, Ir. R., 8 Eq. 372. And where the gift is till marriage, the consent of the testator to a marriage does not extend the gift. *Bullock v. Bennett*, 7 De G. M. & G. 283. See *Cooper v. Cooper*, 6 Ir. Ch. 217. *Theobald on Wills* (2d ed.) 456.

3. *Theobald on Wills* (2d ed.) 455; *Malcolm v. O'Callaghan*, 2 Madd. 523; *Gardiner v. Slater*, 25 Beav. 509; *Gough v. Manning*, 26 Md. 347. But see 1 Story Eq. Jur., § 290; *Phillips v. Ferguson*, 85 Va. 512.

4. *Theobald on Wills* (2d ed.) 455; *Reeves v. Herne*, 5 Vin. Ab. 343, pl. 41; *Reynish v. Martin*, 3 Atk. 330; *Gough v. Manning*, 26 Md. 347. See *Clarke v. Parker*, 19 Ves. Jr. 1; 1 Story Eq. Jur., § 290; *Phillips v. Ferguson*, 85 Va. 512.

5. *Theobald on Wills* (2d ed.) 455; *Stackpole v. Beaumont*, 3 Ves. Jr. 89; *Younge v. Furse*, 8 De G. M. & G. 756; *Phillips v. Ferguson*, 85 Va. 512.

In *Reynish v. Martin*, 3 Atk. 331, Lord Hardwicke said, in speaking of a legacy on condition that legatee marry with consent: "I apprehend that taking this as a mere personal legacy, the plaintiff, by the rules of the civil and ecclesiastical law, and which have been constantly adhered to in this court, will be entitled to the legacy; for it is an established rule in the civil law, and has long been the doctrine of this court, that where a personal legacy is given to a child on condition of marrying with consent, this is not looked on as a condition annexed to the legacy, but as a declaration of the testator *in terrorem*."

"This rule is so strictly adhered to in the ecclesiastical court, that the marrying without consent is not considered there as a breach of the condition,

The doctrine may be evaded by expressing the restriction in the form of a limitation, it being presumed in such case that the intention is to provide for the person while he remains unmarried and not to prevent him from marrying again,¹ and a

although the legacy is actually given over; but that rule has not been carried so far in this court, for in many instances here it has been considered as a breach of the condition, and the legacy thereby forfeited; but that differs from the present case, because here the legacy is given to Mary only, without any limitation over.

"But then it was objected that there is a strong and material difference between a condition precedent and subsequent, and this being a condition precedent, and as the condition was not performed, nothing vested, because the event was not come on which the legacy was to take effect.

"Undoubtedly this is true in general both in law and equity; but I do not find that the civil or ecclesiastical law have made any distinction between conditions precedent and subsequent, but that in both cases the condition as such is merely void.

"This rule of the ecclesiastical court was strongly relied on in the case of *Harvey and Aston* (1 T. Atk. 361), but it was the opinion of all the judges who assisted in that case that it was not to be carried so far in this court; and the distinction taken by Lord Chief Baron Comyns, in his argument in that case, is extremely right, and very well reconciles the difference, *vide* Com. Rep. 738; and the reason is, because the civil law considering the condition, whether precedent or subsequent, as unlawful and absolutely void, the legacy stands pure and simple.

"But in our law, where the condition is precedent, the legatary takes nothing till the condition is performed, and consequently has no right to come and demand the legacy; but it is otherwise where the condition is subsequent, for in that case the legatary has a right, and the court will decree him the legacy; but this difference only holds where the legacy is a charge on the real assets, and, therefore, if this had been merely a personal legacy, should have been of opinion that as the marriage without consent would not have precluded Mary of her right to this legacy in the ecclesiastical court, no more would it have done so here."

1. Theobald on Wills (2d ed.) 455; *Potter v. Richards*, 24 L. J. Ch. 488; *Heath v. Lewis*, 3 De G. M. & G. 954. See *Evans v. Rosser*, 2 H. & M. 190; *Bullock v. Bennett*, 7 De G. M. & G. 283; *Webb v. Grace*, 2 Ph. 707; *Bodwell v. Nutter*, 63 N. H. 446; *Morgan v. Morgan*, 41 N. J. Eq. 235; *Selden v. Keen*, 27 Gratt. (Va.) 576.

"It is difficult to understand how this could be otherwise, for in such a case there is nothing to give an interest beyond the marriage. If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition, and leave the original gift in operation; but if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage. With reference to that point, and also in order that the grounds of my decision might clearly appear to those parties against whom it might be, I wished to look into the authorities; and I am satisfied, from an examination of the authorities, that there is no reason to alter my opinion, that a gift until marriage, and when the party marries then over, is a valid limitation. In the case of a widow, there is no question of the validity of such a limitation. It was decided in *Jordan v. Holkham*, Amb. 209, that, where an estate was given during widowhood, the estate was determinable by the second marriage; and an annuity given during widowhood is also good. *Barton v. Barton*, 2 Vern. 308. In *Scott v. Tyler*, 2 Dick. 712, Lord Thurlow, speaking of the change which the civil law had undergone in its descent, observes that, in the Novels, widowhood was excepted, and an injunction to keep that state was a lawful condition, *Scott v. Tyler*, 2 Dick. 721, was certainly a peculiar case; but, referring to the canon law, Lord Thurlow, citing Godolphin, says that the use of a thing may be given 'during celibacy for the purpose of intermediate maintenance, and will not be interpreted maliciously to a charge of restraining marriage,' 2 Dick. 722; affirming, therefore, the general doctrine that a gift until marriage would be good. In

gift over is not required to make the restriction in this form effectual.¹

(3) *Legacies Charged on Land*.—The validity of conditions annexed to legacies charged on land is governed by the rules applicable to real estate.²

(4) *Legacies Charged on Proceeds of Converted Land—Mixed Funds*.—The validity of conditions annexed to legacies charged upon the proceeds of converted lands,³ or upon a mixed fund arising from the proceeds of sale of realty and personalty, is governed by the rules applicable to personalty.⁴

(5) *Restraints Upon Second Marriage*.—Conditions restraining a widow from second marriage constituted an exception to the rule of the civil law,⁵ and consequently they are valid in respect to personal property if there is a gift over; and in respect to real property, they are valid either with or without a gift over.⁶ In

the case of *Low v. Peers*, C. J. Wilmot's Cases 369, Chief Justice Wilmot goes through the cases upon the subject and shows that, according to his apprehension of the law, a gift until marriage is perfectly good. He notices the case of college fellowships, of customs of manors, of limitations of estates during celibacy, and the express distinction between limitations and conditions, and he remarks that the distinction is recognized and established, and that the common law allows it. I may refer to the cases, and amongst them to the later ones of *Bird v. Hunsdon*, 2 Swanst. 342, and *Marples v. Bainbridge*, 1 Madd. 590, as affirming the same proposition. In those cases all the reasons the court referred to were superfluous, if a limitation during celibacy is not good." *Wigram, V. C.*, in *Morley v. Rennoldson*, 2 Hare 580.

1. *Heath v. Lewis*, 3 De G. M. & G. 954; 2 Jarm. on Wills (5th ed.) *45.

2. *Lord Loughborough*, in *Stackpole v. Beaumont*, 3 Ves. Jr. 89; *Jessel, M. R.*, in *Bellairs v. Bellairs*, L. R., 18 Eq. 516; *Lord Hardwicke*, in *Reynish v. Martin*, 3 Atk. 331; *Smythe v. Smythe* (Va. 1894), 19 S. E. Rep. 175.

3. *Theobald on Wills* (2d ed.) 453; *In re Hart's Trusts*, 3 De G. & J. 195; *Bellairs v. Bellairs*, L. R., 18 Eq. 510.

4. *Lloyd v. Lloyd*, 2 Sim. N. S. 266; *Bellairs v. Bellairs*, L. R., 18 Eq. 510.

But the validity of a condition annexed to a legacy charged upon both real and personal property, is governed by the rules applicable to realty, if the personalty is exhausted. *Hogan v. Curtin*, 88 N. Y. 173.

5. 2 Jarm. on Wills (5th ed.) 44.

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6. *Theobald on Wills* (2d ed.); *Evans v. Rosser*, 2 H. & M. 190; *Newton v. Marsden*, 2 J. & H. 356; *Allen v. Jackson*, 1 Ch. Div. 399; *Cornell v. Lovett*, 35 Pa. St. 100. See *Giles v. Little*, 104 U. S. 295; *Vaughn v. Lovejoy*, 34 Ala. 437; *Gaven v. Allen*, 100 Mo. 297; *Dumey v. Schoeffer*, 24 Mo. 170; *Dumey v. Sassa*, 24 Mo. 177; *Boyer v. Allen*, 76 Mo. 498; *Little v. Giles*, 25 Neb. 320; *Snider v. Newson*, 24 Ga. 139; *Little v. Birdwell*, 21 Tex. 597; *McKrow v. Painter*, 89 N. Car. 437; *Chapin v. Marvin*, 12 Wend. (N. Y.) 538; *Bostick v. Blades*, 59 Md. 231; *Gough v. Manning*, 26 Md. 347; *O'Neale v. Ward*, 3 Har. & M. (Md.) 93; *Hughes v. Boyd*, 2 Sneed (Tenn.) 512; *Duncan v. Phillips*, 3 Head (Tenn.) 415; *Lane v. Crutchfield*, 3 Head (Tenn.) 452; *Selden v. Keen*, 27 Gratt. (Va.) 576; *Pringle v. Dunkley*, 22 Miss. 16; *Knight v. Mahoney*, 152 Mass. 525; *Bates v. Webb*, 8 Mass. 458; *Nash v. Simpson*, 78 Me. 142; *Randall v. Marble*, 69 Me. 310; *Phillips v. Medbury*, 7 Conn. 568; *Chappel v. Avery*, 6 Conn. 31.

In *Indiana*, it is expressly provided by statute that a devise or bequest to a wife with a condition in restraint of marriage shall stand, but the condition shall be void. But the statute does not apply to a mere limitation. *Stilwell v. Knapper*, 69 Ind. 562; *Coon v. Bean*, 69 Ind. 474; *Hibbitts v. Jack*, 97 Ind. 570; *Levengood v. Hoople*, 124 Ind. 28.

As to the necessity of a gift over, see *Cornell v. Lovett*, 35 Pa. St. 100; *Clark v. Tennison*, 33 Md. 85; *Binnerman v. Weaver*, 8 Md. 517; *Hawkins v. Skiggs*, 10 Humph. (Tenn.) 31; *Duncan v.*

some cases, the doctrine just set forth has been extended to the remarriage of widowers.¹

(6) *Performance and Waiver*.—Where there is a gift upon marriage with consent, the legatee has her whole life to perform the condition, and the legacy is not forfeited by first marriage without consent,² unless the will contains an express provision for her in such event.³ If the condition require the consent of several persons, who are executors or trustees, the consent of those who renounce is unnecessary.⁴ So a condition requiring the consent of several persons is performed by obtaining the consent of the

Philips, 3 Head (Tenn.) 415; McCloskey v. Gleason, 56 Vt. 264; Vance v. Campbell, 1 Dana (Ky.) 230; Luigart v. Ripley, 19 Ohio St. 24; Walsh v. Mathews, 11 Mo. 131; Holmes v. Field, 12 Ill. 424.

Instances of Condition Held Valid as to Realty.—The testator bequeathed his property to his wife for life, but, if she married, she was to give up all the property to be equally divided between her and his children. She had two children by the testator, and one by a previous marriage. She married in 1850, and died in 1851; one of the testator's children died in 1857. It was held that the widow was entitled to an estate for life in all the estate, in the event she remained single, but if she married, she was entitled to one-third in fee. Lane v. Crutchfield, 3 Head (Tenn.) 452.

A testator by his will gave his wife \$1,000 in money and a negro boy absolutely; and also, during her natural life or widowhood, all the remainder of his property, both real and personal. He also provided that his wife should not be required to give bond and security for the forthcoming of said property at her death, but that she should have the free use and control of all said property during her natural life or widowhood; he also made provision that at his wife's death the property should be equally divided between his brothers and sisters, and their heirs, etc. It was held that, by the proper construction of the will, the wife did not take a life estate, in the event she married—that her interest in the property, except the money and the negro boy, terminated upon her marriage. Duncan v. Philips, 3 Head (Tenn.) 415.

Condition Valid as to Personalty Where There Is a Gift Over.—A testator ordered a sum of money to be secured on his real estate, upon the sale thereof

by his executors, and the annual interest of it to be paid to his widow during her life or widowhood; and made provision that, if she should marry again, such yearly bequest should cease and terminate; and the principal sum, so secured, should be distributed, with the residue of his estate, among the grandsons of the testator; the widow accepted under the will, and afterwards contracted a second marriage; it was held that the condition was not void, and that on the marriage of the widow her right to the annual payment of such interest determined. Cornell v. Lovett, 35 Pa. St. 100.

Where There Is No Gift Over.—A testator ordered his executors to pay to his widow, in lieu of dower, the yearly sum of \$600 during her natural life, if she should so long remain his widow, out of the income of his property, real and personal, "and if she shall marry again, this yearly payment is to cease." There was no specific disposition of such annuity in case of her marriage. It was held that she was entitled to the annuity notwithstanding a second marriage, the devise being in restraint of marriage. McIlvaine v. Gethen, 3 Whart. (Pa.) 575.

1. Allen v. Jackson, 1 Ch. Div. 399. *Contra* Waters v. Tazewell, 9 Md. 292.

2. Theobald on Wills (2d ed.) 456; Randall v. Payne, 1 Bro. C. C. 55; Beaumont v. Squire, 17 Q. B. 905; 79 E. C. L. 905. But see Clifford v. Beaumont, 4 Russ. 325; Duddy v. Gresham, 2 L. R., Ir. 443; Hogan v. Curtin, 88 N. Y. 163.

3. Theobald on Wills (2d ed.) 456; Lowe v. Manners, 5 B. & Ald. 917.

4. Theobald on Wills (2d ed.) 456; Worthington v. Evans, 1 Sim. & Stu. 165; Boyce v. Corbally, Li. & G. temp. Plunk. 102; Ewens v. Addison, 4 Jur. N. S. 1034; White v. M'Dermot, Ir. R., C. L. 1. See Clarke v. Parker, 19

survivors.¹ Subsequent approbation by the executors of a marriage without consent is not a performance of the condition.² The condition does not apply to a second marriage.³ The consent of the testator to a marriage in his lifetime satisfies the condition,⁴ but his consent to a marriage to take place after his death, does not obviate the necessity for the consent of the persons named in the will.⁵ A gift till marriage fails, if the legatee marries in testator's lifetime, even with his consent.⁶

f. CONDITION NOT TO CONTEST WILL.—A condition not to contest the will is valid as regards realty, with or without a gift over upon breach;⁷ as regards personalty, it is valid if there is a gift over; if not, it is considered *in terrorem* and void.⁸

Ves. Jr. 1. Otherwise, it seems, if the only executor renounces. Graydon v. Hicks, 2 Atk. 16.

1. Theobald on Wills (2d ed.) 457; Ewing v. Anderson, 7 W. R. 23; Dawson v. Massey, 2 Ch. Div. 753. See further Graydon v. Hicks, 2 Atk. 18; Aislabie v. Rice, 3 Madd. 137; Peyton v. Bury, 2 P. Wms. 626; Collett v. Collett, 12 Jur. N. S. 180.

2. Wms. on Exrs. (7th ed.) 1140 *et seq.*; Reynish v. Martin, 3 Atk. 331; Clarke v. Parker, 19 Ves. Jr. 21; Long v. Ricketts, 2 Sim. & Stu. 179. See Malcolm v. O'Callaghan, 2 Madd. 523; Burleton v. Humfrey, Amb. 256.

3. Wms. on Exrs. (7th ed.) 1140 *et seq.*; Theobald (2d ed.) 456; Hutcheson v. Hammond, 3 Bro. C. C. 128; Crommelin v. Crommelin, 3 Ves. Jr. 227.

4. Theobald on Wills (2d ed.) 456; Clarke v. Berkeley, 2 Vern. 420. Otherwise of a condition that the legatee marry a particular person. Davis v. Angel, 31 Beav. 223; 4 De G. F. & J. 524. But see Smith v. Cowdery, 2 Sim. & Stu. 358.

5. Theobald on Wills (2d ed.) 456; Lowry v. Pattison, Ir. R., 8 Eq. 372.

6. Bullock v. Bennett, 7 De G. M. & G. 283. See Cooper v. Cooper, 6 Ir. Ch. 217.

In Bullock v. Bennett, 7 De G. M. & G. 287. Turner, L. J., said: "Some authorities were referred to on the part of this lady in the course of argument; but they were cases in which the provisions of the will applied to marriages with the consent of trustees appointed by the testator's will, and, the marriages afterwards having taken place in the lifetime of the testator, the legatees were held to be entitled. Those cases do not seem to me to touch the present. The plain intention in such cases is to provide for the event, not of any mar-

riage, but of an improvident marriage; and the consent of the testator proves that he did not consider the marriage to be improvident. But here the provision in the will applies to any marriage, whether provident or improvident. So far as they go, however, these cases seem to be rather against than in favor of the lady, for I can find no trace in them of its ever having been supposed that the legatees could take if the marriage was without the testator's consent, and yet they would be so entitled if the will was to be construed as referring only to marriages after the death of the testator."

7. Cooke v. Turner, 15 M. & W. 727; Thompson v. Grant, 14 Lea (Tenn.) 310; Bradford v. Bradford, 19 Ohio St. 546. But see Mallet v. Smith, 6 Rich. Eq. (S. Car.) 12. Compare Hoit v. Hoit, 42 N. J. Eq. 388.

8. 2 Jarm. on Wills (5th ed.) *59; Theobald on Wills (2d ed.) 455; Powell v. Morgan, 2 Vern. 90; Lloyd v. Spielet, 3 P. Wms. 344; Morris v. Burroughs, 1 Atk. 399; Cleaver v. Spurling, 2 P. Wms. 528; Cage v. Russell, 2 Vent. 352; Stevenson v. Abington, 11 W. R. 935; Donegan v. Wade, 70 Ala. 501; Mallet v. Smith, 6 Rich. Eq. (S. Car.) 12.

But in Chew's Appeal, 45 Pa. St. 232, the court, by Thompson, J., said, in speaking of a condition affecting both real and personal property: "It seems to be well settled that where such a provision is merely denounced against disputing a will or its provisions without a devise over, it will only be considered *in terrorem*, and not as fixing on the devisees' share intestacy; and this shows the tendency of the law against giving efficiency to such provisions. But where there is a devise over, in case of a violation of the

g. ASSUMING TESTATOR'S NAME.—Such conditions have been sustained.¹ The legatee need not change his name by act of assembly.²

h. RESIDENCE.—The weight of authority sustains the validity of a condition requiring the devisee to reside on the premises.³ As to what will amount to performance of such a condition, see cases in note.⁴

i. REPUGNANT CONDITIONS.—Conditions repugnant to the nature of the estate or interest previously given as a total restraint upon alienation, after a fee simple in realty,⁵ or an absolute

provisions, to some person named, or that the share thus limited shall fall into the residue of the estate for distribution, the share so limited will pass to its intended devisee, or to the estate, upon breach of the conditions. 2 Williams on Executors 1147; 1 Russ. Leg. 795. It also seems to be the result of authorities, that if there exist *probabilis causa litigandi*, the nonobservance of the conditions will not be forfeitures. Russ. Id. Undoubtedly, I think, no provision could be formed to oust the supervisory power of the law over such conditions and limitations, to control them within their legitimate sphere, which is generally to prevent vexatious litigation."

In Thompson v. Gaut, 14 Lea (Tenn.) 315, and Bradford v. Bradford, 19 Ohio St. 546, it was held that the condition was good both as to real and personal property, whether there was a gift over or not.

Under such a condition, one who aids and advises in a suit instituted by another forfeits his interest. Donegan v. Wade, 70 Ala. 501.

1. Webster v. Cooper, 14 How. (U. S.) 500; Taylor v. Mason, 9 Wheat. (U. S.) 328; Anonymous, 1 Dall. (U. S.) 20.

2. Davies v. Lowndes, 2 Scott 71; 1 Bing. N. Cas. 597; 27 E. C. L. 504.

3. 2 Jarm. on Wills (5th ed.) 156; Dale v. Atkinson, 3 Jur. N. S. 41; Woods v. Townley, 11 Hare 314; Lowe v. Cloud, 45 Ga. 481; Marston v. Marston, 47 Me. 495; Irvine v. Irvine (Ky. 1891), 15 S. W. Rep. 511. But see Pardue v. Givens, 1 Jones Eq. (N. Car.) 366; Keeler v. Keeler, 39 Vt. 550; Newkerk v. Newkerk, 2 Cal. (N. Y.) 345. Such conditions must be expressed with clearness, so as to avoid uncertainty. Fillingham v. Bromley, T. & R. 530; Clavering v. Ellison, 3 Drew. 451; 7 H. L. Cas. 707.

4. Walcot v. Botfield, Kay 550; Astley v. Essex, L. R., 18 Eq. 295; Doe v. Hawke, 2 East 481; Doe v. Stewart, 1 Ad. & El. 300; 28 E. C. L. 89; Sutcliffe v. Richardson, L. R., 13 Eq. 606; Irvine v. Irvine (Ky. 1891), 15 S. W. Rep. 511; Casper v. Walker, 33 N. J. Eq. 35; Jenkins v. Merritt, 17 Fla. 304. A condition that a married woman should not reside at S., where her husband lived, was held void, as obliging her to live separate. Wilkinson v. Wilkinson, L. R., 12 Eq. 604. See Conrad v. Long, 33 Mich. 78; Born v. Horstmann, 80 Cal. 452. See further, as to conditions of residence, note to Casper v. Walker, 33 N. J. Eq. 36; Wellons v. Jordan, 83 N. Car. 371.

5. Litt. 222 b., § 630; Hood v. Oglander, 34 Beav. 525; Blackstone Bank v. Davis, 21 Pick. (Mass.) 42; Moore v. Sanders, 15 S. Car. 440; Yard's Appeal, 64 Pa. St. 95; Bennett v. Chapin, 77 Mich. 527; Oxley v. Lane, 35 N. Y. 346; Gleason v. Fayerweather, 4 Gray (Mass.) 348; Newland v. Newland, 1 Jones (N. Car.) 463; Stanley v. Colt, 5 Wall. (U. S.) 119; Smith v. Clark, 10 Md. 186; Deering v. Tucker, 55 Me. 284; M'Cullough v. Gilmore, 11 Pa. St. 370; Doe v. Roe, 30 Ga. 453. Compare Cross v. Robinson, 21 Conn. 379.

Instances illustrating the Rule.—A testator, after having devised his home farm to his wife for life, remainder over in fee to his single daughters as tenants in common, and his other estate to his son in fee, proceeded in a codicil, reciting the purchase, since the execution of the will, of a tract of woodland, called Swanston Lot, to devise the said parcel to his wife, daughters, and son, "on the express condition that the same is not at any time to be cleared or converted into arable land, but that they are respectively to be allowed to take therefrom as much wood and timber as will

interest in personalty,¹ or a condition that tenant in tail shall not

be required and necessary, with care, for the purpose for which it was purchased as aforesaid" (as a support for the home farm, and the property devised to the son). It was held that the several devisees took a fee simple in Swanston Lot, and that the attempt of the testator to prescribe in what manner his gift should be used, to be made available to all time, was void. *Smith v. Clark*, 10 Md. 186.

A testator, after ordering that "all his worldly substance shall be disposed of," proceeded to say, that it was his will and desire that a certain farm "fall into the possession of B., laying this injunction and prohibition, not to leave the same to any but the legitimate heirs of B.'s father's family, at his, B.'s, decease." It was held that this evinced a general intent to give the fee to B., with an apparent particular intent in relation to the power of alienation, which particular intent was void, because inconsistent with a reasonable enjoyment of the fee. *M'Cullough v. Gilmore*, 11 Pa. St. 370.

Compare Cross v. Robinson, 21 Conn. 379. In this case the testator devised to his wife the use and improvement of one-half of his real estate during her widowhood, and then devised to his five sons in fee, subject to such estate in his wife, all his property, both real and personal, provided that none of the real estate, so given to his five sons, should be sold until three years after the widowhood of his wife, unless sold to some of said five sons, meaning to have it improved all together until that time. By conveyances, in the first instance, from one to another of the sons, and thence to strangers, before the expiration of the time limited in the will, three-fifths of the estate passed to the plaintiffs. In an action of ejectment, brought after the death of the testator's wife, but still before the expiration of said time, against one of the devisees, it was held that the object of the clause in the will limiting the power of alienation was to protect the widow in the enjoyment of her interest, without the annoyance which might result from the occupancy of a stranger with her, and not to deprive the sons of all power of alienation during the period specified; hence, the title of the plaintiffs was not repugnant to the will. *Cross v. Robinson*, 21 Conn. 379.

1. *Bradley v. Peixoto*, 3 Ves. Jr. 324; *In re Jones' Will*, 23 L. T. N. S. 211.

But while subsequent provisions will not take, from an estate previously given, qualities inseparable from it, as alienability from a fee, they may define the estate given and show that what might be a fee was intended to be a less estate. *Sheet's Estate*, 52 Pa. St. 257; *Urich v. Merkel*, 81 Pa. St. 332.

Partial Restrictions.—"But a limited restriction upon alienation is good. Thus, a condition not to sell except to a certain class of persons is good. *Litt. 223 a.*, § 361; *Doe v. Pearson*, 6 East 173; *In re Macleary*, L. R., 20 Eq. 186. See *Ludlow v. Bunbury*, 35 Beav. 36; *Billing v. Welch*, Ir. R., 6 C. L. 88.

"But a condition not to sell except to one person is bad, since a person might be selected who would be certain not to purchase. *Muschamp v. Bluett*, *Bridgm.* 137; *Attwater v. Attwater*, 18 Beav. 330.

"In the same way, conditions restraining alienation by any particular form of conveyance, as by charge or mortgage, are bad. *Willis v. Hiscox*, 4 Myl. & C. 201; *Ware v. Cann*, 10 B. & C. 433; 21 E. C. L. 104.

"Thus, a gift over of so much land as an absolute owner charges or incumbers would be bad. *Willis v. Hiscox*, 4 Myl. & C. 201.

"Directions that the rents upon property devised are not to be raised have been held invalid. *Atty. Gen'l v. Catherine Hall*, Jac. 395; *Atty. Gen'l v. Greenhill*, 33 Beav. 193.

"And a gift over upon alienation by a tenant for life, with a power of disposition by deed or will, is invalid. *In re Wolstenholme*; *Marshall v. Aizlewood*, 43 L. T. N. S. 752.

"A restraint upon alienation limited in time, not followed by a gift over, is ineffectual. *Renaud v. Tourangeau*, L. R., 2 P. C. 4.

"Possibly a gift over upon alienation before a certain time, not having reference to the period of possession, would be valid. See *Large's Case*, 2 Leon. 82; 2 Jarm. on Wills 17; *Churchill v. Marks*, 1 Colly. 445. See *Kiallmark v. Kiallmark*, 26 L. J. Ch. 1.

"It is, however, clear that absolute interests may be given over upon alienation before the period of possession. *Kearsley v. Woodcock*, 3 Hare 185; *In*

marry,¹ or shall not bar the entail, are void.² Upon the same principle a gift over, if the devisee or legatee does not dispose of his interest, or dies intestate, has been held void both as regards realty and personalty.³ But a gift over in the event of a previous gift being void at law or in equity, is good.⁴ Although one cannot be permitted to retain property exempt from the claims of creditors, a gift of a life interest, subject to a conditional limitation over on bankruptcy, insolvency, or alienation, may be sustained.⁵

23. Survivorship—*a.* WORDS OF SURVIVORSHIP—TO WHAT PERIOD REFERRED.—Where the gift is to take effect in possession immediately upon the testator's decease, words of survivorship are regarded as intended to provide against the death of the objects of the gift in the lifetime of the testator, and *prima facie* refer to his death.⁶ Early English cases extended the rule to

re Payne, 25 Beav. 556; Pearson v. Dolman, L. R., 3 Eq. 315.

"These rules apply to personalty, so that if an absolute interest is given, a gift over, if the legatee disposes of his interest, is void. Bradley v. Peixoto, 3 Ves. Jr. 324; *In re* Jones' Will, 23 L. T. N. S. 211." Theobald on Wills (2d ed.) 459. See further, as to partial restraints, Anderson v. Cary, 36 Ohio St. 506; Simonds v. Simonds, 3 Met. (Mass.) 562; Claflin v. Claflin, 149 Mass. 19; Bennett v. Chapin, 77 Mich. 527; Mandlebaum v. McDonell, 29 Mich. 78; Stewart v. Barrow, 7 Bush (Ky.) 368; Langdon v. Ingram, 28 Ind. 360; M'Williams v. Nisly, 2 S. & R. (Pa.) 513; Jackson v. Schutz, 18 Johns. (N. Y.) 184; Oxley v. Lane, 35 N. Y. 346.

1. Arundel's Case, 3 Dyer 342 b.

2. Dawkins v. Penrhyn, L. R., 4 App. Cas. 51; Yard's Appeal, 64 Pa. St. 95.

3. Theobald on Wills (2d ed.) 460. See REMAINDERS, vol. 20, p. 955; Moore v. Sanders, 15 S. Car. 440; Friedman v. Steiner, 107 Ill. 125; Jones v. Bacon, 68 Me. 34; Karker's Appeal, 60 Pa. St. 141.

4. Theobald on Wills (2d ed.) 460; De Themines v. De Bonneval, 5 Russ. 288.

5. Theobald on Wills (2d ed.) 462; 2 Jarm. on Wills (5th ed.) *24. See Rochford v. Hackman, 9 Hare 475; Brooke v. Peterson, 5 Jur. N. S. 781; Knight v. Browne, 7 Jur. N. S. 894; Freeman v. Bowen, 35 Beav. 17; *In re* Muggeridge, Joh. 625; De Tastet v. Le Tavernier, 1 Keen 161; Billson v. Crofts, L. R., 15 Eq. 314; Blackstone Bank v. Davis, 21 Pick. (Mass.) 42; Keyler's Appeal, 57 Pa. St. 236; Nicholls v. Eaton, 91 U. S. 716; Pace v. Pace, 73 N. Car. 119.

"There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and, after his bankruptcy, over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited." Lord Eldon, in Brandon v. Robinson, 18 Ves. Jr. 433.

Meaning of Insolvency.—Insolvency has no technical meaning, but means inability to pay debts. Theobald on Wills (2d ed.) 464; Freeman v. Bowen, 35 Beav. 17; *In re* Muggeridge, Joh. 625. See De Tastet v. Le Tavernier, 1 Keen 161; Billson v. Crofts, L. R., 15 Eq. 314.

Spendthrift Trusts.—See SPENDTHRIFT TRUSTS, vol. 23 p. 5; also Rife v. Geyer, 59 Pa. St. 392; Huber's Appeal, 80 Pa. St. 348; Easterly v. Keney, 36 Conn. 18; Nickell v. Handly, 10 Gratt. (Va.) 336; Williams v. Thorn, 70 N. Y. 270.

Alienation means voluntary alienation, and the gift over does not take effect on hostile bankruptcy. Theobald on Wills (2d ed.) 463; Leas v. Leggett, 1 R. & M. 690; Pym v. Lockyer, 12 Sim. 394; Graham v. Lee, 23 Beav. 388. But see Cooper v. Wyatt, 5 Mod. 293; Roffey v. Bent, L. R., 3 Eq. 759; *Ex p.* Eyston, 7 Ch. Div. 145.

6. 2 Jarm. on Wills (5th ed.) *722;

cases in which the gift was postponed to a prior life estate, or other particular interest carved out.¹ The later English cases

Smith v. Norlock, 7 Taunt. 129. See *Lill v. Lill*, 23 Beav. 446; *Hamilton v. Boyles*, 1 Brev. (S. Car.) 414; *Moffat v. Strong*, 10 Johns. (N. Y.) 12; *Cox v. Hogg*, 2 Dev. Eq. (N. Car.) 121. Compare *Barker v. Giles*, 2 P. Wms. 280; *Blisset v. Cranwell*, 1 Salk. 226; *Doe v. Abey*, 1 M. & S. 428.

Where a testator, by a residuary clause, devised the residue of his real and personal property "to the survivors of his brothers and sisters," designating them, it was held that this was a devise of an estate in common to all the devisees who should survive the testator, with the right of possession immediately after his decease, and not a devise upon a contingency to the two out of the three persons named who might survive the third. *Brimmer v. Sohler*, 1 Cush. (Mass.) 118.

B., by his last will, after giving specific parts of his real and personal property to each of his five sons, by name, devised as follows: "After the above-mentioned articles are taken out of my movable estate, let the remainder be valued by indifferent men, agreed upon for that purpose, and then be divided as my heirs can agree among themselves; and if any of my sons aforesaid should die without lawful issue, then let his or their part or parts be divided equally among the survivors, unless it should happen that he or they, so dying, should leave a wife behind, in which case she shall take back what she brought with her and one hundred pounds besides, and only the remainder shall be divided as aforesaid." It was held that if the limitation had rested alone on the dying without lawful issue, it would have failed; yet, the devise over being to the survivors, it would be construed to mean children living at the death of the party, and not a general failure of issue. *Moffat v. Strong*, 10 Johns. (N. Y.) 12.

"Where the objects are tenants in common, it was for a long period considered that, indefinite survivorship being inconsistent with a tenancy in common, some period was to be found to which the words of survivorship could be referred. This reasoning, however, is obviously inconclusive; for although survivorship is not incident to a tenancy in common, yet there is no inconsistency between a tenancy in common

and an express limitation to survivors. The testator's intention that the property shall devolve to the survivors is better effected by an express gift to them than by a joint tenancy, the survivorship which is incidental to the latter being liable to be defeated by a severance of the tenancy. In seeking for a period to which the words of survivorship could be referred, the obvious rule, where the gift took effect in possession, immediately on the testator's decease, was to treat these words as intended to provide against the death of the objects in the lifetime of the testator, the devise affording no other point of time to which they could be referred; accordingly we find this to be the established construction." 2 Jarm. on Wills (5th ed.) *721.

1. Jarm. on Wills (5th ed.) *722; *Stringer v. Phillips*, 1 Eq. Cas. Ab. 293; *Rose v. Hill*, 3 Burr. 1881; *Wilson v. Bayly*, 3 Bro. P. C. Toml. 195; *Roebeck v. Dean*, 2 Ves. Jr. 265; *Perry v. Woods*, 3 Ves. Jr. 204; *Maberly v. Strode*, 3 Ves. Jr. 450; *Brown v. Bigg*, 7 Ves. Jr. 279; *Garland v. Thomas*, 1 Bos. & P. N. R. 82.

"Where, however, the gift was not immediate (*i. e.*, in possession), there being a prior life or other particular interest carved out, so that there was another period to which the words in question could be referred, the point was one of greater difficulty. In these cases, indeed, as well as in those of the other class, the courts for a long period uniformly applied the words of survivorship to the death of the testator, on the notion (as already observed) that there was no other mode of reconciling them with the words of severance creating a tenancy in common. The weight ascribed to this argument, however, was still more extraordinary in these than in the former cases; for, even if indefinite survivorship were inconsistent with a tenancy in common (but which it clearly was not), yet surely there could be no incongruity between such an interest and a limitation to the survivors at a given period; nevertheless, decision rapidly followed decision, in which, on reasoning of this kind, survivorship was held, in cases of this sort, to refer to the period of the testator's decease." 2 Jarm. on Wills (5th ed.) *722.

abandoned this position and adopted the rule that whether the gift be immediate or postponed, and whether the property be real or personal, words of survivorship *prima facie* refer to the period of division. If there is no previous interest given, the period of division is the death of the testator, and survivors at his death take the whole; but if a previous life estate be given, then the period of division is the death of the life tenant, and survivors at such death take the whole.¹ Authorities in the *United States* may

1. Theobald on Wills (2d ed.) 508; Cripps v. Wolcott, 4 Madd. 12; Stevenson v. Gullan, 18 Beav. 590; Neathway v. Reed, 3 De G. M. & G. 18; Howard v. Collins, L. R., 5 Eq. 349. See *In re Duke*, 16 Ch. Div. 112.

It is immaterial whether the only gift is in the direction to divide, or whether there is a prior gift distinct from such direction. Theobald on Wills (2d ed.) 508; Hearn v. Baker, 2 K. & J. 383.

The principle in the text is known as the rule in Cripps v. Wolcott, 4 Madd. 12, and has been held applicable to real and personal property. *In re Greyson's Trust Estate*, 2 De G. J. & S. 428. See *Marriott v. Abell*, L. R., 7 Eq. 482.

"Thus, in the case of a direct gift to several or the survivors, those who survive the testator take the whole. *Spurrell v. Spurrell*, 11 Hare 54; 17 Jur. 755.

"If payment is postponed till the age of twenty-one, survivorship refers to that. *Forrester v. Smith*, 2 Ir. Ch. 70; *Vorley v. Richardson*, 8 De G. M. & G. 126.

"If there is a gift for life, followed by a gift to several or the survivors, those who survive the period of distribution take indefeasibly. *Cripps v. Wolcott*, 4 Madd. 15; *Whitton v. Field*, 9 Beav. 369; *Naylor v. Robson*, 34 Beav. 571; *Vorley v. Richardson*, 8 De G. M. & G. 126. See *Wordsworth v. Wood*, 1 H. L. Cas. 129. See *In re Dawe's Trusts*, 4 Ch. Div. 210.

"In the same way, if there is a gift for life, and then to the children of the tenant for life who attain twenty-one, and in default of such children, to a class of survivors, the survivorship refers to the period when the prior gift fails. *M'Donald v. Bryce*, 16 Beav. 581; *Carver v. Burgess*, 18 Beav. 541; 7 De G. M. & G. 96; *Taylor v. Beverly*, 1 Colly. 108.

"Upon the same principle, a gift after a life interest to 'surviving children' goes to those who survive the tenant

for life. *Huffam v. Hubbard*, 16 Beav. 579; *Stevenson v. Gullan*, 18 Beav. 590; *Thompson v. Thompson*, 29 Beav. 654; *Neathway v. Reed*, 3 De G. M. & G. 18.

"So if there are several life interests followed by a gift to a class of survivors, they are ascertained at the death of the last tenant for life. *In re Fox's Will*, 35 Beav. 163.

"But if the class of survivors are the children of one of the tenants for life, perhaps they would be fixed at the death of their parent. *Drakeford v. Drakeford*, 33 Beav. 43.

"And if, after a gift to surviving children, there is a limitation giving the shares of such of the said children who die without issue before the tenant for life to survivors, the original limitation to surviving children must refer to those who survive the testator. *Evans v. Evans*, 25 Beav. 81. See *Stringer v. Phillips*, 1 Eq. Ab. 293, pl. 11; 1 P. Wms. 97, n." Theobald on Wills (2d ed.) 508.

Gifts to Be Paid at Twenty-one, After a Life Interest with Benefit of Survivorship.—"If there is a life interest and a period of division as well, for instance, a gift to A for life, then to a class to be paid at twenty-one, with a clause of survivorship, the question is more complicated. In such cases survivorship refers most naturally to the words with which it is placed in immediate connection.

"a. Therefore, if the gift is after a life interest to a class, to be paid at twenty-one, with benefit of survivorship, survivorship refers most naturally to the age of twenty-one just before mentioned. *Tribe v. Newland*, 5 De G. & S. 236; *Knight v. Knight*, 25 Beav. 111; *Forrester v. Smith*, 2 Ir. Ch. 70; *Berry v. Bryant*, 2 D. & S. 1; *Corneck v. Wadman*, L. R., 7 Eq. 80.

"This construction is assisted by a gift over upon death of all under twenty-one. *Salisbury v. Lamb*, 1 Ed. 465; *Ambl. 383*; *Bouverie v. Bouverie*, 2

be divided into two classes, those which follow the earlier English cases in referring words of survivorship to the death of the testator, whether the gift be immediate or postponed,¹ and those which follow the later English cases in referring the words in either event to the period of division.² If the tenant for life dies in the lifetime of the testator, the remainder is accelerated, and the survivors are fixed at the testator's death.³ Of course, if the language

Ph. 349; *Alty v. Moss*, 34 L. T. N. S. 312.

"On the other hand, it is rebutted if the gift over is upon death of all before the tenants for life. *Daniel v. Gossett*, 19 Beav. 478; *Fisher v. Moore*, 1 Jur. N. S. 1011. See too *Doe v. Sparrow*, 13 East 359; *Gummoe v. Howes*, 23 Beav. 192.

"b. If, however, the direction as to payment is independent of the gift to survivors, the ordinary rule prevails, if, for instance, the gift is to surviving children at twenty-one. *Huffam v. Hubbard*, 16 Beav. 579; *Pope v. Whitcombe*, 3 Russ. 124; *Crozler v. Fisher*, 4 Russ. 398; *Lill v. Lill*, 23 Beav. 446; *Daniel v. Gossett*, 19 Beav. 478." *Theobald on Wills* (2d ed.) 510.

1. *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Mowatt v. Carow*, 7 Palge (N. Y.) 328; *Pyms v. Mahan*, 1 Dem. (N. Y.) 180; 32 Hun (N. Y.) 75; *Willets v. Willets*, 35 Hun (N. Y.) 401; *Stevenson v. Lesley*, 70 N. Y. 515; *Davis v. Davis*, 118 N. Y. 411; *Matter of Herrick's Estate* (Surrogate Ct.), 12 N. Y. Supp. 105; *Ross v. Drake*, 37 Pa. St. 376; *Passmore's Appeal*, 23 Pa. St. 381; *Harris v. Carpenter*, 109 Ind. 540; *Hoover v. Hoover*, 116 Ind. 501; *Hansford v. Elliott*, 9 Leigh (Va.) 79; *Martin v. Kirby*, 11 Gratt. (Va.) 71; *Porter v. Porter*, 50 Mich. 456; *Rood v. Hovey*, 50 Mich. 395; *Eberts v. Eberts*, 42 Mich. 404; *Branson v. Hill*, 31 Md. 188; *Vickers v. Stone*, 4 Ga. 462; *Clanton v. Estes*, 77 Ga. 353. But compare *Matter of Denton* (Supreme Ct.), 12 N. Y. Supp. 52; *Teed v. Morton*, 60 N. Y. 506; *Wyllie v. Lockwood*, 86 N. Y. 291; *Kelso v. Lorillard*, 85 N. Y. 177; *Byrnes v. Stilwell*, 103 N. Y. 453; *Woelpper's Appeal*, 126 Pa. St. 562; *Caggins' Appeal*, 124 Pa. St. 30; *Jameson v. Jameson*, 86 Va. 56.

As to *Maryland*, see *Young v. Robinson*, 11 Gill & J. (Md.) 328; *Branson v. Hill*, 31 Md. 187.

As to *Illinois*, see *Hempstead v. Dickson*, 20 Ill. 195; *Ridgeway v. Underwood*, 67 Ill. 419; *Blatchford v. Newberry*, 99 Ill. 11; *Nicoll v. Scott*,

99 Ill. 529; *Cheney v. Teese*, 108 Ill. 482; *Summers v. Smith*, 127 Ill. 650.

As to *Ohio*, see *Lawrence v. McArter*, 10 Ohio 41; *Stevenson v. Evans*, 10 Ohio St. 311; *Sinton v. Boyd*, 19 Ohio St. 30; *Smith v. Block*, 29 Ohio St. 488.

As to *Vermont*, see *Shepard v. Shepard*, 60 Vt. 109.

2. *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 32; *Holcomb v. Lake*, 24 N. J. L. 686; *In re Jones' Will* (N. J. 1890), 21 Atl. Rep. 950; *Slack v. Bird*, 23 N. J. Eq. 240; *Dutton v. Pugh*, 45 N. J. Eq. 431; *Hill v. Rockingham Bank*, 45 N. H. 271; *O'Brien v. O'Leary*, 64 N. H. 333; *Denny v. Kettell*, 135 Mass. 138; *Coveny v. McLaughlin*, 148 Mass. 576; *Wren v. Hynes*, 2 Metc. (Ky.) 130; *Hughes v. Hughes*, 12 B. Mon. (Ky.) 116; *Bayless v. Prescott*, 79 Ky. 252; *Biddle v. Hoyt*, 1 Jones Eq. (N. Car.) 159; *Vass v. Freeman*, 3 Jones Eq. (N. Car.) 224; *Evans v. Godbold*, 6 Rich. Eq. (S. Car.) 26; *Schoppert v. Gillam*, 6 Rich. Eq. (S. Car.) 83; *Roundtree v. Roundtree*, 26 S. Car. 450; *Simpson v. Cherry*, 34 S. Car. 68. Compare *Goodwin v. McDonald*, 153 Mass. 481; *Drayton v. Drayton*, 1 Desaus. (S. Car.) 324.

A testator made certain specific devises and bequests to several of his children. He then gave to his wife a life estate in his real and personal property not specifically disposed of. He then declared that his real and personal property, after the decease of his wife, unless his wife should choose to give up the estate before her decease, should be sold and divided among certain of his children; and then declared that if any of his children should die without lawful issue of the body begotten, then his, her or their share or legacy should be equally divided among the survivors, share and share alike. It was held that he used the term survivors with reference to the period when the estate should be divided after the happening of the event mentioned in his will, to wit, the death of his wife. *Williamson v. Chamberlain*, 10 N. J. Eq. 373.

3. *Theobald on Wills* (2d ed.) 508;

of the will, expressly or impliedly fixes the time to which survivorship is to be referred, the rule is excluded.¹

6. "SURVIVORS"—WHEN READ "OTHERS."—The word "survivors" will not be construed "others" unless there is something in the context to indicate that such construction is necessary to effectuate the intention of the testator.² What context will justify such construction is a question upon which authorities differ, and each case will depend largely upon the peculiar context of the particular will.

Spurrell v. Spurrell, 11 Hare 154; Daniell v. Daniell, 6 Ves. Jr. 297; Simpson v. Cherry, 34 S. Car. 68. See REMAINDERS, vol. 20, p. 895.

1. Theobald on Wills (2d ed.) 510; Morse v. Mason, 11 Allen (Mass.) 36; Scott v. Guernsey, 48 N. Y. 106. See Wylie v. Lockwood, 86 N. Y. 291; Cochran v. Cochran, 3 Desaus. (S. Car.) 186; Woelpper's Appeal, 126 Pa. St. 562; Rieff's Appeal, 125 Pa. St. 151.

"Thus, if the testator provides for the children of legatees between whom there is to be survivorship only in case they do not survive him, or gives large powers of making advances during the lifetime of the tenant for life, to legatees among whom there is to be survivorship, it may appear that survivors were to be determined at his death. Rogers v. Towsey, 9 Jur. 575; Blackmore v. Snee, 1 De G. & J. 455.

"And, perhaps, if the gift to survivors is followed by words of limitation, such as executors and administrators, or assigns, the argument that a personal enjoyment by the survivors was not intended might prevail, and survivorship would be referred to the death of the testator. Rose v. Hill, 3 Burr. 1881; Wilson v. Bagley, 3 Bro. P. C. 195.

"At any rate, this would clearly be the case if the gift is after a life interest to surviving children or their heirs and assigns, where the substitutional gift shows that vested interests were intended to be taken at the testator's death. *In re Hopkins' Trust*, 2 H. & M. 411." Theobald on Wills (2d ed.) 510.

On the other hand, a devise to "the surviving children of my sister A., not knowing all their names," was referred to the date of the will. Morse v. Mason, 11 Allen (Mass.) 36.

2. 2 Jarm. Wills (5th ed.) *690; Ferguson v. Dunbar, 3 Bro. C. C. 468 n.; Milsom v. Awdry, 5 Ves. Jr. 465; Wollen v. Andrews, 9 J. B. Moo. 248; 2 Bing. 126; 9 E. C. L. 342; Davidson v. Dallas, 14 Ves. Jr. 576; Mann v. Thomp-

son, Kay 645; Crowder v. Stone, 3 Russ. 217; Ranelagh v. Ranelagh, 2 Myl. & K. 441; Winterton v. Crawford, 1 R. & M. 407; Eyre v. Marsden, 4 Myl. & C. 240; *In re Arnold's Trusts*, L. R., 10 Eq. 252; Waite v. Littlewood, L. R., 8 Ch. 70; *In re Keep's Will*, 32 Beav. 122; Holland v. Allsop, 29 Beav. 498; Cole v. Sewell, 2 H. L. Cas. 186; Smith v. Osborne, 6 H. L. Cas. 393; Taaffe v. Conmee, 10 H. L. Cas. 64. See Duryea v. Duryea, 85 Ill. 42; Clark v. Baker, 3 S. & R. (Pa.) 477; Lapsley v. Lapsley, 9 Pa. St. 131; Jackson v. Blanshan, 3 Johns. (N. Y.) 292; Spruill v. Moore, 5 Ired. Eq. (N. Car.) 284; Birney v. Richardson, 5 Dana (Ky.) 429; Deboe v. Lowen, 8 B. Mon. (Ky.) 620; Dickinson v. Hoomes, 1 Gratt. (Va.) 302; Lowry v. O'Bryan, 4 Rich. Eq. (S. Car.) 264; Yates v. Mitchell, 1 Rich. Eq. (S. Car.) 265; Williamson v. Chamberlain, 10 N. J. Eq. 373.

Mr. Jarman, after a careful examination of the English authorities, says: "The result then would seem to be that the word 'survivor,' when unexplained by the context, must be interpreted according to its literal import; but the conviction that this construction most commonly defeats the actual intention of testators, has induced a readiness in the courts to yield to the slightest indication in the context of an intention to use the word in the sense of 'other.' But the present state of the authorities seems hardly to justify the hope that litigation has reached its limits on this often-occurring slip, and should teach to framers of wills the necessity of increased attention to its avoidance." 2 Jarman Wills (5th ed.) *710.

Mr. Theobald has attempted the following classification of English authorities:

"1. If there is an absolute gift to several persons, with a gift to the survivors, if any die without issue, survivors

must be construed in its ordinary sense. *Crowder v. Stone*, 3 Russ. 217; *Ranelagh v. Ranelagh*, 2 Myl. & K. 441; *Stead v. Platt*, 18 Beav. 50; *Greenwood v. Percy*, 26 Beav. 572.

"2. Where there is a gift over, to take place only in case the event on which the property is limited to the first legatees, among whom there is to be survivorship, happens in respect of all the legatees, survivor will be construed other, so as not to cause an intestacy. For instance, if the bequests are to A, B, and C, payable at twenty-one, and if either die under twenty-one, his share to the survivors, and if two die under twenty-one, the whole to the survivor, and if all die under twenty-one, then over, the share of one dying under twenty-one would go to one who had predeceased him, but attained twenty-one, and to the survivor equally. *Wilmot v. Wilmot*, 8 Ves. Jr. 10; *In re Jackson's Trust*, 14 Ir. Ch. 472. The same construction was adopted in *Re Connellan's Trust*, 16 Ir. Ch. 524, though there was no gift over, but *quære*.

"In these cases, the testator intends the property to go over as a whole, or not at all. As the whole cannot go over where the event does not happen in respect of all the first legatees, there is no other disposition of the shares in respect of which it happens, except among the first legatees themselves, and, in order to allow them to take, the word survivor must be read other.

"3. Where there is a devise to sons and the heirs of their bodies, and if any die without issue to the survivors and the heirs of their bodies, and if all die without issue, over, survivorship will be referred to the *stirpes* and not to the first takers, and the share of a son dying without issue will go among the issue of a son previously deceased and the surviving sons. *Doe v. Wainwright*, 5 T. R. 427; *Smith v. Osborne*, 6 H. L. Cas. 376.

"In such cases, the testator has expressed his intention of benefitting the line of issue, and the survivorship contemplated is one between the respective *stirpes* and not between the first takers merely, and this, coupled with the gift over, which can only take effect if all the sons die without issue, is sufficient to enlarge the meaning of the word survivor.

"It is immaterial whether the word is survivors or such as survive. *In re Tharp's Estate*, 1 De G. J. & S. 453.

"And the same construction will be

adopted even if there is no gift over to interpret the testator's intention. *Harman v. Dickenson*, 1 Bro. C. C. 91. See 34 Beav. 352; *Williams v. James*, 20 W. R. 1010; *Tufnell v. Borrell*, L. R., 20 Eq. 194.

"4. The same will be the case where the will gives life estates with limitations expressly to issue, followed by a gift, on failure of issue of any of the tenants for life, to the surviving tenants for life for their lives and then to their issue, and an ultimate gift over on failure of issue of all the tenants for life; and it makes no difference whether the gift be to survivors for life and then to their issue, or to survivors in like manner as the original shares were given. *Lowe v. Land*, 1 Jur. 377; *In re Keep's Will*, 32 Beav. 122; *In re Tharp's Estate*, 1 De G. J. & S. 453; *Holland v. Allsop*, 29 Beav. 498; *Hurry v. Morgan*, L. R., 3 Eq. 152; *Badger v. Gregory*, L. R., 8 Eq. 78; *Waite v. Littlewood*, L. R., 8 Ch. 70; *In re Palmer's Trusts*, L. R., 19 Eq. 320; *Wake v. Varah*, 2 Ch. Div. 348; *In re Row's Estate*, 43 L. J. Ch. 347.

"There is the same evidence of intention to benefit the issue, and the gift over shows that survivorship is contemplated, not merely between the first takers, but between the respective *stirpes*.

"5. Whether the same construction would be adopted in the absence of an ultimate gift over seems unsettled. The observations made in *Wake v. Varah*, 2 Ch. Div. 348, and *Beckwith v. Beckwith*, 46 L. J. Ch. Div. 97, are in favor of a strict construction of the word survivors under such circumstances. See too *Milsom v. Awdry*, 5 Ves. Jr. 465. But the attention of the court in those cases was not called to the cases in which a gift over has been held to be immaterial. *Hodge v. Foote*, 34 Beav. 349; *In re Beck's Trusts*, 16 W. R. 189; 37 L. J. Ch. 233; *In re Arnold's Trusts*, L. R., 10 Eq. 252, recently followed in *Re Walker*, 12 Ch. Div. 205.

"*In re Corbett's Trusts*, Johns. 591, may be supported on the ground that the testator expressly provided for the surviving issue of the children of the tenants for life, thus excluding an intention of also providing for children of tenants for life dying before the period of accruer, besides which the case was one in which absolute gifts were subsequently cut down by settlement.

"In *Beckwith v. Beckwith*, 46 L. J. Ch. Div. 97, the gift was to 'other daughters surviving,' so that to give surviving a stirpital construction would in effect have been to reject the word entirely.

"If accruing shares are given to the survivors or survivor for their joint lives, and after the decease of the survivor to the children of the survivors or survivor, the surviving tenant for life will take the whole for life, though probably the children of predeceasing tenants for life would take on his death. *Winterton v. Crawford*, 1 R. & M. 407.

"6. But if the gift to survivors is not given in the same manner as the original shares, there is no evidence that stirpital survivorship was intended, and the word will be construed strictly.

"Thus, where, the prior limitations being for life with remainder to children, the gift is to survivors absolutely, and not to survivors for life, and then to their children, although there is a gift over of the whole upon death of all without issue, the intention to benefit the lines of issue is not sufficiently indicated, and the word survivors will be construed strictly. *Twist v. Herbert*, 28 L. T. N. S. 489.

"Survivors must, *a fortiori*, be strictly construed where there is no gift over. *Leeming v. Sherratt*, 2 Hare 14; *Lee v. Stone*, 1 Exch. 674; *In re Corbett's Trusts*, Johns. 591, the residuary gift; *Browne v. Rainsford*, Ir. R., 1 Eq. 384.

"In such a case, however, there may be a general intention expressed to benefit the *stirpes* and not merely the surviving parents; for instance, by a preliminary statement of the intention that the property is to be divided among the children of several parents, without any mention of survivorship between the parents. *Hawkins v. Hamerton*, 16 Sim. 410.

"7. It seems, when the original limitations are for life with remainder to children in tail, and if any of the tenants for life die without children, to the surviving tenants for life in tail, followed by a gift over in case of a total failure of issue of all the tenants for life, the stirpital construction would not be adopted. See *Maden v. Taylor*, 45 L. J. Ch. 569. See, however, *Cooper v. MacDonald*, L. R., 16 Eq. 258.

"8. Where the shares of some members of the class are settled and others not, and the gift over is to the survivors of the class in the same way as the

original shares, the case is more difficult.

"In such a case the word survivors was construed others, chiefly by the force of a gift over in default of all the objects to be benefited. *Lucena v. Lucena*, 7 Ch. Div. 255.

"If the gift is to a class of sons and daughters, and the daughters' shares are, by a separate clause, directed to be settled and given over in default of issue to the surviving sons and daughters, in the same way as the original shares, survivors would possibly not be construed as others. *DeGaragnol v. Liardet*, 32 Beav. 608; *In re Usticke*, 35 Beav. 338. See *Nevill v. Boddam*, 28 Beav. 554.

"On the other hand, if the shares of daughters dying without issue, given to surviving members of the class, are directed to be settled for the benefit of the other shares, survivors will be read others, at any rate as regards the settled shares. *Jackson v. Sparks*, 38 L. J. Ch. 75; and see the judgment of the M. R. in *Lucena v. Lucena*, 7 Ch. Div. 255.

"Upon similar principles, if there is an absolute gift to several, with a gift to their issue, if they die leaving issue, and if any die without issue, to the survivors, subject to the same executory limitation in favor of issue as the original shares, survivorship will be referred to the *stirpes*, and not merely to the individuals. *Eyre v. Marsden*, 2 Keen 564; 4 Myl. & C. 231; *Cross v. Maltby*, L. R., 20 Eq. 378. See *Le Jeune v. Le Jeune*, 2 Keen 701.

"But if the gift to survivors is absolute, and not subject to the same defeasibility in favor of issue as the original shares, survivors must be construed strictly, though there may be a gift over in the event of the death of all the legatees without issue. *Ferguson v. Dunbar*, 3 Bro. C. C. 468, n.

"Under a gift, in default of children of a daughter, to the others or other of his children by name, equally between them if more than one, the word others will not be read as survivors. *In re Hagen's Trusts*, 46 L. J. Ch. 665.

"Nor, under a gift to a son by name and the survivors of the testator's daughters, is it necessary that the son should survive in order to take. *In re Bates*, 11 W. R. 768." *Theobald on Wills* (2d ed.) 503.

It is very doubtful how far these requirements would be adopted in the *United States*. The tendency of the

c. ACCRUED SHARES.—Clauses disposing of the shares of the devisees and legatees dying before a given period or event, do not, without a positive and distinct indication of intention, extend to shares accruing under those clauses so as to pass them a second time. Thus, where a man gives a sum of money to be divided amongst four persons, as tenants in common, and declares that if one of them dies before twenty-one or marriage, it shall survive to the others, if one dies and three are living, the share of that one so dying will survive to the other three, but if a second dies, nothing will survive to the remainder but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship.¹

authorities in this country is to place each decision, to a great extent at least, upon the peculiar provisions of the particular will.

1. 2 Jarm. Wills (5th ed.) *710; Lord Hardwicke, in *Pain v. Benson*, 3 Atk. 80; *Rudge v. Barker*, Cas. temp. Talb. 124; *Es. p. West*, 1 Bro. C. C. 575; *Crowder v. Stone*, 3 Russ. 217; *Douglas v. Andrews*, 14 Beav. 347. See *Perkins v. Micklethwaite*, L. R., 2 Ch. 171; *Masden's Estate*, 4 Whart. (Pa.) 441; *Hutchinson's Appeal*, 34 Conn. 300; *Brooke v. Croxton*, 2 Gratt. (Va.) 507; *Everitt v. Everitt*, 29 N. Y. 39; *Owen v. Owen*, Busb. Eq. (N. Car.) 121; *Gill v. Roberts*, 33 N. J. Eq. 474.

In *Taylor v. Foster*, 17 Ohio St. 166, the rule was not observed. See *Turner v. Withers*, 23 Md. 43.

Thus, a testator made the following devise: "My will is, that all the remaining part of my lands, not sold or otherwise disposed of, be equally divided among my surviving daughters;" and, "It is my will that shall either of my daughters be dead, or die without issue, the before-mentioned land shall be divided between the surviving ones." The testator left four daughters living at his death, who all died successively; the one dying last but one alone leaving issue, a daughter, who, with other nephews and nieces, were the heirs at law of her last dying. It was held that the limitation over to the survivors was valid; that an interest or share, having once survived, did not again survive, but, upon the death of her taking by survivorship, descended to her heirs. *Lewis v. Claiborne*, 5 Yerg. (Tenn.) 369.

Part—Portion.—The rule applies where the word "part" or "portion" is used instead of share. *Bright v. Rowe*, 3 Myl. & K. 316; *Goodwin v.*

Finlayson, 25 Beav. 65; *Cambridge v. Rous*, 25 Beav. 416.

What Will Pass Accrued Shares.—Upon this subject Theobald has made the following classification of the English authorities. "If, for instance, accrued shares are directed to go in the same manner as original shares. *Cursham v. Newland*, 2 Beav. 145; *Milsom v. Awdry*, 5 Ves. Jr. 465; *Eyre v. Marsden*, 4 Myl. & C. 231; *Giles v. Melsom*, L. R., 6 H. L. Cas. 24.

"2. And when original and accrued shares have once been consolidated by a direction, for instance, that they are to go in the same manner, 'there is no occasion to carry on any separate account of the original share from the accrued share,' and both will pass under the word share. *In re Hutchinson*, 5 De G. & S. 681.

"3. If 'his or her share or shares,' are spoken of where only one original share has been previously given, so that the words cannot be satisfied *reddendo singula singulis*, as might be the case if the words were 'his, her or their share or shares,' accrued shares will be carried over. *Wilmott v. Flewitt*, 13 W. R. 856. And apparently 'share and shares and interest' would carry accrued shares. *Douglas v. Andrews*, 14 Beav. 347.

"4. Accrued shares will pass where the testator, though he speaks of individual shares, yet shows that he looks on the fund as existing at the period of distribution as an aggregate and previously undivided fund, by speaking of it, for instance, as the trust fund. *Worldidge v. Churchill*, 3 Bro. C. C. 465; *Leeming v. Sherratt*, 2 Hare 14; *Sillick v. Booth*, 1 Y. & C. C. 121, 739; *Barker v. Lea*, T. & R. 413. So, where the whole fund is given to a class with benefit of survivorship, the words of

24. Substitution—*a*. DEFINITION.—Although every executory limitation intended to destroy prior intervals in certain contingencies is in the widest sense substitutional, the term is generally applied to limitation intended to provide for the death of prior devisees or legatees before the period of distribution.¹ Thus, a direct gift to A or his children, goes to A if he survives the testator, and to his children if he does not.² If the gift be preceded by a life interest, the substitutional gift takes effect whether A dies in the lifetime of the testator or the tenant for life.³

***b*. GIFTS OVER ON DEATH UNDER SPECIFIED CIRCUMSTANCES.**—Wherever there is a gift, whether immediate or deferred, to individuals, a gift over in case the devisee or legatee die under specified circumstances, takes effect, if the event happens in the testator's lifetime.⁴ The rule applies even though the legatee or

survivorship apply to the whole, accrued as well as original shares. *In re Crawhall's Trusts*, 2 Jur. N. S. 892.

"5. And a gift over of the whole is convincing evidence of the same intention. In such a case 'share must have been meant to include every interest, accruing as well as original, for otherwise the estate would go away from the issue piecemeal; whereas, it is obvious, nothing was intended to go over, but that all should go over at once on failure of the issue of all the children, as if all but one had died without issue who was intended to take all.' *Doe v. Birkhead*, 4 Exch. 110; *Douglas v. Andrews*, 14 Beav. 347; *Dutton v. Crowdy*, 33 Beav. 272; *Langley v. Langley*, L. R., 6 Ir. 277.

"6. And if the bequest is of residue, the presumption against intestacy will assist the court in passing accrued with original shares. *Goodman v. Goodman*, 1 De G. & S. 695.

"7. Accrued shares are similarly not liable to the same restrictions as original shares, in the absence of a clearly expressed intention so to restrict them, *Gibbons v. Langdon*, 6 Sim. 260; *Ware v. Watson*, 7 De G. M. & G. 248; and on the other hand, *Trickey v. Trickey*, 3 Myl. & K. 560; *In re Jarman's Trusts*, L. R., 1 Eq. 71; *Fitzgerald v. Fitzgerald*, Ir. R., 7 Eq. 436." *Theobald on Wills* (2d ed.) 517.

It is not believed that in the present condition of the American decisions any corresponding classification is possible. It is highly probable, however, that in the future, *Theobald's* classification may be followed in doubtful cases.

As to proper method of framing limitations of cross remainders, see *REMAINDERS*, vol. 20, p. 871.

1. *Theobald on Wills* (2d ed.) 491.

Thus a bequest to be "equally divided among my brothers and sisters and their heirs," has been held substitutional on its appearing that testator knew that one of his sisters was dead. *Huntress v. Place*, 137 Mass. 409. Compare *McGregor v. Canada Invest., etc., Co.*, 21 Can. Supreme Ct. 499.

2. *Theobald on Wills* (2d ed.) 493; *Montayn v. Nucella*, 1 Russ. 165; *Salisbury v. Petty*, 3 Hare 86; *Whitcher v. Penley*, 9 Beav. 477.

3. *Theobald on Wills* (2d ed.) 493; *Girdlestone v. Doe*, 2 Sim. 225; *In re Porter's Trusts*, 4 K. & J. 188; *Habergam v. Ridehalgh*, L. R., 9 Eq. 395; *Hobgen v. Neale*, L. R., 11 Eq. 48; *In re Dawe's Trusts*, 4 Ch. Div. 210. See *Ebey v. Adams*, 135 Ill. 80; *Camp v. Cronkright* (Supreme Ct.), 13 N. Y. Supp. 307. For other illustrations, see *LEGACIES AND DEVISES*, vol. 13, p. 35.

4. *Hawkins on Wills* *243; *Schouler on Wills* (2d ed.), § 565. See *LEGACIES AND DEVISES*, vol. 13, p. 31; *REMAINDERS*, vol. 20, pp. 895, 938. See *Hannam v. Sims*, 2 De G. & J. 151; *Godard v. May*, 109 Mass. 471; *Mowatt v. Carow*, 7 Paige (N. Y.) 336; *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252.

As ordinarily stated, the rule seems applicable only to personality. But upon both principle and authority, it seems to apply to both realty and personality. *Hannam v. Sims*, 2 De G. & J. 151; *State v. Lyons*, 5 Harr. (Del.) 196. See *Goodall v. McLean*, 2 Bradf. (N. Y.) 306.

devisee be dead at the date of the will, the presumption being that the testator was ignorant of the fact.¹

c. GIFTS OVER TO EXECUTORS, ADMINISTRATORS OR REPRESENTATIVES.—An immediate gift to A or his executors, administrators or personal representatives will not lapse by A's death before the testator,² but if the bequest to A be by way of remainder after a life interest, the substitutional provision is held to apply only to the case of the legatee dying between the death of the testator and that of the life tenant.³ Upon the same principle a legacy to A, to be paid one year from the testator's death or to his representatives, will lapse if A dies before the testator.⁴ Of course, if the word "representatives" can be construed next of kin, a gift to the other representatives is *prima facie* substitutional whether immediate or postponed.⁵ A bequest to A, his executors or administrators, merely gives A the absolute interest and will lapse by his death, although the gift be immediate.⁶

d. GIFTS TO CLASSES, SUBSTITUTIONAL AND INDEPENDENT GIFTS.—Substitutional gifts of the shares of members of a class differ from substitutional gifts of bequests to individuals named in the will, the principle of distinction being that, to determine whether such gifts are to take effect, the test in the case of a bequest to a class must necessarily be this: Was the deceased, whose supposed share is claimed, or was he not, ever a member of the class? In other words, was he, or was he not, ever an object of the gift? If not, there can be no substitution.⁷ Thus if a testator gives a legacy to a class of persons, as to the children of A, and goes on to provide, that in case of the death of any one of the children of A before the period of distribution, the issue of such child shall take their parent's share, such issue cannot take unless the parent might have taken, and consequently, if a child of A be dead at the date of the will or at the death of the testator, the issue of that child cannot take anything.⁸ Where

1. *Hannam v. Sims*, 2 De G. & J. 151; *Ive v. King*, 16 Beav. 46; *In re Sheppard's Trust*, 1 K. & J. 269.

2. *Corbyn v. French*, 4 Ves. Jr. 434; *In re Porter's Trust*, 4 K. & J. 188; *Bone v. Cook*, M'Clel. 168.

3. *Bone v. Cook*, M'Clel. 176; *Corbyn v. French*, 4 Ves. Jr. 434.

4. *Tidwell v. Ariel*, 3 Madd. 209; *In re Porter's Trusts*, 4 K. & J. 195.

5. *Brent v. Washington*, 18 Gratt. (Va.) 526. Compare *Stook's Appeal*, 20 Pa. St. 349; *Ware v. Fisher*, 2 Yeates (Pa.) 578; *Abbott v. Jenkins*, 10 S. & R. (Pa.) 296.

6. *Elliot v. Davenport*, 1 P. Wms. 83. See LEGACIES AND DEVISES, vol. 13, p. 35.

7. Sir W. Pagewood, in *Re Porter's Trusts*, 4 K. & J. 192.

8. *Romilly, M. R.*, in *Ive v. King*, 16 Beav. 53, stated by him to be the principle established by *Peel v. Callow*, 2 Myl. & K. 41; *Waugh v. Waugh*, 9 Sim. 372; *Christopherson v. Naylor*, 1 Meriv. 320. See *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 256. Compare *Delafield v. Shipman*, 103 N. Y. 463; *Appleton v. Fuller* (Supreme Ct.), 16 N. Y. Supp. 353; *Matter of Crawford*, 113 N. Y. 366; *Outcalt v. Outcalt*, 42 N. J. Eq. 500.

Pennsylvania.—It seems that this distinction has been ignored, the rule being, that even in gifts, the alternative gift takes effect if the first legatee be one who would have taken as a member of the class, had he lived to the period of distribution. *May's Appeal*, 41 Pa. St. 522. See *Long v. Labor*, 8 Pa. St.

the testator provides that if any of the class die in his lifetime, the share of the members so dying is to go to their issue, he must be supposed to have in mind living persons, subject to the contingency of such persons continuing to live up to the time of his death, and the class is ascertained at the date of the will. Therefore, the issue of those who die after the date of the will take by substitution to the exclusion of the issue of those who died before the date.¹ But if the gift to the issue is original and independent, they take even though their parents died in the lifetime of the testator, or even before the date of the will.²

In determining whether any particular limitation is original or substitutional, it should be remembered that a gift to issue is substitutional when the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue; and

229. Compare *Herr's Estate*, 28 Pa. St. 467; *Morrison's Estate*, 139 Pa. St. 306.

1. *Christopherson v. Naylor*, 1 Meriv. 320; *In re Hotchkiss' Trust*, L. R., 8 Eq. 643. See *Habergham v. Ridehalgh*, L. R., 9 Eq. 395.

In *Christopherson v. Naylor*, 1 Meriv. 320, under a bequest "to each and every the child and children of my brother and sisters which shall be living at the time of my death; but, if any child or children of my said brother and sisters shall happen to die in my lifetime, and leave issue, then the legacy or legacies hereby intended for such child or children so dying, shall be for his, her, or their issue," it was held that the issue only took by substitution, and that therefore only the issue of such children as were living at the date of the will were entitled in the event of the death of their respective parents during the testator's lifetime, Sir W. Grant saying: "The question, in this case, does not depend on the words 'shall happen to die in my lifetime.' Though, according to strict construction, importing futurity, those words might have been understood as speaking of the event, at whatever time it may happen. But the context necessarily excludes this construction. The nephews and nieces are, here, the primary legatees. Nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But, of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will. The

issue of those who were dead at that time can, consequently, show no object of substitution; and to give them original legacies would be, in effect, to make a new will for the testator."

Exception.—The testator's language may, however, show that he intended the issue of persons dead at the date of the will, who would have been members of the class if alive, to take their parents' share, and in such case the intent will be given effect. Thus, where the testator directed the residue of his property to be "equally divided among my brothers and sisters and their heirs," and when the will was made there were living three brothers, one sister, and children and grandchildren of two deceased sisters; and it appeared that testator knew of the decease of his two sisters, and of the existence of their issue, it was held that the heirs of the deceased sisters took by representation equally with surviving brothers and sisters. *Huntress v. Place*, 137 Mass. 409, citing *Gowling v. Thompson*, L. R., 11 Eq. 366, n.; *Barnaby v. Tassell*, L. R., 11 Eq. 363; *In re Sibley's Trusts*, 5 Ch. Div. 494; *In re Webster's Estate*, 23 Ch. Div. 737; *Giles v. Giles*, 8 Sim. 360; *Jarvis v. Pond*, 9 Sim. 549; *In re Philips' Will*, L. R., 7 Eq. 151; *Burt v. Hellyar*, L. R., 14 Eq. 160; *Wingfield v. Wingfield*, 9 Ch. Div. 658; *Davis v. Taul*, 6 Dana (Ky.) 57; *Richey v. Johnson*, 30 Ohio St. 288.

2. *Hawkins on Wills* *249; *Coulthurst v. Carter*, 15 Beav. 421; *Rust v. Baker*, 8 Sim. 443; *Loring v. Thomas*, 1 Dr. & Sm. 497; *Smith v. Smith*, 8 Sim. 353; *Attwood v. Alford*, L. R., 2 Eq. 479; *Matter of Crawford*, 113 N. Y. 366; *Outcalt v. Outcalt*, 42 N. J. Eq.

original if the share which the issue are to take is not by a prior clause expressed to be given to the parent of such issue.¹ If the gift to issue is original, it is not necessary for the issue to survive their own parent;² if substitutional, it is necessary;³ but whether in the case of an original⁴ or substitutional gift, it is necessary for the issue to survive the period of distribution.⁵

500; *Wheeler v. Allen*, 54 Me. 232. See *May's Appeal*, 41 Pa. St. 512.

1. *Kindersley, V. C.*, in *Lanphier v. Buck*, 2 D. & S. 484; *Attwood v. Alford*, L. R., 2 Eq. 479; and *Westbury* in *Martin v. Holgate*, L. R., 1 H. L. 181; *In re Hotchkiss' Trusts*, L. R., 8 Eq. 643. But compare *Outcalt v. Outcalt*, 42 N. J. Eq. 500; *Matter of Crawford*, 113 N. Y. 366; *May's Appeal*, 41 Pa. St. 512; *Vaughan v. Dickens*, 2 Dev. & B. Eq. (N. Car.) 56.

2. 2 Jarm. Wills (5th ed.) *189; *Lanphier v. Buck*, 2 D. & S. 484; *In re Smith's Trusts*, 7 Ch. Div. 665.

3. 2 Jarm. Wills (5th ed.) *189; *Lanphier v. Buck*, 2 D. & S. 484. See *In re Turner*, 2 D. & S. 501; *Hurry v. Hurry*, L. R., 10 Eq. 346; *Bennett's Trusts*, 3 K. & J. 280; *Crause v. Cooker*, 1 J. & H. 207; *In re Merrick's Trusts*, L. R., 1 Eq. 551.

4. *Martin v. Holgate*, L. R., 1 H. L. 175. See *In re Orton's Trusts*, L. R., 3 Eq. 375.

5. *Kindersley V. C.*, in *Lanphier v. Buck*, 2 D. & S. 498; 2 Jarm. Wills (5th ed.) *189. See *In re Turner*, 2 D. & S. 501; *Hodgson v. Smithson*, 21 Beav. 354; *Masters v. Scales*, 13 Beav. 60; *Buckle v. Fawcett*, 4 Hare 545; *In re Pell's Trust*, 3 De G. F. & J. 291; *In re Merrick's Trusts*, L. R., 1 Eq. 551; *Austin v. Bristol*, 40 Conn. 133; *Brent v. Washington*, 18 Gratt. (Va.) 535; *Post v. Horning* (Supreme Ct.), 6 N. Y. St. Rep. 716.

These peculiarities of original and substitutional bequests will best be understood by a careful examination of the opinion of *Kindersley, V. C.*, in the leading case of *Lanphier v. Buck*, 2 D. & S. 484; better reported 34 L. J. Ch. 650. In this case a testator gave his residuary estate amongst his nephews and nieces, and after directing the share of his niece E. G., and also a sum of £1,000 which he had given her, to be held upon certain trusts, with an ultimate gift over from the benefit of which, as respected the £1,000, he excluded a niece M. L., he directed the shares of other nieces (including a niece

M. B.) and also certain sums of £1,000 given to them to be held for their separate use, respectively, for their lives, and then for their children living at their respective deceases; but in case all the children of his said other nieces, or of any or either of them, should die, either in their respective lifetimes, or after their deceases, under age and without leaving lawful issue, then upon trust "to pay, assign and transfer" their shares "equally amongst all and every his nephews and nieces who shall be living at such time or times, and to the issue of such of them as might be then dead, in equal shares and proportions (such issue to be entitled to its parent's share only), except as to the sums of £1,000 given to his other nieces, which he directed should not survive to his niece M. L., but be paid in the same manner as he had directed the £1,000 given to his niece E. G., in case of her decease without issue, or their all dying under age and without issue." The gift over of E. G.'s £1,000 was not made to take effect on E. G.'s death without issue, but "in case all the children of E. G. should die, either in her lifetime or after her decease under age, and without leaving lawful issue." M. B. died without ever having been married. *Held*, that the gift over took effect, that the word issue meant children of the nephews and nieces, and not issue generally; that the gift to the issue of the nephews and nieces was an original gift, and not a gift by substitution; that it was not necessary that the children who took a share should survive the tenant for life, or the gift being original, their parents.

In the above case *Kindersley, V. C.*, said: "The gift over is to two classes, viz., the nephews and nieces who shall be living at the time when the preceding limitations terminate, and the issue (*i. e.*, children) of such of the nephews and nieces as shall be then dead. And here it is necessary to attend to the distinction between original and substitutional gifts to issue. A gift to issue is substitutional when the share which

the issue are to take is by a prior clause expressed to be given to the parent of such issue; and a gift to issue is an original gift when the share which the issue are to take is not by a prior clause expressed to be given to the parent of such issue. Thus, in the present case, the gift to the issue of such nephews and nieces as shall die before the termination of the prior limitations, is an original, and not a substitutional, gift to the issue, because the share which is to be taken by the issue of any predeceased nephew or niece is not by any prior clause expressed to be given to such predeceased nephew or niece. The issue who are to take are the issue of such nephews and nieces as shall die before the termination of the prior limitations; and nothing is given to such nephews and nieces as die before the termination of the preceding limitations, the gift to nephews and nieces being exclusively to such as shall be living at that time. On the other hand, if the gift be thus: on the death of A without issue, to nephews and nieces (generally), followed by a direction that if any of them shall die before the termination of the preceding limitations, the issue of such nephew or niece shall take his or her share—there the gift to the issue is substitutional, because the share which the issue are to take is by the prior clause given in the first instance to the nephew or niece, the parent of such issue.

"This distinction between original and substitutional gifts to issue may, at first sight, appear trivial; but a little consideration will show that, in more ways than one, it is of great importance with respect to consequences. In the former case the gift to the nephews and nieces is altogether contingent; nothing vests in any one nephew or niece until the happening of the event which terminates the prior limitations; in the latter case every nephew and niece takes a vested interest, liable only to be divested in case he or she dies before the happening of that event, leaving issue.

"And further, in the former case, the representative of any nephew or niece dying before the happening of that event, without having had issue, would take nothing; but in the latter case, if any nephew or niece should die before the event, without having had issue, his or her representative would take the share which was, in the first instance, given to and was vested in that nephew or niece, and which was not

divested by his or her dying before the event, because there was no issue to take by way of substitution. The distinction, therefore, is not a trivial one, but substantial and important. The gift then, in this case, is clearly an original and independent gift to the issue (*i. e.*, children) of any nephew or niece who died before the happening of the event which terminated the preceding limitations, *viz.*, the death of Mary Buck, unmarried. And taken in conjunction with the gift to such nephews and nieces as should be living at that time, it does not, in principle or effect, differ from a gift, after the death of A without issue, to C and D and the children of B, in which case it is clear that all the children of B would take, whether they survived A or not. On what ground is the court to introduce, in the one case more than in the other, a condition that no child shall take who does not survive the termination of the prior limitations?

"And if the court cannot introduce such a condition where the gift to the issue (or children) is an original gift, what better reason can be assigned for doing so when the gift to the issue is substitutional? Nothing short of absolute necessity, arising out of the context, could justify such an interpolation; and it cannot be suggested that any such necessity is imposed by anything contained in this will. The reason generally assigned for holding that the issue ought to survive the termination of the prior limitations to be entitled to take, is, that it is not likely that the testator would have annexed the condition to the gift to the parents and not have annexed it to the gift to the children or issue. But it appears to me that this is altogether an insufficient ground, and that it violates a plain canon of construction for inserting the conditions. Besides, very good reason exists for imposing the condition on the parent, when the share is given to his or her issue, which does not apply to the gift to the issue.

"The conclusion, therefore, at which I have arrived is, that whether the gift to the issue be original or substitutional, the issue need not survive the happening of the event which terminates the preceding limitations.

"On examining the authorities on this question I find much difference of opinion. I think that the present Master of the Rolls, and the Lord Justice K. Bruce, are generally disposed to

hold that the issue, in order to take, must survive the happening of the event which terminates the preceding limitations; although the Master of the Rolls, in *Thompson v. Clive*, 23 Beav. 283, and the Lord Justice Knight Bruce when Vice Chancellor, in *Barker v. Barker*, 5 De G. & S. 753, did not exclude such issue. On the other hand, I consider that the late Vice Chancellor of *England*, the Lord Justice Turner, the Vice Chancellor Stuart, and the Vice Chancellor Wood, have held that the issue need not survive the happening of the event which terminates the preceding limitations in order to take. And to these may be added Lord Langdale, although in *Bennett v. Merriman*, 6 Beav. 360, he excluded the issue who died before the happening of the event, on the ground of the special wording of the will, and even then expressing much doubt. Upon the whole, I think the preponderance of authority is decidedly in favor of the view which I have taken of this question. I may mention that two cases have come before myself, *Harcourt v. Harcourt*, 26 L. J. Ch. 536, and *Humfrey v. Humfrey*, 2 D. & S. 55. In one I decided in favor of the issue; in the other, with great reluctance, I followed the authorities then presented to me, which were the other way.

"The third question which has been raised is this: Assuming that the issue (*i. e.*, the children) of nephews and nieces, in order to take, need not be living at the happening of the event which terminates the preceding limitations (which in the present case is the death of Mary Buck, without issue), must they survive their own parents? Supposing a nephew or niece died in the lifetime of Mary Buck, having had children, some one of whom predeceased its parent, will such child be entitled to take? I am of opinion that this depends upon the question whether the gift to the issue (or children) is an original or substitutional gift. If it be an original gift I see no more reason for imposing a condition that the child must survive Mary Buck. In either case, the imposing any such condition appears to me to be a violation of the plain rule of construction, which forbids the court to introduce anything into a testament, unless the context renders it absolutely necessary to do so. But, on the other hand, where the gift to the issue is not original, but sub-

stitutional, that is, where the gift is in the first instance made to the parent, followed by a direction that if the parent dies before the happening of a certain event, his or her issue shall be substituted for the parent, the case is altogether different; for no substitution can take place till the death of the parent, and it would be absurd to talk of substituting for the parent at his death such of his children as were then already dead. The substitution must necessarily be of living children, not of dead children. And to hold this is not introducing into the will any condition not expressed by the testator; it is only giving effect to the testator's direction that the share, which is in the first instance given to and vested in the parent (*i. e.*, the nephew or niece), should, in case of his or her death before the happening of a certain event, go to his or her children; that is, that the children should take, by way of substitution for their parent, the share previously given to the parent. In my opinion, therefore, the rule on this subject is, that if the gift to the issue is an original gift, they need not survive their own parent in order to take; but that if the gift to the issue is substitutional, then they must survive their parent in order to take by substitution."

Gift to Issue of Legatees Who Die Leaving Issue.—In concluding his remarks upon original and substitutional wills, in *Lanphier v. Buck*, 2 D. & S. 499, Kindersley, V. C., said: "There are cases where, although the gift to the issue (or children) is an original gift, the testator has, by his language, precluded children from taking who did not survive their parent. Thus, if the gift had been to such of the nephews and nieces as should be living at the happening of a certain event, and to the issue of such of the nephews and nieces as should have previously died leaving issue, those words would be a sufficient indication of the testator's intention that such children only as were left by their parent, that is, as survived their parent, should take."

In *Thompson v. Clive*, 23 Beav. 282, Romilly, M. R., so held as to the effect of the word leaving. But in *Re Smith's Trusts*, 7 Ch. Div. 665, Hall, V. C., held otherwise.

Further Distinctions.—Mr. Theobald has attempted to reconcile the English decisions upon this subject, by a series of refined distinctions not recognized

in many instances by the judges who delivered the opinions. As a classification of the English authorities brought down to a late date, it cannot fail to be of interest.

"1. When there is a gift to several persons *nominatim*, with the substitution of their issue in the event of their death, the fact that one of the persons so named is dead at the date of the will will not prevent his issue from taking. *Hannam v. Sims*, 2 De G. & J. 151; *Ive v. King*, 16 Beav. 46; *Hobgen v. Neale*, L. R., 11 Eq. 48. See *Barnes v. Jennings*, L. R., 2 Eq. 448.

"2. If, however, the original gift is to a class, with a substitutional gift to issue, the question is, whether the issue take a share which has been given to a parent who is contemplated as capable of taking under the will, or whether they take a share which has not been previously given to their parent. In the former case, issue of parents dead at the date of the will will not take; in the latter they will.

"The important point is not whether the gift itself is substitutional, but whether the interests of persons who are contemplated as capable of taking under the will are given, in the event of their death, to substituted legatees.

"Thus, though a gift to such of a class as may be then living, or the issue of any then dead, is strictly substitutional, the issue, if they take at all, take original shares, since nothing is given to parents then dead. *Attwood v. Alford*, L. R., 2 Eq. 479.

"In the same way, a gift to parents 'then living,' and the issue of those then dead, is a direct substantive gift to the issue. *Smith v. Smith*, L. R., 5 Ch. 342; *Martin v. Holgate*, L. R., 1 H. L. Cas. 175. See *Ashling v. Knowles*, 3 Drew. 593; *Ecles v. Ecles*, 3 Drew. 447.

"a. If the gift is to parents and issue in one continuous sentence—as, for instance, to children then living, and the issue of those then dead—the issue of parents deceased at the date of the will take, though the issue may be directed to take only a parent's share, as this direction will be satisfied by a stirpital distribution. *Tytherleigh v. Harbin*, 6 Sim. 329; *Rust v. Baker*, 8 Sim. 443; *Bebb v. Beckwith*, 2 Beav. 308; *Coulthurst v. Carter*, 15 Beav. 421; *In re Faulding's Trusts*, 26 Beav. 263; *In re Philp's Will*, L. R., 7 Eq. 151; *Heasman v. Pearse*, L. R., 7 Ch. 275.

"It seems the issue of a parent who

died before the testator was born would not take. *Wingfield v. Wingfield*, 9 Ch. Div. 658.

"If the gift is to 'my children then living, and the children of such of my said children as shall be then dead,' the testator, by using the term 'said' children, shows that he is contemplating a class of children living at the date of the will and capable of taking under it, and, therefore, children of those dead at the date of the will will not be admitted. *In re Thompson's Trust*, 2 W. R. 218; 5 De G. M. & G. 280. See *Pell v. Catlow*, 9 Sim. 372; *Smith v. Pepper*, 27 Beav. 86; *Hall v. Woolley*, 39 L. J. Ch. 106. On the other hand, if the gift is to brothers and sisters living at a particular time, and the children of such of the said brothers and sisters as should have died, and the testator has only one brother living at the date of the will, he cannot be referring to a class existing at the date of the will, and children of brothers and sisters dead at the date of the will will be admitted. *In re Jordan's Trust*, 2 N. R. 57; *Giles v. Giles*, 8 Sim. 360. See *Jarvis v. Pond*, 9 Sim. 549.

"If the children are expressed to be the children of parents who are beneficiaries under the will; if, for instance, the bequest is to 'my daughters and their children,' the children of a daughter dead at the date of the will take nothing. *Parker v. Tootal*, 11 H. L. Cas. 143. See *Crook v. Whitley*, 26 L. J. Ch. 350. But see *Clay v. Pennington*, 7 Sim. 370.

"b. When the gift is clearly substitutional, as in the case of a gift to a class or their issue, issue of members of the class dead at the date of the will will take. *In re Sibley's Trusts*, 5 Ch. Div. 494, *overruling Congreve v. Palmer*, 16 Beav. 435.

"This construction may be aided by the context. Thus, if none of the members of the original class are alive at the date of the will, or if the original class is brothers and sisters, and the testator has only one brother living at the date of the will, children of those then dead will come in. *Gowling v. Thompson*, L. R., 11 Eq. 366. See *Barnaby v. Tassell*, L. R., 11 Eq. 363; *Jarvis v. Pond*, 9 Sim. 549.

"c. Where the gift to the issue is in an independent clause, the question is whether the intention is to add fresh members to, or substitute them for, the original class.

"If the gift is to children living at the

testator's death, with a direction that, if any should happen to die in his lifetime, the 'legacy' intended for such child should be for his issue, the word legacy shows that the testator meant to substitute only issue of parents who at the date of the will were capable of taking. *Christopherson v. Naylor*, 1 Meriv. 320; *Hunter v. Cheshire*, L. R., 8 Ch. 751. It may be doubted whether *Phillips v. Phillips*, 13 W. R. 170; 10 Jur. N. S. 1173, and *Parsons v. Gulliford*, 13 W. R. 170; 10 Jur. N. S. 231, can stand with these authorities. The same rule applies if there is no direct gift to issue, but only a direction that issue of parents dying are to stand in the place of their parents, or take their parents' share. *Butter v. Ommaney*, 4 Russ. 71; *Gray v. Garman*, 2 Hare 268; *Atkinson v. Atkinson*, Ir. R., 6 Eq. 184; *In re Hotchkiss' Trusts*, L. R., 8 Eq. 643; *Habergham v. Ridehalgh*, L. R., 9 Eq. 395; *Kelsey v. Ellis*, 38 L. T. N. S. 471.

"Where the gift was to such of the children of the testator's sisters as should survive the tenant for life, followed by a direction that in case any of such children should be dead at the testator's decease, leaving issue, such issue should take the share of their deceased parent, the issue of a child dead at the date of the will was not included. *West v. Orr*, 8 Ch. Div. 60. See *Giles v. Giles*, 8 Sim. 360.

"On the other hand, if the original gift is to a class, with a direction that the issue of any dying in the testator's lifetime, or before the period of distribution, should take the share their parents would have been entitled to if then living, the issue of those dead at the date of the will will be admitted, as the direction amounts to an independent gift, the word share being satisfied by a stirpital distribution. *Loring v. Thomas*, 1 D. & S. 497; *In re Chapman's Will*, 32 Beav. 382; *Adams v. Adams*, L. R., 14 Eq. 246.

"This rule has been applied where the original gift was to a class living at the death of the tenant for life. *Harris v. Harris*, 48 L. J. Ch. 321.

"In these cases it is not the share of the parents, or the share the parents are entitled to, which is given to the issue, but the share the parents would have been entitled to. *In re Potter's Trusts*, L. R., 8 Eq. 52, is a more difficult case, since there the gift was to nephews and nieces, and in case of the death of any of his said nephews and

nieces, leaving issue, such issue to take the share their parents would have taken if living, the word 'said' showing that the testator referred to nephews and nieces capable of taking under the will. See *In re Thompson's Trust*, 2 W. R. 218; 5 De G. M. & G. 280.

"Perhaps issue of parents dead at the date of the will would not be admitted where other express provision is made for such issue. *Waugh v. Waugh*, 2 Myl. & K. 41.

"Whether the contingency of the original gift attaches to the substituted gift: When there is a life interest followed by a contingent gift to certain persons, and a gift, if they die before the contingency, to their children, the contingency attaching to the gift to the parents does not attach to that to the children, and the children take vested interests although they may not survive the contingency upon which the gift to the parents was to take effect. For instance, if the bequest is to A for life, then to 'such of my nephews as may be then living, and the children of such as may be then dead,' the children take vested interests upon their parents' death, whether they survive A or not.

"1. This is clearly settled if the children take original shares. *Martin v. Holgate*, L. R., 1 H. L. Cas. 175; *In re Orton's Trust*, L. R., 3 Eq. 375; *Burt v. Hellyar*, L. R., 14 Eq. 160.

"2. But if the gift to the children is substitutional there appears to be some difficulty. On the whole, the current of recent authority seems to be in favor of the same rule in the case of substitutional as of original gifts. *Masters v. Scales*, 13 Beav. 60; *In re Turner*, 34 L. J. Ch. 660; *Lanphier v. Buck*, 2 D. & S. 484; *In re Merrick's Trusts*, L. R., 1 Eq. 551.

"But a difficulty is created by the case of *Pearson v. Stephen*, in the House of Lords, 5 Bligh N. S. 203. There there was a gift to S. during coverture, and upon the death of her husband in her life to her absolutely, but if her husband should survive her, then to the testator's five sons and their respective issue *per stirpes* and not *per capita*; and it was held that in the event of S. dying in her husband's life, the sons of the testator living at such event would be absolutely entitled, but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S., would be entitled to the share their parents would have taken; but see the remarks of Kindersley, V.

25. Words Importing Death—To What Period Referred—*a. WORDS REFERRING TO DEATH SIMPLY—DEATH TREATED AS A CONTINGENT EVENT—*(1) *When the Gift Is Immediate.*—If there is an immediate gift to A, and a gift over in case of his death, or if he die, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A's death before the testator.¹ The rule applies where, after a gift to

C., on this case, in *Lanphier v. Buck*, 34 L. J. Ch. 659.

"3. There is, however, this difference between a substitutional and original gift to the children, that in the former case only those children who survive the parents will take, while in the latter all the children will take, whether they survive the parents or not; but see *Humfrey v. Humfrey*, 2 D. & S. 129. 'The substitution takes place at the death of the nephew or niece. And then I see very good ground for saying there, by reason of its being substitution, you will not substitute dead people for the nephew or niece who has been living up to that time and has then just died.' *Lanphier v. Buck*, 2 D. & S. 484; 34 L. J. Ch. 657; *In re Turner*, 34 L. J. Ch. 660; *In re Merrick's Trusts*, L. R., 1 Eq. 551; *Thompson v. Clive*, 23 Beav. 282; *Crause v. Cooper*, 1 J. & H. 207; *In re Bennett's Trusts*, 3 K. & J. 280; *Hurry v. Hurry*, L. R., 10 Eq. 346; *Hobgen v. Neale*, L. R., 11 Eq. 48; *Heaseman v. Pearse*, L. R., 11 Eq. 522; L. R., 7 Ch. 275; *In re Haskett, Smith's Trusts*, 26 W. R. 418.

"Upon a similar principle, under a gift in certain events to a class, and the issue of such of them as shall then be dead, members of the class dying without issue before the events happen take a share. *In re Wood*, 29 W. R. 171.

"Whether the original and substituted class are mutually exclusive: When the gift is to a class or their issue, the further question arises whether the original and substituted legatees form two mutually exclusive classes, so that no substituted legatees can take if there are any members of the original class to take, or whether the issue of members of the original class dying can take with the surviving members of the original class.

"It is clear that if all the original class survive the period of distribution, they alone take. *Sparks v. Restal*, 24 Beav. 218; *Margitson v. Hall*, 10 Jur. N. S. 89;

12 W. R. 334. So, if none of the original class survive the period of distribution, the substituted legatees alone take. *Willis v. Plaskett*, 4 Beav. 208; *Timins v. Stackhouse*, 27 Beav. 434; *Bolitho v. Hillyar*, 34 Beav. 180; *Attwood v. Alford*, L. R., 2 Eq. 479.

"But if some of the original class die leaving children, and others survive the period of distribution: If the gift is to several persons *nominatim* as tenants in common, or their children, those who survive the period of distribution take, together with the children of those who die before it. *Price v. Lockley*, 6 Beav. 180. In the same way, in the case of a simple substitutional gift to children or their issue, to be divided amongst them in equal shares, the issue of a child dying after the testator, and before the period of distribution, take with the other children. *Finlason v. Tatlock*, L. R., 9 Eq. 258; *Neelson v. Monro*, 27 W. R. 936; *In re Sibley's Trusts*, 5 Ch. Div. 494. See *Holland v. Wood*, L. R., 11 Eq. 91.

"How the class of substituted legatees is to be ascertained, when the gift is to A for life, then to B or his issue:

"1. If B dies in the testator's lifetime, the class is ascertained at the testator's death. *Ive v. King*, 16 Beav. 46.

"2. If B survives the testator and dies in the lifetime of the tenant for life, the class is ascertained at B's death. *Ive v. King*, 16 Beav. 46; *Hobgen v. Neale*, L. R., 11 Eq. 48.

"But the class is not to be definitely ascertained at those periods, but will open to let in issue born afterwards and before the period of distribution. *In re Sibley's Trusts*, 5 Ch. Div. 494; *In re Jones' Estate*, 47 L. J. Ch. 775, *overruling*, on this point, *Hobgen v. Neale*, 11 Eq. 48." *Theobald on Wills* (2d ed.) 494.

Whether, under a gift to several or their children, the children take *per capita* or *per stirpes*, see *supra*, this title, *Construction of Gifts to Classes—Taking Per Capita or Per Stirpes.*

1. *Theobald on Wills* (2d ed.) 483;

several, there is a gift over "in case of the death of either in the lifetime of the others or other," since the death of one before the other is a certain and not a contingent event.¹

So, under a gift to A, and in case of "his decease, or at his decease, to B," A takes an absolute interest if he survives the testator.² But under a gift to A, and at his decease to B, A takes for life only, with remainder to B;³ so also, where the gift is to A for life, and in case of his death to B, as otherwise, the remainder

2 Jarm. Wills (5th ed.) *752; *Bindon v. Suffolk*, 1 P. Wms. 96; *Turner v. Moor*, 6 Ves. Jr. 557; *Cambridge v. Rous*, 8 Ves. Jr. 12; *Crigan v. Baines*, 7 Sim. 40; *Taylor v. Stainton*, 2 Jur. N. S. 634; *Schenk v. Agnew*, 1 K. & J. 405; *Ingham v. Ingham*, 1 R., 11 Eq. 101; *Crossman v. Field*, 119 Mass. 172; *Britton v. Thornton*, 112 U. S. 533. See *Herbert v. Smith*, 1 N. J. Eq. 141; *Beatty v. Montgomery*, 21 N. J. Eq. 324; *Burdge v. Walling*, 45 N. J. Eq. 10; *Bishop v. McClelland*, 44 N. J. Eq. 450; *Baldwin v. Taylor*, 37 N. J. Eq. 81; *Karker's Appeal*, 60 Pa. St. 141; *Fulton v. Fulton*, 2 Grant Cas. (Pa.) 28; *Stevenson v. Fox*, 125 Pa. St. 571; *Kerr v. Bryan*, 32 Hun (N. Y.) 51; *Vanderzee v. Slingerland*, 103 N. Y. 47; *Matter of New York, etc., Co.*, 105 N. Y. 89; *Kelly v. Kelly*, 61 N. Y. 50; *Traver v. Schell*, 30 N. Y. 89; *Ash v. Coleman*, 24 Barb. (N. Y.) 645; *Fowler v. Ingersoll*, 127 N. Y. 477; *Black v. Williams* (Supreme Ct.), 21 N. Y. St. Rep. 263; *Engel v. State*, 65 Md. 544; *Dorsey v. Dorsey*, 9 Md. 31; *Hammitt v. Hammitt*, 43 Md. 311; *Jones v. Webb*, 5 Del. Ch. 132; *Sims v. Conger*, 39 Miss. 231; *Reams v. Spann*, 26 S. Car. 561; *Hamilton v. Boyles*, 1 Brev. (S. Car.) 418; *Davis v. Parker*, 69 N. Car. 276; *Burton v. Conigland*, 82 N. Car. 102; *Buchanan v. Buchanan*, 99 N. Car. 312; *Wright v. Charley*, 129 Ind. 257; *Hoover v. Hoover*, 116 Ind. 498; *Harris v. Carpenter*, 109 Ind. 540; *Wills v. Wills*, 85 Ky. 486; *Whitney v. Whitney*, 45 N. H. 311; *Briggs v. Shaw*, 9 Allen (Mass.) 516; *Webb v. Lines*, 57 Conn. 156; *Johnes v. Beers*, 57 Conn. 303.

Thus, where a testator directed his estate to be equally divided, but, if any of his children happened to die, such child's share to go to the survivors, it was held that the death must occur in the lifetime of the testator. *Sealy v. Laurens*, 1 Desaus. (S. Car.) 137.

A testator devised "all his property, both real and personal," with certain

specified exceptions, "to his wife;" the furniture she was to dispose of as she saw fit, "and all the rest of the property;" and then, in the concluding clause of the will, added: "In case of the death of both myself and wife, all the property and effects before mentioned as belonging to my wife shall revert to my mother." The wife survived the testator. It was held that under this will the wife took an absolute estate in the property devised to her. *Dorsey v. Dorsey*, 9 Md. 31.

"If, in such a case, the words are to be read literally, you have, in the first, the absolute gift, and then a gift over in the event of death, an event not contingent but certain, and in order to avoid the repugnancy of an absolute giving and an absolute taking away the court is forced to read the words 'in case of death' as meaning in case of death before the interest vests." Lord Cairns, in *O'Mahoney v. Burdett*, L. R., 7 H. L. Cas. 395. The context, however, may show that the testator referred to death at any time. *Simpson v. Cherry*, 34 S. Car. 68; *Fowler v. Ingersoll*, 127 N. Y. 472. Compare *Hottell v. Browder*, 13 Lea (Tenn.) 676.

1. *Howard v. Howard*, 21 Beav. 550. See *Underwood v. Wing*, 4 De G. M. & G. 659; *Wing v. Angrave*, 8 H. L. Cas. 199.

So also, though the gift over be to persons "then living" or to survivors. *Trotter v. Williams*, Pre. Ch. 78; *King v. Taylor*, 5 Ves. Jr. 806. See *Whitney v. Whitney*, 45 N. H. 311.

It makes no difference that the gift, in case of A's death, is to his children. *Slade v. Milner*, 4 Madd. 80; *Schenk v. Agnew*, 4 K. & J. 405.

2. *Arthur v. Hughes*, 4 Beav. 506.

3. *Constable v. Bull*, 2 De G. & S. 411; *Waters v. Waters*, 26 L. J. Ch. 624; *Reid v. Reid*, 25 Beav. 469; *Bibbens v. Potter*, 10 Ch. Div. 733; *Joslyn v. Hammond*, 3 Myl. & K. 110; *Adams' Trusts*, 14 W. R. 18. See *Stone v. McEckron*, 57 Conn. 194.

would not be disposed of.¹ In regard to realty, if the devisee gives A the fee, a gift over, in case of A's death, will be held to refer to his death before the testator.²

(2) *When the Gift Is Postponed.*—If the gift is after a life estate, or a time is appointed for payment, the words, "in case of death," refer to death at any time before the vesting in possession, whether before or after the death of the testator.³

b. WORDS REFERRING TO DEATH COUPLED WITH A CONTINGENCY.—It may be laid down as a general rule of construction that, where the context is silent, words referring to the death of a prior devisee or legatee, in connection with some collateral event, apply to the contingency happening at any time, as well after as before the death of the testator.⁴ The rule is the same whether the gift be immediate, as where the bequest is to A, and if she die unmarried, or without children or issue, to B;⁵ or postponed

1. Theobald on Wills (2d ed.) 484; Smart v. Clark, 3 Russ. 365; Tilson v. Jones, 1 R. & M. 553; Ingham v. Ingham, 11 R. 101; Barney v. Arnold, 15 R. I. 78.

2. Theobald on Wills (2d ed.) 485; Rogers v. Rogers, 7 W. R. 541. See Edwards v. Edwards, 15 Beav. 357; Randfield v. Randfield, 8 H. L. Cas. 225. See Briggs v. Shaw, 9 Allen (Mass.) 517; Whitney v. Whitney, 45 N. H. 311; Ash v. Coleman, 24 Barb. (N. Y.) 646; Hill v. Hill, 5 Gill & J. (Md.) 87.

In states in which the fee passes without words of limitation, it would seem to be immaterial whether the devise be to A and his heirs, or simply to A. Of course, if the devise merely gives A a life estate, the limitation over would probably be construed by way of remainder. Theobald on Wills (2d ed.) 485; Bowen v. Scrowcroft, 2 Y. & C. 640. See Leppes v. Lee, 92 Ky. 16. But see Wright v. Stephens, 4 B. & Ald. 574.

3. Theobald on Wills (2d ed.) 485; Hervey v. M'Laughlin, 1 Price 264; Johnston v. Antrobus, 21 Beav. 556; Bolitho v. Hillyar, 34 Beav. 180. See James v. Baker, 8 Jur. 750; Green v. Barrow, 10 Hare 459; Burton v. Contigland, 82 N. Car. 102; Davis v. Parker, 69 N. Car. 276; Engel v. State, 65 Md. 544; Beatty v. Montgomery, 21 N. J. Eq. 327; Sims v. Conger, 39 Miss. 235; Fowler v. Ingersoll, 127 N. Y. 472; Shepard v. Shepard, 60 Vt. 118.

But in *Johnes v. Beers*, 57 Conn. 295, this distinction was disregarded, and the words importing death were confined to death in the lifetime of the testator.

4. O'Mahoney v. Burdett, L. R., 7 H. L. Cas. 388. See 2 Jarm. Wills (5th ed.) *783; Farthing v. Allen, 2 Madd. 503; Bowers v. Bowers, L. R., 5 Ch. 244. Compare Watson v. Watson, 7 De G. M. & G. 248; Britton v. Thornton, 112 U. S. 526; Tomlinson v. Nickell, 24 W. Va. 148; Shepard v. Shepard, 60 Vt. 109; Barney v. Arnold, 15 R. I. 78; Smith v. Hunter, 23 Ind. 580; Buchanan v. Buchanan, 99 N. Car. 313; Harwell v. Benson, 8 Lea (Tenn.) 344; Shadden v. Hembree, 17 Oregon 14. Of course, if the event happens in the testator's lifetime, the ulterior gift is accelerated. *State v. Turner*, 18 S. Car. 103. See REMAINDERS, vol. 20, pp. 895, 938.

5. O'Mahoney v. Burdett, L. R., 7 H. L. Cas. 388; Theobald on Wills (2d ed.) 485; Smith v. Stewart, 4 De G. & S. 253; Cotten v. Cotten, 23 L. J. Ch. 489; Bowers v. Bowers, L. R., 8 Eq. 283; L. R., 5 Ch. 244; Else v. Else, L. R., 13 Eq. 196; Varley v. Winn, 2 K. & J. 705; Buchanan v. Buchanan, 99 N. Car. 308. See Smith v. Hunter, 23 Ind. 580; Tomlinson v. Nickell, 24 W. Va. 148; Gibson v. Hardaway, 68 Ga. 370; Jessup v. Smuck, 16 Pa. St. 327; Nellis v. Nellis, 99 N. Y. 505; Fowler v. Ingersoll, 127 N. Y. 478.

Cases Contra.—For instances in which dying unmarried or without children, and similar expressions, have been restrained to dying in the lifetime of the testator, see *King v. Frick*, 135 Pa. St. 575; *Stevenson v. Fox*, 125 Pa. St. 568; *Fitzwater's Appeal*, 94 Pa. St. 141; *Biddle's Estate*, 128 Pa. St. 59; *Hancock's Estate*, 13 Phila. (Pa.) 283; *Morrison v. Truby*, 145 Pa. St. 540; *Murchison v. Whitted*, 87 N. Car. 469;

to a life interest, as to X for life, remainder to A, and if A dies unmarried, or without children or issue, to B.¹

Baker v. McGrew, 41 Ohio St. 113; *Chaplin v. Turner*, 2 Rich. Eq. (S. Car.) 138; *Vanderzee v. Slingerland*, 103 N. Y. 47; *McLoughlin v. Maher*, 17 Hun (N. Y.) 215; *Gibson v. Walker*, 20 N. Y. 479; *Leonard v. Kingsland*, 67 How. Pr. (N. Y. C. Pl.) 431; *Mead v. Maben* (Supreme Ct.), 14 N. Y. Supp. 732; *Wright v. Charley*, 129 Ind. 257; *Coe v. James*, 54 Conn. 511; *Denise v. Denise*, 37 N. J. Eq. 163; *Barrell v. Barrell*, 38 N. J. Eq. 60; *Joseph v. Ulitz*, 34 N. J. Eq. 1. See further *Issue*, vol. 11, p. 919.

1. *O'Mahoney v. Burdett*, L. R., 7 H. L. Cas. 388; *Ingram v. Soutten*, L. R., 7 H. L. Cas. 408. See *Sims v. Conger*, 39 Miss. 233; *Nellis v. Nellis*, 99 N. Y. 505.

In *Edwards v. Edwards*, 15 Beav. 357, *Romilly, M. R.*, held that if the gift be in remainder after a life interest, words importing death without children would *prima facie* be restricted to the event of death before the period of distribution.

For similar decisions in the *United States*, see *Birney v. Richardson*, 5 Dana (Ky.) 430; *Wurts v. Paige*, 19 N. J. Eq. 365; *Wolfe v. Van Nostrand*, 2 N. Y. 440; *M'Graw v. Davenport*, 6 Port. (Ala.) 319; *Price v. Johnson*, 90 N. Car. 592; *Blum v. Evans*, 10 S. Car. 56; *McCormick v. McElligott*, 127 Pa. St. 230.

The doctrine was repudiated by the House of Lords. *O'Mahoney v. Burdett*, L. R., 7 H. L. Cas. 388; *Ingram v. Soutten*, L. R., 7 H. L. Cas. 408.

In *O'Mahoney v. Burdett*, L. R., 7 H. L. Cas. 395, *Lord Cairns* said, in referring to the decision of *Romilly, M. R.*, in *Edwards v. Edwards*, 15 Beav. 357: "With regard to the second class of cases, namely, gifts to A for life, and if he shall die without children, over, the Master of the Rolls expresses himself thus: 'In the second of the supposed cases there is a manifest distinction. There the event spoken of, on which the legacy is to go over, is not a certain but a contingent event. It is not in case of the death of A, but in case of his death without children; and here it would be importing a meaning and adding words to the will, if it were to be construed to import as a condition which was to entitle B to take, that the

death of A without children must happen before some particular period. In these cases, therefore, it has always been held that if at any time, whether before or after the death of the testator, A should die without leaving a child, the gift over takes effect and the legacy vests in B. This is established by the case of *Farthing v. Allen*, 2 Madd. 310, mentioned in *Maddocks* but reported only in *Jarman on Wills*, vol. 2, p. 688.' My Lords, I agree with these observations, but I must observe in passing that I am unable to understand how it is not, to use the expression of the Master of the Rolls, 'importing a meaning and adding words to the will,' if you construe it to imply, as a condition which is to entitle B to take, that the death of A without children must happen before some particular period, any more where there is not than where there is a previous life estate." In this case there was a gift of £1,000 consols to A for her life, after her death to her daughter B; "if B should die unmarried or without children, the consols I here will to revert to C." The will then appointed D residuary legatee. Both A and C died in the lifetime of the testatrix. On her death B entered into possession and married, but after some years died, without ever having had a child. Held, that on the death of B without children, the gift over to the residuary legatee took effect, and that it was not affected by the death of C in the lifetime of the testatrix. The gift to C failed by lapse, and the residuary legatee became entitled to take all that C, if living at the death of the testatrix, could have taken.

Instances in Which the Period of Defeasibility Is Limited.—"There may, however, be circumstances in the will limiting the defeasibility to some earlier time than the death of the legatee without issue. Some of the cases decided on the authority of *Edwards v. Edwards*, 15 Beav. 357, are probably not reconcilable with the rule laid down in *Ingram v. Soutten*, L. R., 7 H. L. Cas. 408. See *Allen's Estate*, 3 Dr. 380.

"The following rules seem, however, to be admitted in *O'Mahoney v. Burdett*, L. R., 7 H. L. Cas. 388.

"1. Possibly, where there is a gift

over, if any members of a class die without issue, to the survivors, the gift over must take effect, if at all, before the time when the survivors are to be ascertained.

"Thus, if the gift is immediate, the gift over may be limited to the happening of the event in the testator's lifetime. *Johnson v. Smaling*, 26 W. R. 231. See *Apsey v. Apsey*, 36 L. T. N. S. 941, a case apparently inconsistent with *Bowers v. Bowers*, L. R., 8 Eq. 283.

"If the gift is, after a life interest, to several, and if any die without issue to the survivors, the gift over may, in the same way, be limited to death without issue before the tenant for life. See *Clark v. Henry*, L. R., 11 Eq. 222; L. R., 6 Ch. 588; *Besant v. Cox*, 6 Ch. Div. 604.

"2. If the fund is vested in trustees who are directed to distribute it at a certain time, so that the trusts then determine, and the legatees who are to take upon the death of prior legatees without issue are contemplated as taking through the medium of the same trustees, there is *prima facie* reason for restricting the death without issue to death without issue before the period of distribution. *Galland v. Leonard*, 1 Swanst. 161; *Wheable v. Withers*, 16 Sim. 505; *Edwards v. Edwards*, 15 Beav. 357; *Beckton v. Barton*, 27 Beav. 99; *Dean v. Handly*, 2 H. & M. 635. See *Smith v. Colman*, 25 Beav. 217.

"But words directing payment or distribution at a certain time will not confine the contingency to that time, if the persons to take upon the death without issue of a prior legatee are not treated as taking through the medium of the same payment or distribution. *Gosling v. Townshend*, 17 Beav. 245; 2 W. R. 23.

"3. And if there are no trustees, but payment or division is directed at the death of the tenant for life, and all the subsequent dispositions are made with reference to the same payment or division, the death without issue will be confined to such death before the period of distribution. *Olivant v. Wright*, 1 Ch. Div. 346. See *In re Anstice*, 23 Beav. 135; *Pearman v. Pearman*, 33 Beav. 394.

"So, if there is a life tenancy and then a gift to a class to be paid when they respectively attain twenty-one, and, if any die without issue, to the survivors, to be paid at the same time as the original share, death without issue will

be limited to such death under twenty-one. *In re Johnson's Trusts*, 10 L. T. N. S. 445; *In re Hayne's Trusts*, 18 L. T. N. S. 16.

"Similarly, if the gift is to A if living at the death of the tenant for life, and if not, to his children, and if he dies without children, over, the ultimate gift over is confined to the lifetime of the tenant for life. *Andrews v. Lord*, 8 W. R. 405. See *Wood v. Wood*, 35 Beav. 587; *In re Hill's Trusts*, L. R., 12 Eq. 302.

"4. When there is a gift over upon death, without issue, before a given time, of all the legatees whose shares have previously been given over upon death leaving issue indefinitely, or if the gift to the persons who are to take upon death of the prior legatees, without issue, is again given over upon the death of such persons before a certain time, there is a strong argument for restraining the prior gift over to death of the prior legatees without issue before the same time. *In re Hayes' Will*, 9 Jur. N. S. 1068; *In re Sarjeant*, 11 W. R. 203; *Da Costa v. Keir*, 3 Russ. 360. See *Doe v. Sparrow*, 13 East 359; *Lloyd v. Davies*, 15 C. B. 76; 80 E. C. L. 75.

"6. If the gift is followed by words of limitation or benefit, as 'to A, his heirs and assigns,' or 'to A forever,' or 'to A for his own use and benefit,' and the property is then given over upon contingencies, one or other of which must happen, as, for instance, upon death either with or without children, the defeasibility will be limited by the period of distribution, whether it is the testator's death or some other time, in order not to cut down the previous absolute interest to life interests merely. *Doe v. Sparrow*, 13 East 359; *Clayton v. Lowe*, 5 B. & Ald. 636; *Gee v. Manchester*, 17 Q. B. 737; 79 E. C. L. 735; *Woodburne v. Woodburne*, 23 L. J. Ch. 336; *Da Costa v. Keir*, 3 Russ. 360; *Slaney v. Slaney*, 33 Beav. 631.

"If, however, the gift is merely in general words, without any express indication that it is intended to be absolute, the fact that the contingencies upon which the property is given over in effect reduce the interest to a life interest, will not have the effect of confining the happening of the contingencies to the period of distribution. *Gosling v. Townshend*, 2 W. R. 23; *Cooper v. Cooper*, 1 K. & J. 658; *Bowers v. Bowers*, L. R., 8 Eq. 283; L. R., 5 Ch. 244.

26. Successive and Concurrent Interests—*a*. DEVISE TO A CLASS IN TAIL.—A devise to the sons of a person in tail is *prima facie* a gift to a class.¹ But, if there is a general intention manifest to

"7. It is not, however, necessary, in order to limit the defeasibility, that the gifts over should be upon contingencies, one or other of which must occur, so as to cut down the prior interest to a life estate, unless the defeasibility is limited.

"In *Clayton v. Lowe*, 5 B. & Ald. 636; *Gee v. Manchester*, 17 Q. B. 737, and *Woodburne v. Woodburne*, 23 L. J. Ch. 336, the interest of the surviving legatee would not necessarily have been reduced to a life estate, and if it is once clear that the legatee is to take an absolute interest, a gift over in one event is as inconsistent with that absolute interest as a gift over in several, one of which must occur. And accordingly, where the intention to give indefeasible interests at a particular time is clear, the gift over upon a single contingency, as upon death without issue, will be limited to death without issue before that time. *Brotherton v. Bury*, 18 Beav. 65; *Ware v. Watson*, 7 De G. M. & G. 248; *In re Anstice*, 23 Beav. 135; *Clark v. Henry*, L. R., 11 Eq. 222; L. R., 6 Ch. 588; perhaps *Barker v. Cocks*, 6 Beav. 82, and *Davenport v. Bishopp*, 2 Y. & C. C. 463, come under this head.

"8. If the gift is contingent, as to A at twenty-one, there is some reason for restricting a gift over upon death coupled with a contingency to such death under twenty-one. It seems clear that this construction would be adopted if the gift over is, upon the death of A leaving children, to his children, in order to provide for the children of A, if he dies under twenty-one leaving children. *Home v. Pillans*, 2 Myl. & K. 15.

"It seems the same would be the case if the person to take under the gift is the widow of the legatee. *Randfield v. Randfield*, 8 H. L. Cas. 225.

"The gift over upon death without issue cannot, however, be restricted to the time of vesting, where there is an express gift over upon death merely, before the time of vesting. *Martineau v. Rogers*, 8 De G. M. & G. 328.

"Whether the defeasibility would be limited where the gift over is to strangers is more doubtful. See *Andrews v. Lord*, 6 Jur. N. S. 865; and see *In re Dowling's Trusts*, L. R., 14 Eq. 463; *Smith v. Spencer*, 6 De G. M. & G. 631.

"9. Where there is a gift to two persons, and if either dies under twenty-one without issue, to the survivor, and if both die without issue, over, the defeasibility will be restricted to the age of twenty-one. *Kirkpatrick v. Kirkpatrick*, 13 Ves. Jr. 476; *Thackeray v. Hampson*, 2 Sim. & Stu. 214. See *Else v. Else*, L. R., 13 Eq. 196.

"10. When there is a gift at twenty-one, or upon marriage with consent, a gift over upon marriage without consent has been confined to the age of twenty-one. *Desbody v. Boyville*, 2 P. Wms. 547; *Knapp v. Noyes*, Amb. 662; *Osborn v. Brown*, 5 Ves. 527; *West v. West*, 4 Giff. 198; *Duggan v. Kelly*, 10 Ir. Eq. 295.

"11. It may be noticed that where there is a gift to several, and in case of the death of any to the survivors, and if they die without children, over, the gift, in case of death, will not be extended to mean death at any time, nor will the gift upon death without children be confined to such death in the lifetime of the testator. *Clarke v. Lubbock*, 1 Y. & C. C. 492; *Child v. Giblett*, 3 Myl. & K. 71." *Theobald on Wills* (2d ed.) 486.

Alternative Gifts.—The doctrine as to alternative gifts (see part 6 of extract from *Theobald*) was recognized in *Umstead's Appeal*, 60 Pa. St. 365. *Barrell v. Barrell*, 38 N. J. Eq. 62.

1. *Theobald on Wills* (2d ed.) 314; *De Windt v. De Windt*, L. R., 1 H. L. 87; *Surtees v. Surtees*, L. R., 12 Eq. 400.

Testator directed his trustees to purchase lands in the counties of N. and D., to be settled, on the death of the eldest son of J. S. without issue (which happened), to the use of every son of J. S. then living, or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his decease to the use of such son's first and every other son successively in tail male, and on failure of such issue, to the testator's right heirs. *Held*, that the younger sons of J. S. took as tenants in common for life, with remainders as to each son's share to his first and other sons in tail male, with cross remainders

keep the estates together in a single line of enjoyment, the members of the class will take successively.¹

b. GIFTS TO PARENT AND CHILDREN—(*Compare supra*, this title, *Devise to A, or to A for Life, or to A and His Heirs, and if He Die Without Issue, Over*; also *Gift to A and His Children—Rule in Wild's Case*).—Where a testator gives property to a parent and his children, *simpliciter*, and there are children then in existence, the children and the parent take the property together, either as joint tenants or as tenants in common, according to the words of the will; but if there be any superadded words, which import a desire that the property should be settled, the court will lay hold of the words, and will infer a gift to the parent for life with remainder to the children.²

over. *Surtees v. Surtees*, L. R., 12 Eq. 400.

1. Theobald on Wills (2d ed.) 314; *Cradock v. Cradock*, 4 Jur. N. S. 626; *Allgood v. Blake*, L. R., 7 Exch. 339; L. R., 8 Exch. 160.

W. C., after devising an estate for life to A. and B. in succession, with remainder in each case to trustees, devised the same estate to the first son of the body of B. in tail male; and in default of such issue to the second, third, and all and every other the son and sons of B. severally and successively in tail male; and in default of such issue, to the third and all and every other the son and sons of the body of A., and the heirs male of such son and sons; and in default of such issue, to his own (the testator's) right heirs in fee. A. died in 1820, leaving six sons. B. died in 1845, without leaving issue male. Upon the death of B., J. C., the third son of A., entered into possession, and continued in possession down to the time of his death in 1856, and thereupon his eldest son entered into possession. On bill filed by the three younger sons of A., the court held that the devise to the third and all and every other the son and sons of the body of A. did not give them an estate in joint tenancy, or a tenancy in common, but an estate in succession in tail male, and that J. C. took the entirety; and he having executed a disentailing deed, his heir at law was entitled to the estate in fee. *Cradock v. Cradock*, 4 Jur. N. S. 626.

2. Romilly, M. R., in *Mason v. Clarke*, 17 Beav. 131. See *Wilson v. Maddison*, 2 Y. & C. 372; *Beales v. Crisford*, 13 Sim. 592; *Cannon v. Apperson*, 14 Lea (Tenn.) 553; *Frank v. Unz*, 91 Ky. 621; *Biggs v. McCarty*, 86 Ind. 352; *Feemster v. Good*, 12 S. Car.

573; *Gillespie v. Schuman*, 62 Ga. 252; *Rich v. Rogers*, 14 Gray (Mass.) 174; *Oyster v. Oyster*, 100 Pa. St. 538. *Compare Green's Estate*, 140 Pa. St. 253. For other authorities see *ISSUE*, vol. 11, pp. 879-886.

The fact that the gift is to testator's wife, in trust for herself and children, does not necessarily show that they are not to take concurrently. *Newill v. Newill*, L. R., 7 Ch. 253.

"But, if there is anything to show that the parent is to take a different interest from that of the children, he will take for life, with remainder to the children.

"1. If the bequest is to A and his children as tenants in common, if more than one, showing that the tenancy in common is to apply to children only, the father takes for life. *Doe v. Burn-sall*, 6 T. R. 30; 1 B. & P. 215, where issue must have meant children, by the force of the gift over in default of issue of such issue. See *Doe v. Elvey*, 4 East 313.

"2. A devise to A and his children, and the heirs of the parent and children, gives a joint estate in fee, or an estate tail to the parent, according as there are or are not children living at the time of the devise. *Oates v. Jackson*, 2 Stra. 1172; *Underhill v. Roden*, 2 Ch. Div. 494.

"But a devise to A and his children, and the heirs of the children, would give A an estate for life with remainder to his children. *Jeffery v. Honey-wood*, 4 Madd. 211, was decided on this ground, though it would seem the word heir referred to the parent as well as the children.

"3. If the bequest is to a father and his children, and there is a desire expressed that the whole fund should be

c. GIFTS TO PARENT AND ISSUE.—See ISSUE, vol. 11, p. 879.

27. Joint Tenants and Tenants in Common.—See JOINT TENANTS, vol. 11, p. 1057.

settled or secured, a term which would have no meaning as applied to the father's interest as joint tenant, the father takes for life. *Vaughan v. Headfort*, 10 Sim. 639; *Combe v. Hughes*, L. R., 14 Eq. 415.

"If a continuing trust is created, which is contemplated as outlasting the parent's life, there is room for a similar argument in favor of a life interest in the parent. *Ogle v. Corthorn*, 9 Jur. 325.

"4. Whether, where the gift is to the separate use of the mother, it will be considered a sufficient indication of intention to cut the interest of the parent down to a life interest is not certain. On the whole, the better opinion seems to be that where the words creating the separate use apply to the whole fund or legacy, it will be construed as giving the mother a life interest. *Newman v. Nightingale*, 1 Cox 341; *French v. French*, 11 Sim. 257; *Bain v. Lescher*, 11 Sim. 397; *Froggatt v. Wardell*, 3 De G. & S. 685; *Dawson v. Bourne*, 16 Beav. 29; *Jeffery v. De Vitre*, 24 Beav. 296; *Scott v. Scott*, 11 Ir. Ch. 114; *Ogle v. Corthorn*, 9 Jur. 325, in which case the Vice Chancellor Wigram thought that a gift to the separate use was conclusive against the children participating with their mother. *Combe v. Hughes*, L. R., 14 Eq. 415. On the other hand the case of *DeWitte v. De Witte*, 11 Sim. 41, and *Bustard v. Saunders*, 7 Beav. 92 (which, however, only followed *DeWitte v. DeWitte*, 11 Sim. 41), are inconsistent with this rule.

"If the interest of the mother alone is given to her separate use, or the separate use attaches to the interests of all alike, no argument in favor of a life estate can be founded upon the separate use. *Fisher v. Webster*, L. R., 14 Eq. 283; *Newsom's Trusts*, L. R., 1 Ir. 373. The same is the case if her interest only is directed to cease on marriage. *Izod v. Izod*, 11 W. R. 452.

"5. If upon the marriage of their mother the fund is to be divided among the children, this affords an argument that it is not to be divided before, and the mother takes for life or till marriage. *Mill v. Mill*, Ir. R., 9 Eq. 104; *Ir. R.*, 11 Eq. 158.

"6. If the whole fund is contemplated

as remaining undisposed of, if there are no children, if there is a gift over for instance in default of children, the same construction is adopted. *Audsley v. Horn*, 26 Beav. 195; 1 De G. F. & J. 226. See *Lampley v. Blower*, 3 Atk. 396.

"7. If the children are contemplated as taking shares in the whole fund by a direction, for instance, that if there is but one child, the whole is to go to that child, since the children are to take the whole, the parent to take nothing must take a life interest. *Garden v. Pulteney*, Amb. 499; 2 Eden 323; *Audsley v. Horn*, 26 Beav. 195; 1 De G. F. & J. 226.

"8. If the bequest is such as expressly to include all the children of the parent, and not merely those in being at the period of distribution, it will be construed to give a life estate to the parent, with remainder to the children, since it is a singular intention to impute to the testator that the parent's interest in the estate should continually diminish on the birth of a new child. *Jeffery v. De Vitre*, 24 Beav. 296; *Jeffery v. Honeywood*, 4 Madd. 211.

"9. If the legacy is payable in part at once, and in part at a future period, the parent will take for life, as otherwise different classes of children might take the two portions. *Morse v. Morse*, 2 Sim. 485.

"10. If, in the event of the mother's death before the testator, the children are to take unequal shares, the presumption of joint tenancy is apparently rebutted. *Armstrong v. Armstrong*, 7 Eq. 518.

"11. If the children are contemplated as not enjoying the property till after their mother's death, by being called heirs, for instance, the parent takes for life only. *Crawford v. Trotter*, 4 Madd. 192; *Ogle v. Corthorn*, 9 Jur. 325; *Wilson v. Vansittart*, Amb. 561.

"12. There may be a reference to another gift, to assist the court in giving the parent a life interest. *French v. French*, 11 Sim. 257; *In re Owen's Trusts*, L. R., 12 Eq. 316.

"13. An executory trust for A and her children will be settled on A for life, and afterwards for her children. *In re Bellasis' Trust*, L. R., 12 Eq. 218." *Theobald on Wills* (2d ed.) 314.

28. *Tenants by Entireties*.—See JOINT TENANTS, vol. 11, p. 1069.

29. *Interests Undisposed of*—*a*. TITLE OF HEIRS AND NEXT OF KIN.—Interests undisposed of in realty and personalty pass to the heir at law or next of kin, as the case may be, who can only be excluded by express words or by plain and necessary implication.¹ Directions excluding them from any share in the testator's property will, as a general rule, be taken to have been inserted only

1. Theobald on Wills (2d ed.) 610; Schouler on Wills (2d ed.), § 545; Randall v. Bookey, 2 Vern. 425; Halliday v. Hudson, 3 Ves. Jr. 210; Rogers v. Rogers, 3 P. Wms. 193; Ramsay v. Sheldermine, L. R., 1 Eq. 129. See McDougald v. Gilchrist, 20 Fla. 573; Hoffner v. Wynkoop, 97 Pa. St. 130; McDevitt's Appeal, 113 Pa. St. 103; Hitchcock v. Hitchcock, 35 Pa. St. 393; Cunningham v. Dungan, 83 Ind. 572; Jackson v. Schaubert, 7 Cow. (N. Y.) 189; Jackson v. Burr, 9 Johns. (N. Y.) 104; Catton v. Taylor, 42 Barb. (N. Y.) 578; Reed v. Underhill, 12 Barb. (N. Y.) 113; Havens v. Havens, 1 Sandf. Ch. (N. Y.) 324; Wood v. Keyes, 8 Paige (N. Y.) 365; Bulkley v. Bulkley, 1 Root (Conn.) 78; Wheat v. Wheat, 24 Ala. 429; Denson v. Mitchell, 26 Ala. 360; Crane v. Doty, 1 Ohio St. 279; Haralson v. Redd, 15 Ga. 148; Thomas v. Benton, 4 Desaus. (S. Car.) 17; Pulliam v. Byrd, 2 Strobb. Eq. (S. Car.) 134; Wilkins v. Taylor, 8 Rich. Eq. (S. Car.) 291; Rosborough v. Hemphill, 5 Rich. Eq. (S. Car.) 95; Philleo v. Holliday, 24 Tex. 38; Henderson v. Peachy, 3 Leigh (Va.) 64; Luckey v. Dykes, 10 Miss. 60; Winston v. Webb, Phill. Eq. (N. Car.) 1; Miller v. London, 1 Wins. Eq. (N. Car.) 81; Hastings v. Earp, Phill. Eq. (N. Car.) 5; Feimster v. Tucker, 5 Ired. Eq. (N. Car.) 69; Phifer v. Phifer, 6 Ired. Eq. (N. Car.) 155; Alexander v. Alexander, 6 Ired. Eq. (N. Car.) 229; Hardie v. Cotton, 1 Ired. Eq. (N. Car.) 61; Morrison v. Kennedy, 2 Ired. Eq. (N. Car.) 379. Compare Snelgrove v. Snelgrove, 4 Desaus. (S. Car.) 274.

Instances Illustrating the Rule.—

After several devises and bequests, the testator declared as follows: "All the residue and remainder of my estate, of every description, and wherever found, I order and direct to be divided into twenty-two shares, and divided as follows: to wit, S. four shares," etc.; then naming thirteen others, and giving each a different number of shares, the aggregate amounting to but twenty shares.

It was held that the remaining shares were undisposed of by the will, and did not pass to the legatees named. Duffield v. Morris, 8 W. & S. (Pa.) 348.

A testatrix made a will, wherein, after giving several legacies, she used these words: "The residue of my property, after paying my just debts, I give and bequeath to M. and D., constituting them residuary legatees to all my property not otherwise disposed of, whether real or personal, for their use and benefit, and after the death of D., what remains of her part to be put at interest for the benefit of P. and R." She afterwards made a codicil, wherein she said: "First. The one moiety or half of my estate, which in said will I devised to A. I do, by this codicil, devise jointly to said A. and his wife E., as a life estate, to hold, possess, and enjoy by them, or either of them who may survive the other, during his or her natural life. Second. The moiety which, etc., I devised to B., by this codicil my will is, that after the decease of said B., said moiety is to descend to C. and D. and F. equally." It was held that, as to the one moiety, M. and D. took but a life estate in the real estate, and the income only of the personal estate, and that the reversionary interest was to be regarded as undivided property of the testatrix, and was to be distributed to her next of kin by the statute of distributions. Pickering v. Langdon, 22 Me. 413.

Where a testator by his will expressed his intention to dispose of the bulk of his estate by deeds and notes, and, after certain specific bequests to his wife, gave a pecuniary legacy to one granddaughter, who, he declared, should have only the amount so bequeathed to her, but died without making any other disposition of his estate, it was held that he died intestate as to the property not specifically bequeathed, and that the same descended to his heirs at law, including the said granddaughter. Hitchcock v. Hitchcock, 35 Pa. St. 293.

The testator ordered his executor to

for the purpose of the dispositions made by the will, and will not exclude them from taking property undisposed of.¹

pay his debts and to pay his wife twenty-two pounds, and gave legacies to his children by name, and ordered his executor to have his estate, real and personal, appraised, and if the value amounted to more than the sums bequeathed, the surplus was to be divided among the legatees in proportion to their legacies; and if less, then a deduction to be made in like proportion, provided that his debts should be first paid; and he declared that it was to be understood that all of the legatees and heirs named were to receive their several sums out of his estate, the lands and chattels which he left at his death, and he appointed two of his sons and legatees his executors. It was held that there was no devise of the real estate; that, at most, the executors only had a power to sell the land, and that, if so, the lands until sold descended to the heirs. *Jackson v. Burr*, 9 Johns. (N. Y.) 104; *Jackson v. Schaubert*, 7 Cow. (N. Y.) 187; *Catton v. Taylor*, 42 Barb. (N. Y.) 578; *Reed v. Underhill*, 12 Barb. (N. Y.) 115.

Where it appeared from the face of the will that certain slaves directed to be emancipated (ineffectually) were not intended to be included in a clause bequeathing a residue, it was held that such slaves would go to the next of kin as property undisposed of by the will. *Feimster v. Tucker*, 5 Jones Eq. (N. Car.) 69.

Property Undisposed of in Consequence of Unexecuted Power.—A testator made the following devise: "I will and bequeath the residue of my estate to my wife, to manage the same as she may think most advisable, for her own support and for the support and education of our children, as long as she remains a widow, and should she again intermarry, it is my will that my property should be divided between her and my children, agreeable to the laws of *North Carolina*; and should she not intermarry until my children become of lawful age, I hereby invest her with full authority to divide my property among them as she may deem most expedient." It was held that the widow, remaining unmarried until her death, had no right to make disposition of this property at her discretion by will, but that in such event she had a life estate, and the property after her death was

to be divided among the children of her testator, as it would have been divided if he had died intestate. *Phifer v. Phifer*, 6 Ired. Eq. (N. Car.) 155. See *Holt v. Hogan*, 5 Jones Eq. (N. Car.) 82; *Dominick v. Sayre*, 3 Sandf. (N. Y.) 555; *McGaughey v. Henry*, 15 B. Mon. (Ky.) 383; *Haralson v. Redd*, 15 Ga. 148.

1. *Theobald on Wills* (2d ed.) 610. See *Johnson v. Johnson*, 4 Beav. 318; *Sykes v. Sykes*, L. R., 3 Ch. 301; *Ramsay v. Shelmerdine*, L. R., 1 Eq. 129; *Gould v. Gould*, 32 Beav. 391; *Coffman v. Coffman*, 85 Va. 459; *Ranchfuss v. Ranchfuss*, 2 Dem. (N. Y.) 271; *Luther Lafflin Mills v. Newberry*, 112 Ill. 123; *Crane v. Doty*, 1 Ohio St. 279.

In *Fitch v. Weber*, 6 Hare 145, the testatrix devised and bequeathed her real and personal estate in trust, as to the real estate, for sale, as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale as a fund of personal and not real estate, for which purpose such proceeds, or any part thereof, should not, in any event, lapse or result for the benefit of her heir at law; and, after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should, by any codicil to that her will, direct or appoint. The testatrix made no codicil. *Held*, that the heir at law was entitled to the proceeds of the real estate undisposed of by the will, *Wigram, V. C.*, saying: "What, in the first place, is the purpose for which the testatrix says she excludes the heir? It is simply that the real estate may be made a fund of personal estate. But that purpose will not *per se* disinherit the heir, except for the purposes of the will; and if the purposes for which the heir at law is excluded may be taken as the measure of the intended effect of the exclusion, the clause will disinherit the heir for the purpose of the will, but no further."

"According to the older cases, a gift to the testator's widow, in lieu of all claims upon his estate or in lieu of thirds, does not deprive her of a share in property undisposed of. This has been so held where a complete disposition was attempted to be made by the testator. *Pickering v. Stanford*, 2 Ves.

b. TITLE OF EXECUTOR TO RESIDUE UNDISPOSED OF.—See EXECUTORS AND ADMINISTRATORS, vol. 7, p. 236.

c. UNEXHAUSTED INTEREST IN LANDS DEVISED FOR SPECIAL PURPOSES.—Where the whole legal estate is given for the purpose of satisfying trusts expressed, and these trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose, with an intention to give to the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him. Under this distinction a devise charged with debts gives the devisee the beneficial interest in the surplus; but a devise upon trust to pay debts gives rise to a resulting trust in the surplus for the benefit of the heir at law.¹

d. CHARGES ON REALTY—PROCEEDS OF LAND DIRECTED TO BE SOLD.—See LEGACIES, vol. 13, p. 42.

e. CHARGES ON MIXED FUNDS.—See LEGACIES, vol. 13, p. 45.

Jr. 272, 581; 3 Ves. Jr. 332, 492. And the same rule has been applied in cases where there was, on the face of the will, an intestacy. *Johnson v. Johnson*, 4 Beav. 318; *Travenor v. Grindley*, 32 L. T. N. S. 424. Possibly, if the words of exclusion are large and comprehensive, and there is an intestacy on the face of the will, a gift in lieu of all claims and demands would exclude the widow from a share in property undisposed of. *Lett v. Randall*, 3 S. & G. 83. Upon similar principles, a direction that one of the next of kin shall take no share in the testator's property will not prevent him from taking his share under the Statutes of Distribution. *Johnson v. Johnson*, 4 Beav. 318; *Sykes v. Sykes*, L. R., 4 Eq. 200; L. R., 3 Ch. 301. See *Ramsay v. Shelmerdine*, L. R., 1 Eq. 129; *Gould v. Gould*, 32 Beav. 391.

"A limitation to the next of kin of a married woman, as if she had died unmarried, will not exclude the husband's title as administrator if there are no next of kin. *Hawkins v. Hawkins*, 7 Sim. 173.

"On the other hand, a gift to a child of 'ten shillings and no more,' has been held to bar the child's right as next of kin where no disposition was attempted to be made by the will. *Breton v. Vachell*, 5 Bro. P. C. 51; 11 Vin. Ab. 185. And a clause excluding some of the next of kin may be so framed as in effect to amount to a gift to the others. *Bund v. Green*, 12 Ch. Div. 819." *Theobald on Wills* (2d ed.) 611, 612.

1. Lord Eldon, in *King v. Denison*, 1 Ves. & B. 272. See further, upon this distinction, *Wych v. Packington*, 3 Bro. P. C. Toml. 44; *Hobart v. Suffolk*, 2 Vern. 644; *Watson v. Hayes*, 5 Myl. & C. 125; *Collis v. Robins*, 1 De G. & S. 131; *Wills v. Wills*, 1 D. & W. 439; *Bird v. Harris*, L. R., 9 Eq. 204; *Hiel v. London*, 1 Atk. 618; *Rogers v. Rogers*, 3 P. Wms. 193; *Dawson v. Clark*, 15 Ves. Jr. 409; 1 Jarm. Wills (5th ed.) *556.

"If I give to A and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest." Lord Eldon in *King v. Denison*, 1 Ves. & B. 272.

Every conversion, however absolute, will be deemed a conversion for the purpose of the will only, unless the testator distinctly indicates a different intention. *Richards v. Miller*, 62 Ill. 418.

Hence, when land is required to be converted into money for certain purposes, and more is sold than is required for those purposes, the surplus proceeds will be treated as land. *Cook v. Cook*, 20 N. J. Eq. 377.

f. DEVOLUTION OF INCREASE IN RENTALS DEVISED TO CHARITY—THETFORD SCHOOL CASE.—Where a testator gives for charitable purposes the whole of an estate, or all the rents of an estate, apportioning the rents so as to exhaust them in charity, any increase in the rents must be applied to the same charitable purposes.¹ So again, where a testator has expressed in his will

1. *Beverley v. Atty. Gen'l*, 6 H. L. Cas. 310; *Thetford School Case*, 8 Co. 130; *Atty. Gen'l v. Johnson*, Amb. 190; 2 *Story's Eq. Jur.*, § 1178. See *Atty. Gen'l v. Trinity Church*, 9 Allen (Mass.) 422.

The principle had its origin in the *Thetford School Case*, 8 Co. 130 b., in which land of the value of £35 a year was devised to certain persons, and their heirs, for the maintenance of a preacher, etc., of a master and usher, and of a grammar school, and of certain poor people; special distribution was made amongst them by the testator in the same will; the sums distributed amounting in the whole to £35 per annum, the then yearly profit of the land. The land became of greater value. *Held*, that the revenue and profit of the said land should be employed to the increase of the stipend of the preacher, schoolmaster, etc., and poor, and if any surplusage remained, it should be expended for the maintenance of a greater number of poor, etc., and nothing should be converted by the devisees to their own use.

In *Atty. Gen'l v. Bristol*, 2 J. & W. 307, 320, Lord Eldon said: "The doctrine laid down in the *Thetford Case*, which has been adhered to since, was that if the whole land and rents of it at the time are given for a charity, those to whom the lands are given must, if there is an increase in the rents, apply them to charitable purposes. There are other cases where the same doctrine has been held, not only where the gift has been of lands, but where it has been of rents and profits. . . . If a testator gives all his lands to charitable uses, and then mentions some, but not so many as to exhaust the whole value of the land, yet the gift will carry all the rents and profits in point of application to charitable purposes."

And in referring to the application of the principle to a devise of rents and profits, he further observed, in *Atty. Gen'l v. Skinners' Co.*, 2 Russ. 443: "There are many cases which have decided that, where it appears on the will

itself what was the yearly value of the estates given to charitable purposes, and the testator has parceled among the different charities the whole of that yearly rent or value so attributed to the property, any future increase of rents must go to charity. The court seems to have said that the testator has himself declared what constitutes the whole of the estate, and that in parceling out his dispositions to charity, he has exhausted in charity what, he himself has said, constitutes the whole of the estate; and, from the circumstance of his knowing what was the then present value of the estate, and devoting it exclusively to charity, we have inferred an intention on his part that the whole of the estate should be given to charitable purposes. The doctrine of these cases is neither more nor less than this: A gift of the rents and profits of an estate is a gift of the estate itself; such a devise as I have just mentioned is the gift of the rents and profits; it is therefore a gift of the estate." Of course, if the particular objects of the charity have ceased to exist, so that the surplus cannot be so applied, a question might arise as to the application of the *cy pres* doctrine, as to which see *Jackson v. Phillips*, 14 Allen (Mass.) 539.

Cases Not Within the Rule.—"The cases not coming within the rule in the *Thetford School Case* will fall under two heads.

"1. Where the sums given to the various charitable objects do not exhaust the whole annual value of the lands at the time of the devise. (*Atty. Gen'l v. Bristol*, 2 J. & W. 294.) If property be given to a corporate body, and certain annual sums are directed to be paid thereout, which are less (by however small an amount) than the annual rents at the time of the devise, the rule does not apply, and the corporate body will in general be held to take the increased rents for their own benefit.

"Thus, in *Atty. Gen'l v. Brazenose College*, 2 Cl. & F. 295, where the rent was at the time of the devise £66. 13s. 4d. a year by the foundation accounts,

that he intends to devote the whole of some particular property to charities, and has then gone on to say so much to one and so much to another, but not so as to exhaust the whole property, the court fastens upon the intention expressed in the beginning of the bequest, and although the testator has not so apportioned, yet, according to its well-known jurisdiction to make a scheme for charity, it has devoted the whole to charity.¹ Thus, if a testator gives the whole of his estate to charity, apportioning the rents, such as they are, amongst the different charitable objects, if those rents increase, the increase must go in the proportions in which the testator had given the original rents. So, if a testator declares his intention to give the whole to charity, but specifically appropriates only a certain part, still, the general intention in favor of charity prevails, and the proportion not appropriated by him will be appropriated by the court of chancery to charity.²

and the charges upon it amounted to £65 3s. 4d. only, the increased rents were held to belong to the college. So in *Atty. Gen'l v. Trinity College, Cambridge*, 34 Beav. 383, where the testator devised real estates, which he described as 'of the yearly value of fourscore pounds or thereabouts,' to the college, and at the testator's death the rents exceeded the specific payments to be made thereout by £1 6s. 8d., the college was entitled to the whole surplus rents.

"2. The rule in the Thetford School Case does not apply, where the whole rents at the time of the devise are disposed of by the will, but part only of the rents is given to charitable objects, and the remaining part, under the name of surplus or overplus, is given to a corporate body, or some other object not charitable. In such cases the charitable objects have no claim to absorb the whole of the increased rents, and the corporate body, or other person to whom the surplus rents are given, will in general be entitled, after making the specific payments to the charitable objects, to take the whole of the increased rents. (*Southmolton v. Atty. Gen'l*, 5 H. L. Cas. 1; *Beverley v. Atty. Gen'l*, 6 H. L. Cas. 310.)

"It may, however, be a question in such cases, whether there is to be a proportionate augmentation of the sums devoted to charitable purposes; but such a proportionate distribution of the increased rents will not, it appears, be made without a special intention appearing to that effect. (*Atty. Gen'l v. Skinners' Co.*, 2 Russ. 438,

443.) However, where the testator directed lands of the value of £100 a year to be purchased, and gave £96 to charity, and gave 'the residue of the said sum, being £4 yearly,' to the Drapers' Company for their pains, it was held that all the objects were entitled ratably to the increased rents. (*Atty. Gen'l v. Drapers' Co.*, 4 Beav. 67.)" *Hawkins on Wills* *65.

See also, for a case held not within the principle, by reason of the peculiar provisions of the will, *Atty. Gen'l v. Trinity Church*, 9 Allen (Mass.) 422.

1. Lord Cranworth, in *Beverley v. Atty. Gen'l*, 6 H. L. Cas. 318; *Arnold v. Atty. Gen'l*, Show. P. C. 22; *Mercers Co. v. Atty. Gen'l*, 2 Bligh N. S. 165.

So, also, "if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." *Moggridge v. Thackwell*, 7 Ves. Jr. 69.

2. Lord Cranworth, in *Beverley v. Atty. Gen'l*, 6 H. L. Cas. 319. In this case Lord Cranworth said, in speaking of the principles laid down in the text: "Now those are the general rules which have been acted upon for so long a period that it would be extremely dangerous and impolitic to enter into any question as to whether they were, in their inception, founded in very good sense or not. Many of the most eminent judges, from time to time, have

30. Doctrine of Lapse.—See LEGACIES AND DEVICES, vol. 13, p. 34.
31. Administration.—See DEBTS OF DECEDENTS, vol. 5, p. 206; EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165.
32. Election.—See ELECTION, vol. 6, p. 247.
33. Conversion.—See EQUITABLE CONVERSION, vol. 6, p. 664.
34. Executor's Trusts.—See TRUSTS AND TRUSTEES, vol. 27, p. 1.

pointed out that if the doctrine, which we are now familiar with, of resulting trusts had been understood in those days as it is understood now, in all probability that construction of those devises or bequests would never have been adopted, because it is a well-known rule of law that the heir at law is not to be disinherited of anything that would come by descent to him, unless by express words or necessary implication. And Lord Hardwicke and Lord Eldon both intimated their strong opinion that if the question was now untouched by decisions, if a testator gave only £35 a year to charity, and afterwards the estate became more valuable than £35 a year, the right of the heir at law would not be affected. I do not, however, propose now at all to question that general doctrine; whether rightly or wrongly established in its origin, the doctrine is now established, and it would be very improper to depart from it. But Lord Eldon remarked, in a case that came before him in investigating this matter, in which he gave a judgment which has been almost the foundation of all our reasoning on this subject since *Atty. Gen'l v. Mayor of Bristol*, 2 Jac. & W. 294, that, after all, this question must in each case be looked at as one of construction, in order to see what is the fair inference to be deduced from the will of the testator. There may be circumstances in the case to show that the general doctrine is not applicable. Lord Eldon says, in *Atty. Gen'l v. Mayor of Bristol*, 2 Jac. & W. 294: 'As far as I have read these ancient cases,' and it seems he had quite exhausted the subject by reading them all, 'they state it to depend upon the intention of the donor, and that one way of finding out that intention is, to inquire whether the whole of the annual value of the property was at the time of the foundation of the charity distributed amongst the objects of the charity. If it was, they say that that circumstance is evidence of the donor's intention to give the whole of the increased value to the

same object.' The same doctrine was adopted by your Lordships' House in a case to which I shall presently call your attention, *Mercers' Co. v. Atty. Gen'l*, 2 Bligh N. S. 165, and which came before this House soon after Lord Lyndhurst had received the Great Seal, in 1827 or 1828. All these cases to which I have referred, in which the doctrine has been applied, are cases where the whole property has been given to charity. Up to a very recent period I have been unable to discover any case in which that doctrine has been applied where there was known by the testator to be any surplus of which he had not expressly or impliedly disposed. Lord Eldon remarked, in the *Bristol Case*: 'If I give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say that the *cestui que trust*, even in the case of a charity, is entitled to the surplus.'

In the same case, Lord Wensleydale said: "There is no question whatever with respect to the principle of law which ought to be applied to the case. My noble and learned friend has explained the law laid down in the *Thetford School Case*, 8 Rep. 130b, ed. 1826, and afterwards in the case of *Atty. Gen'l v. Mayor of Bristol*, 2 Jac. & W. 294, and the other cases to which he has referred. There is no question at all that if a testator or a donor gives the whole rents of an estate to charity, all the improved rents must go to charity also. And if, according to the doctrine of the *Thetford School Case*, he apportioned all the rents amongst all the charitable objects existing at the time of his gift, although he makes no express declaration that the surplus shall be appropriated to charity, the surplus rents must be divided in the same way. And if he leaves the surplus rents to those persons who are to administer the fund, those surplus rents are not to go to charity, but to be for the benefit of the persons to whom he leaves them."

WIND.—See note 1.

WINDMILL.—See note 2.

WINDOW.—A window is an opening in the wall of a building for the admission of light and air to the interior, and to enable those within to look out.³

WINE.—(See also INTOXICATING LIQUORS, vol. 11, p. 582).—Wine is the fermented juice of the grape.⁴

1. **Before the Wind Distinguished from "Going off Large"**—(See also NAVIGATION, vol. 16, p. 270).—There is, in nautical technicality, a difference between "going off large" and "going before the wind." "Going off large" is when the wind blows from some point abaft the beam, or over the quarter of the ship. "Going before the wind" is when the wind is free, comes over the stern, and the ship's yards are braced square across. *Hall v. The Buffalo*, 11 Fed. Cas., p. 214, No. 5927. Notwithstanding the technical distinction, the court said that the statute as to the exhibition of lights by sailing craft made no distinction between a vessel "going off large" and "going before the wind."

2. **Warranty.**—Defendant contracted with plaintiffs for the purchase of a certain windmill, tank fixtures, etc.; the warranty was on "the within ordered windmill." It was contended that the warranty on the windmill did not cover the tank; the court held otherwise, saying: "It is contended that the warranting 'the within ordered windmill,' indorsed on the back of the contract, does not cover the tank used in connection therewith. This position is not tenable. The word 'windmill' used in the contract of warranty refers to the whole machine as ordered by the defendant. Plaintiffs contracted to supply defendant with an appliance for drawing water and storing it for use of defendant's stock. Defendant was as much concerned in the tank or in the pump as in the mill proper. We construe the contract in the light of the circumstances, and, so construing, we must hold that the warranty includes tank, pump, mill—the whole plant." *Fairbanks v. De Lissa*, 36 Mo. App. 719.

3. **Insurance Contract.**—*Hale v. Springfield F. & M. Ins. Co.*, 46 Mo. App. 508, citing *Bouvier's* and *Worcester's Dictionaries*. In that case, an insurance policy provided that plate glass windows of a certain size should be

separately insured. Plaintiff contended that a plate glass front, which was immovable and stationary, was not a window, as the glass was part of the front of the building. This contention was upheld by the court, which said: "It is a matter of common information that glass enters almost as extensively into the construction of modern buildings as stone, wood, iron, etc. Its use is not so restricted in modern architecture as formerly. There are to be found, in almost any American city, houses into the structure of which glass so largely enters that they might, without impropriety, be characterized as 'glass houses.' These considerations would indicate that the clause in question is at least susceptible of the interpretation claimed by the assured. And the rule of construction in such cases is, that if there is a doubt in respect to the meaning of the terms of a clause of an insurance policy, that doubt must be resolved in favor of the interpretation of the assured, although intended otherwise by the insurer."

Covenant.—But, in *Burt v. Haslett*, 18 C. B. 162, 893; 86 E. C. L. 162, 893, it was held that a plate glass shop front fixed with wooden wedges, without screws, nails or glue, and removable without injury to the premises, was a window affixed or belonging to the premises within a covenant to deliver up the premises "with all windows," etc.

Bay Windows.—As to windows projecting over sidewalk, see *STREETS AND SIDEWALKS*, vol. 24, p. 38.

4. *State v. Moore*, 5 Blackf. (Ind.) 118; *Watson v. State*, 55 Ala. 160.

Spirituos Liquors.—In *Caswell v. State*, 2 Humph. (Tenn.) 403, it was held that wine was not a spirituous liquor. The court said: "The question for consideration is, whether wine is a spirituous liquor within the meaning of the statute, passed in the year 1837, ch. 120, making it a misdemeanor to retail spirituous liquors. We think it is not. Wine is a fermented liquor. Spirits

WINNER—(See also GAMBLING CONTRACTS, vol. 8, p. 992).—
See note 1.

are distilled liquors. And this distinction exists, not only in common parlance, but is recognized by chemists and philologists. Mr. Webster, in his 18th definition of the word 'spirit,' calls it a strong, pungent, stimulating liquor, obtained by distillation, as rum, brandy, gin, whisky. Wine he defines to be the fermented juice of grapes. Dr. Johnson defines spirit to be an inflammable liquor, raised by distillation, and wine the fermented juice of the grape. The word 'spirit' is derived from the Latin word *spiritus*, one meaning of which is life. The discovery of the art of distillation belongs to the Alchemists, who made it in the course of their investigations after what they called the *elixir vitae*, a liquid the discovery of which was to render man immortal. When, by distillation, they had procured pure alcohol, judging from its effects, they for a while were deluded by the hope that the grand secret had been discovered, and called it *aqua vitae*, water of life. Brandy is still so called by the French, *eau de vie*. The English, in adopting a name, have taken the word *spiritus* as the root from which to form it, instead of the more common word *vitæ*." To the same effect are *Caswell v. State*, 2 Humph. (Tenn.) 402; *Fritz v. State*, 1 Baxt. (Tenn.) 17; *State v. Moore*, 5 Blackf. (Ind.) 118.

But in *State v. Giersch*, 98 N. Car. 720, it was held that where a statute of *North Carolina* prohibited the introduction and sale of spirituous liquors, those terms were generic and included all intoxicating liquors containing alcohol, whether distilled, fermented or vinous. This case is disapproved in *Sarlls v. U. S.*, 152 U. S. 574, but is in line with *Kizer v. Randleman*, 5 Jones (N. Car.) 428.

Judicial Notice—Intoxicating Liquor.—The court takes judicial notice that wine is an intoxicating liquor. *Wolf v. State*, 59 Ark. 297, citing 11 Am. & Eng. Encyc. of Law 582. See also *Jones v. Surprise*, 64 N. H. 243; *State v. Packer*, 80 N. Car. 439; *State v. Williamson*, 21 Mo. 496.

1. Gambling Contracts.—In *Pearce v. Foote*, 113 Ill. 228; 55 Am. Rep. 414, it was held that option dealings in grain, where no property passes, or is expected by either party to pass, are void as gambling contracts, and money

paid thereon may be recovered, under the statute, from the broker of the party as the "winner." The court said: "There is and can be no such thing as agency in the perpetration of crimes or misdemeanors, or indeed in the doing of any unlawful act. All persons actively participating are principals. Treating all the parties engaged as principals, it is immaterial to which one the money or property lost was in fact paid or delivered—whether to Hooker & Co., or to any of the parties on the board of trade with whom they may have made fictitious contracts, and lost—and paying to either principal is, in law, paying to the winner."

In *Triplett v. Seelbach*, 91 Ky. 32, it was held that the proprietor of a gaming house, who received a certain per cent. of the winnings of each game, called the "take-out," was interested in the winnings to that extent and was therefore a "winner" within the meaning of *Kentucky* statute which gives a right of action to the loser. The court said: "We do not understand that the winner, in the sense of said statute, must be one of the players, with cards in his hands; but if he is to receive a per cent. of the winnings by the actual player, he is, in the sense of the statute, a winner. He, according to an arrangement with the players and himself, is to receive a part of the winnings as his profits. Why should he not be regarded as a winner in the sense of the statute? He certainly has a community of interest in the stakes with whoever wins, and this interest is the result of an arrangement with all the players, and this arrangement and division makes him a joint wrongdoer with the winner; it makes no difference which one it may be. If, by an arrangement, the winning was divided between the actual player and another, there is no doubt that the latter would be responsible as a joint wrongdoer for the whole sum won as a winner. Here the arrangement does not make him a partner with any particular player as against the others, but it does make him jointly interested with the winner in the stakes. It is true that he may be indifferent as to which will be the winner; but as soon as one or the other has won, the arrangement gives him a joint interest in the winning with

WISH.—The courts have often to determine whether the word *wish*, as used by the testator, gives rise to a precatory trust. In the notes will be found some cases in which the term has been held to create such a trust, and others in which, under the circumstances, it has been held not to.¹

WITH.—The preposition *with* is, in general, used as denoting connection, appendage, company of, concomitance,² along with in place or time.

the actual player, which makes him, in the sense of the statute, a winner. It is not to be understood that the actual winner cannot recover from him said per cent. of his own stakes; but this is so because the statute gives the remedy against him in the sense that he is a winner, even from the successful player; but, nevertheless, he is jointly interested with the winner in the loser's losses, which makes him responsible for them as a joint wrongdoer. It is not the extent but the community of interest that makes wrongdoers responsible for the whole wrong. If each is to receive a certain amount of the result of the unlawful enterprise, this gives them such a community of interest as to render each responsible for the whole amount received."

1. In the following cases, a trust was held to have been created: *McRee v. Means*, 34 Ala. 349; *Cook v. Ellington*, 6 Jones Eq. (N. Car.) 371; *Bliven v. Seymour*, 88 N. Y. 469; *Phillips v. Phillips*, 112 N. Y. 197; 8 Am. St. Rep. 737; *Liddard v. Liddard*, 28 Beav. 266.

In the following cases, a trust was held not to have been created: *Hopkins v. Glunt*, 111 Pa. St. 287; *Lines v. Darden*, 5 Fla. 51; *Montreal Bank v. Bower*, 17 Ont. Rep. 548.

2. *Hart v. Fanny Ann*, 6 T. B. Mon. (Ky.) 51.

Exemption Statutes.—A *Vermont* statute exempted from execution "two horses . . . with sufficient forage for the keeping of the same." It was held that the exemption of forage was an independent claim or right, not conditioned upon the debtor's having the exempt animals. The court said: "The preposition *with*, as here used, is to be construed as connecting two independent subjects rather than as joining a dependent or qualifying clause to one subject. It is the same as if it read, a yoke of oxen and in addition forage." *Kimball v. Woodruff*, 55 Vt. 229.

With and Of.—In *Cochran v. State*, 30 Ala. 546, it was held no variance where

the indictment charged the playing to have been at a game of cards, and the statutory form charged the playing to have been at a game *with* cards.

Filing with.—The provision of the thirteenth section of the chapter of the Revised Statutes of *Illinois*, entitled "Ne exeat and Injunctions," authorizing affidavits filed with the bill and answer to be read on motions to dissolve injunctions, must not be construed as requiring the affidavits to be filed at the same time with the bill and answer to authorize them to be read, but only to be filed in the case with the bill or answer, no matter when, so it is before the hearing of the motion. *Hummert v. Schwab*, 54 Ill. 142.

But in *Hossler v. Hartman*, 82 Pa. St. 55, it was held to be a sufficient compliance with the rule that the plaintiff should file *with* his declaration or statement an affidavit of claim, that they both be filed at the same time; and that the rule did not require them to be attached or deposited in the same pigeonhole.

In order to recover an attorney's fee, the statute provided that an affidavit should be filed *with* the original papers. In *Wilkins v. Troutner*, 66 Iowa 559, the court said: "The statute uses the expression 'filed *with* the original papers.' It is said that 'with' is not synonymous with 'at the same time.' Ordinarily this may be so, but we think it must be so construed in the statute under consideration. If this is not so, then the statute is meaningless, unless it can be said that the affidavit may be filed *with*, that is, placed among, the original papers, and filed at any time after judgment; and clearly this is not the intent of the statute."

With Surety.—In *Cavence v. Butler*, 6 Binn. (Pa.) 53, in order to effectuate the intent of the legislature, the court construed the expression "he shall be bound with surety" as equivalent to "he shall be bound by surety" or "he shall find surety."

WITHDRAW.—To withdraw is to take away what has been enjoyed, to take from.¹

With Quick Child.—In *Reg. v. Wycheley*, 8 C. & P. 262; 34 E. C. L. 381, Gurney, B., said: "Quick with child is having conceived; with *quick* child is when the child is quickened." This distinction is denied, however, in *State v. Cooper*, 22 N. J. L. 52; 51 Am. Dec. 248. It is there said: "There is no foundation in law for this distinction. The ancient authorities show clearly that the terms are synonymous, both importing that the child had quickened in the womb, and that the period had arrived when the life of the infant, in contemplation of law, had commenced." In support of this statement, the opinion cites *Boynton's Case*, 14 St. Tr. 634; 1 Hale's P. C. 368, 4 B. C. 395. See also *Mitchell v. Com.*, 78 Ky. 208; 39 Am. Rep. 227.

With an Officer.—A *Pennsylvania* statute provided that when defendant appealed, he should enter into a recognizance with the prothonotary in the nature of a special bail. It was held that this meant that the defendant should give sufficient security to be filed in the office of the prothonotary, and not taken out before him, that the recognizance could be entered into before such persons as are legally authorized to take bail in the court where the suit is pending. *Jones v. Badger*, 5 Binn. (Pa.) 461.

With All Faults.—In *Shepherd v. Kain*, 5 B. & Ald. 240, it is said "with all faults" must mean with all faults which it may have consistently with its being the thing described, and in that case, where a ship was advertised as "a copper fastened vessel, to be sold *with all faults*," and it appeared that she was not copper fastened, it was held that the vendor was liable for a breach of warranty.

The meaning of selling with all faults is that the purchaser shall make use of his eyes and understanding to discover what defects there are. But the vendor is not to make use of any artifice or practice to conceal faults, or to prevent the purchaser from discovering a fault, which he, the vendor, knew to exist. *Mitch v. Andrews*, 8 Ired. (N. Car.) 6.

With a Strong Hand.—In an indictment for forcible detainer, the words "and with a strong hand" should never be omitted. The same description and degree of force are necessary to con-

stitute the offense of forcible detainer that are required to constitute a forcible entry. Greater force must be averred than is expressed by the phrase "with force and arms." The court said: "Greater force must be averred than is expressed by '*vi et armis*.' The words 'and with a strong hand' should never be omitted. Whart. on Crim. Law, § 2047. These words mean something more than a common trespass. They imply that the entry was accompanied with that terror and violence which constitute the offense. *Com. v. Shattuck*, 4 Cush. (Mass.) 141. The same description and degree of force is necessary to constitute a forcible detainer as a forcible entry." *Com. v. Brown*, 138 Pa. St. 452. See also *Rex v. Wilson*, 8 T. R. 357; *Com. v. Shattuck*, 4 Cush. (Mass.) 141; *Baude's Case*, Cro. Jac. 41; **FORCIBLE ENTRY AND DETAINER**, vol. 8, p. 101.

With Liberty of a Port.—As to the effect of these words in a policy of marine insurance, see *Allegre v. Maryland Ins. Co.*, 8 Gill & J. (Md.) 190; 29 Am. Dec. 536.

With in the Sense of By.—See *Pettee v. Flewellen*, 2 Ga. 239.

With Effect.—The common condition of an appeal bond is that the principal "shall prosecute his appeal *with effect*." The words "with effect," in such instrument, mean successfully. *Perreau v. Bevan*, 5 B. & C. 291; 11 E. C. L. 230; *Legate v. Marr*, 8 Blackf. (Ind.) 404; *Karthauss v. Owings*, 6 Har. & J. (Md.) 134; *Champomier v. Washington*, 2 La. Ann. 1013. See also *Robinson v. Brinson*, 20 Tex. 439; *Trent v. Rhomberg*, 66 Tex. 249; *Gould v. Warner*, 3 Wend. (N. Y.) 54; *Babbitt v. Finn*, 101 U. S. 7; *Marryott v. Young*, 33 N. J. L. 336.

In *Hobart v. Hilliard*, 11 Pick. (Mass.) 143, however, it is held that filing the transcript of the supreme court complies with the condition. But in *Trent v. Rhomberg*, 66 Tex. 249, and in *Champomier v. Washington*, 2 La. Ann. 1013, it is held that an abandonment of the appeal is a breach of the condition.

1. *Central R., etc., Co. v. State*, 54 Ga. 409. That case was a construction of a statute reserving to the state the right to *withdraw* franchises thereafter conferred upon private corporations.

The *Texas* statute provides a penalty

WITHHOLD.—See note 1.

for the "withdrawal" of field notes of a survey from the land office. It was held that the withdrawal contemplated by the statute was intended to designate the act of the owner or someone for him. The court said: "The primary meaning of the word 'withdraw' carries with it the idea that the act from which it results is the act of some person who has formerly possessed, who made the deposit, who owns or controls. Of the word, Mr. Richardson says: 'But to withdraw, *e. g.*, implies a putting forth or forward, and then a drawing back from one person or thing to another; and considered in relation to that *from* which (is drawn) it denotes privation; but considered in relation to that *to* which (is drawn) it denotes reunion; agreeably to the meaning of the word *with*.' 'To draw back or away; to take back or away; to resume.' Mr. Webster gives to the word substantially the same meaning. If the legislature had intended to embrace a wrongful and unauthorized taking from the general land office, a taking wrongful to the owner and unauthorized by him, some appropriate words would certainly have been used to express such intention." *Snider v. Methvin*, 60 Tex. 498.

An agreement by a partner to "withdraw from the firm," means to withdraw at once; and it further means (1) "that the withdrawing partner shall make over to the continuing partners all his interest in the partnership and in the partnership assets, whether there be real or personal estate, whether there be outstanding contracts, or anything of the kind;" (2) "that the continuing partners shall indemnify the retiring partners against all the liabilities of the firm from that time forth. They take the assets, they take the benefit of the contracts, they take the chances of success for the future, and they must keep him indemnified." *Gray v. Smith*, 43 Ch. Div. 208.

Withdrawal of a Claim.—It is not a *withdrawal* of a claim, where it has been dismissed for failure to make parties and prosecute the same. *Lynch v. Bond*, 19 Ga. 314.

1. Distinguished from Conceal.—Withholding property is not equivalent to concealing property. The court said: "The argument of the appellee, that the word 'conceal' is manifestly the synonym of withholding, is not sus-

tained by any lexicographer we have consulted, or the popular sense of the term. Secrecy is an essential ingredient of the act of concealment. 'To hide or withhold from observation, to cover or keep from sight,' are the meanings technically and popularly conveyed by the word 'conceal.' It can scarcely be imagined that the extraordinary power of requiring an answer upon oath, with the summary process of attachment, sequestration and commitment, were to be exercised by a court of special limited jurisdiction in every case in which the administrator or executor should allege a third person withheld property which belonged to the estate of the deceased." *Taylor v. Bruscup*, 27 Md. 226.

Withholding Commissions.—A *United States* statute provides that the postmaster general may withhold commissions, when he is satisfied that a postmaster has made false returns. It was held that an order of the postmaster general reciting that he is satisfied that a false return has been made, and fixing the compensation which he deemed reasonable, was not conclusive in a suit against the postmaster and sureties upon his official bond to recover the moneys alleged to have been illegally withheld. The court said: "The action of the postmaster general in assigning a postmaster to his proper class and fixing his salary accordingly, under such provisions of the statute, is essentially different from the exercise of the discretion conferred of withholding commissions on such returns as the postmaster general may be satisfied are false. To 'withhold' commissions seems fairly to imply a temporary suspension, rather than a total and final denial or rejection of the same. If such withholding is not conclusive upon the postmaster, how can the allowance made, while the commissions are being withheld, be treated or regarded as a final and conclusive adjudication as to the compensation the postmaster is, or shall be, entitled to receive? The court below regarded the order in question as provisional in its character, and accordingly held, in substance, that it did not so conclusively fix and determine the commissions and compensation of the postmaster as to make the statement of her accounts based thereon conclusive against her and her sureties. The contrary proposition urged on behalf of the *United States* involves the

WITHIN—(See also AT, vol. 1, p. 890; IN, vol. 10, p. 322; TIME, COMPUTATION OF, vol. 26, p. 4)—referring both to time and place, means in the limits or compass of, not beyond, not later than,¹ in the inner part.²

assertion that the falsity of the post-master's returns is actually and finally established by the order of the post-master general, and that the accounts adjusted in accordance therewith amount to more than *prima facie* evidence of the correctness of the balance claimed to be due from the defendants. We think this contention of the government cannot be sustained, and that the ruling of the circuit court on the question was correct." U. S. v. Dumas, 149 U. S. 278.

1. Webster's Dictionary; Levert v. Read, 54 Ala. 531; Jennings v. Russell, 92 Ala. 606.

2. Webster's Dict. In several cases the courts have refused to accept this second definition, preferring, under the circumstances, that first given in the text. See Levert v. Read, 54 Ala. 531, and the examples set out in this note.

A statute provided that exceptions should be filed "within" ten days after service of notice of the filing of a commissioner's report. It was held that whether the exceptions are placed on file before or after the service, can make no difference. The court said: "Taking the statute literally, the question would turn on the meaning of the word 'within.' The primary meaning is, 'in the inner part or side of.' Worcester gives as examples these: 'Go, shut thyself *within* thy house.' Ezek. 3:24. 'That which is *within* the cup and platter.' Matt. 23:26. This meaning is therefore not applicable, as I think, to the word as used in the statute. The word is otherwise defined by both Worcester and Webster as 'not beyond;' and it is in this sense that it is used in the statute. The word 'within' is not one of such preciseness as to have but one meaning, and, in construing a statute, we must adopt that meaning always which has application to the subject." Chicago, etc., R. Co. v. Eubanks, 32 Mo. App. 189.

So, where a statute provided that, to obtain a lien, a certificate should be filed "within four days" from the departure of the vessel, it was held that the certificate might be filed any time before the *expiration* of the four days, whether it was filed before or after the beginning of the four days being im-

material; *e. g.*, before the departure of the vessel. Young v. The Orpheus, 119 Mass. 179.

In Atherton v. Corliss, 101 Mass. 40, it was held that where a statute provided that a widow might waive the provision for her in her husband's will at any time "within six months after the probate of the will," a waiver before probate was sufficient, although counsel contended that by the use of the word "within," instead of "before," the legislature signified that the act was to be *between* some certain points of time. The court said: "The important question in the case is upon the interpretation of the phrase 'within six months after the probate of the will.' Is the reference to the probate of the will for the purpose of fixing merely the terminus *ad quem*? or does it also fix the terminus *a quo*? The main purpose undoubtedly is to fix a time when her right of election shall cease, and the presumption of the statute become absolute. But the words used, in strictness, would seem also to limit the right in the other direction, and confine it to the specified period subsequent to the actual probate of the will. If the provision related only to the right of the widow to claim her distributive share of the personal estate, regardless of the will, we should be disposed to give it this narrower construction. There is much force in the argument of the counsel for the appellant in favor of thus limiting the right of the widow to disturb the provisions of the will in respect of the personal estate."

Within a Certain Distance of a Road.

—To determine, under a *New Jersey* law to prevent accidents at crossings, whether a proposed new road is *within* 500 feet of an old one, the width of the old road, where it crosses the railroad, must be regarded. State v. Drummond, 45 N. J. L. 511.

Within a Certain Distance of a Named Place.

—A local law prohibiting the sale of spirituous liquors within three miles of a named town, includes the corporate limits of the town. The court said: "It is urged that the act above referred to presents no obstacle to the granting of a license to the petitioner to sell spirituous, vinous or

Definition.

malt liquors within the limits of the town of Falkville. The contention is that the prohibition operates only in the area extending three miles in all directions from the outer limits of the town, and not in the town itself. To impute this meaning to the words of the statute would result in defeating the obvious purpose of its enactment. The extension of the prohibition beyond the town limits was manifestly designed to preclude the possibility of the suppression of the liquor traffic in the town itself being made ineffectual by its establishment in the immediate neighborhood. It is plain that the word 'within' as used in the statute means 'in the limits or compass of; not beyond.' Webster's International Dictionary. The intention would not have been more distinctly evidenced if the statute had expressly provided that the prohibition should be operative in the limits or compass of three miles of Falkville, or that it should not be of force beyond three miles of Falkville. Manifestly, the town itself is included within the defined limits, and only beyond those limits could the traffic in question be licensed. In *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64, the court construed a contract which stipulated that the defendant should not practice dentistry 'within a radius of ten miles of Litchfield.' It was held that this expression meant 'within ten miles of the center of the village of Litchfield.' This construction seems natural and reasonable. It is unnecessary, however, to determine in this case whether the legislature intended the prohibition to cover an area extending three miles from the center of the town or three miles from its boundaries. Under either construction the town itself is within the designated territory." *Jennings v. Russell*, 92 Ala. 606.

Within the Inclosure — Distress.—In *Pettit v. May*, 34 Wis. 666, it was held where the plaintiff's horse, being *in the street*, was destroying the fence surrounding defendant's inclosure, he was liable to be distrained as doing damage *within the inclosure*. The court said: "The horse of the plaintiff was in the street, tearing down and destroying the defendant's fence surrounding his inclosure, at the time the defendant seized and held him as an animal *damage feasant*; and the first question to be determined is, whether the horse was liable to be distrained under such circum-

WITHIN.**Definition.**

stances. Was the horse 'doing damage within his inclosure,' so as to authorize the defendant to distrain and keep him in the manner prescribed by the statute? The fence is a part of the inclosure of the owner or occupant of lands, and to injure or destroy that is, in our judgment, to do 'damage within the inclosure,' as those words are used and to be understood in the statute. Unlike the statute of *Vermont*, and perhaps those of some other states, which authorize any person to impound 'any beast found in his inclosure doing damage,' our statute seems to be more comprehensive, and it is unnecessary that the beast should be found in the inclosure in order to justify the distress, but suffices that it is taken doing damage therein, although itself on the outside. Such appears to be the reasonable and proper construction of the statute, and the court accordingly so holds and applies it."

Within a Street.—Where a statute gave power to assess, for expenses of road repair, all premises "within" certain streets, it was held that a yard—Kent and Essex Yard, Whitechapel—set back from one of such streets, and having other houses between it and the street, but the only access to which was from the street by means of carriage gates and along a private covered way, was "within" the street. *Baddeley v. Gingell*, 17 L. J. Exch. 63; 1 Exch. 319. In that case *Alderson, B.*, said: "You cannot say that any house is literally *within* the street, and we must therefore come to the consideration of what is intended by the expression 'within;'" and the yard was held (see especially judgment of *Parke, B.*) to be "within" the street because its sole communication was by means of the street, and because it *fronted* and *abutted* on, and derived the benefit of the repairs to, the street.

Within or Under.—It seems difficult to see how a grant of "minerals" "*within* or *under*" land is fuller, and less liable to receive a restricted meaning, than if "under" alone were used; but this suggestion has been made. Per *Romilly, M. R.*, *Midland R. Co. v. Checkley*, L. R. 4 Eq. 25; *observed* upon by *Wickens, V. C.*, *Het v. Gill*, L. R., 7 Ch. 705, note.

Statute of Limitations.—(See also **LIMITATION OF ACTIONS**, vol. 13, p. 667).—A provision in the *Pennsylvania* statute gives a period of ten years after a removal of a disability, for bringing suits, and "in case such person or per-

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WITHIN.

Definition.

sons shall die within the said term of ten years, under any of the disabilities aforesaid, the heir or heirs of such person or persons shall have the same benefit that such person or persons could or might have had by living until the disabilities should have ceased or been removed." In *Henry v. Carson*, 59 Pa. St. 302, the court construes the provision as follows: "What is the meaning of this clause? If it were not for the phrase '*within* the said term of ten years,' there would be no difficulty in its interpretation, or any doubt as to its meaning. The corresponding clause in the *Delaware* act of June 16, 1793, which was evidently borrowed from ours, omits the phrase and avoids the difficulty. But as the clause stands in our act, giving to the language its ordinary signification, it appears to be contradictory and insensible. If we are at liberty to reject the phrase as repugnant to the general and evident purpose and intent of the whole clause, its meaning is obvious. It gives to the heirs of a person dying under disability the same time in which to bring their action or make their entry as their ancestors would have had, if they had lived until the disability had ceased or been removed. But we are not at liberty to reject the phrase if we can possibly give it such a construction as will make it consistent with the residue of the clause and with its manifest purpose and intent. We cannot give it such a construction unless we interpret the preposition '*within*' as referring and applying not to the time included in 'the said term of ten years,' but to the time intervening between the disseisin and the removal of the disability, when 'the said term' commences. Thus interpreting it, the clause will read: 'and in case such person or persons shall die *within*, that is to say, inside of, not overstepping, before the commencement of, the said term of ten years, under any of the disabilities aforesaid, the heir or heirs of such person or persons shall have the same benefit,' etc. If this is not the ordinary and proper meaning of the preposition '*within*,' it is the meaning which the context requires, and the only one of which it is susceptible if the phrase is retained. If we interpret it according to its ordinary meaning and usage, the clause is contradictory and insensible. If it is to be understood as meaning literally *within* the said term, that is, *during its continuance*, then the clause

is not only absurd, but it involves an impossibility. How can a person die '*within* the said term of ten years under any of the disabilities aforesaid,' when the term does not commence until after the disabilities have ceased or been removed? And what sense is there in providing that 'the heirs shall have the same benefit' that their ancestor 'might have had by living until the disabilities should have ceased or been removed,' if they have ceased or been removed when the ancestor dies? The contradiction and the absurdity involved, if the phrase is to be literally interpreted, are too manifest to admit or require further argument. To give the clause then a sensible meaning, we must interpret the phrase as suggested or we must reject it altogether, and in either alternative we are brought to the same conclusion as to its meaning, viz.: that it was intended to give the heirs of a person dying under disability the same benefit that the ancestor would have had if he had lived until its removal. In support of this construction, we have the authority of Tilghman, C. J., in *Thompson v. Smith*, 7 S. & R. (Pa.) 209; 10 Am. Dec. 453, where he says: 'Our act of assembly is indeed not clearly or accurately expressed, when it speaks of persons dying under a disability *within* ten years. But the meaning is that if the title first descends or accrues to a person under disability, and that person dies before the disability cease or be removed, his heir, whatever may be his condition as to ability or disability, shall have the same benefit that he himself might have had by living until the disability had ceased, that is to say, he shall have ten years from the death of his ancestor; but if the person to whom the title first descends or accrues, being then under disability, shall live till the disability cease, then ten years and no more shall be allowed to him and his heirs, in case he shall die *within* the ten years.' In saying that the heir 'shall have ten years from the death of his ancestor,' he evidently refers to a case where the heir has an immediate right of entry, and not to a case where the right of entry or action is suspended by the intervention of a particular estate.

"Substantially the same construction has been given to the British statute, 21 James 1, already referred to, and to similar statutes in some of the states of our Union, as the following cases will show: *Doe v. Jesson*, 6 East 81; *Dem-*

arrest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 136; 8 Am. Dec. 467; Jackson *v.* Johnson, 5 Cow. (N. Y.) 74; 15 Am. Dec. 433; Moore *v.* Jackson, 4 Wend. (N. Y.) 58; Carpenter *v.* Schermerhorn, 2 Barb. Ch. (N. Y.) 314; Lewis *v.* Marshall, 5 Pet. (U. S.) 470; Sicard *v.* Davis, 6 Pet. (U. S.) 124; Thorp *v.* Raymond, 16 How. (U. S.) 247; Tillinghast's Adams Eject. 58."

"Within" in the sense of "in" or at "the end of."—In *Adams v. Cumiskey*, 4 Cush. (Mass.) 420, it was held that the words "within sixty days," in the direction to return an execution issued by a justice of the peace, mean the same as "in sixty days" or at the "end of sixty days," and that the execution could not be returned before the end of the period.

Within a Certain Time Includes Last Day—(See also **TIME, COMPUTATION OF**, vol. 26, p. 4; **AFTER**, vol. 1, p. 323).—Where letters of administration were granted January 12, 1852, a demand exhibited January 12, 1853, was held "within one year after the granting of the letters." The court said: "In *Massachusetts* it was held, in *Bigelow v. Willson*, 1 Pick. (Mass.) 487, under a statute which allowed the redemption of an equitable estate sold on execution 'within one year next after the time of executing, by the officer to the purchaser, the deed thereof,' that in computing the year allowed for the redemption, the day on which the deed was executed should be excluded. In *Sims v. Hampton*, 1 S. & R. (Pa.) 411, the supreme court of *Pennsylvania* held that, in computing the twenty days allowed for entering an appeal with the prothonotary after the entry of the award of arbitrators upon his docket, the day upon which the entry of the award was made should be excluded. The words of the statute are, 'shall enter such appeal with the prothonotary of the proper county *within* twenty days after the entry of the award of arbitrators on his docket.' In *Windsor v. China*, 4 Me. 312, the supreme court of *Maine* decided that an answer which the statute required to be given to a notice '*within* two months after such notice,' was in time when given on the 20th of December, the notice having been given on the 20th of October. The day on which the notice was given was excluded. These decisions from other states assert the same rule which was adopted by this court in *The Steamboat Mary Blane v. Beehler*, 12 Mo. 477." *Kimm v. Os-*

good, 19 Mo. 60. To the same effect, *McDonald v. Vinette*, 58 Wis. 619; *Shelton v. Gillett*, 79 Mich. 173; *Frantz v. Kaser*, 3 S. & R. (Pa.) 395; *Williams v. Burgess*, 12 Ad. & El. 635; 40 E. C. L. 142; *Chaffee v. Harrington*, 60 Vt. 718.

An oral contract of insurance for one year, including its date, is a contract to be performed within a year, and therefore not within the Statute of Frauds. The court said: "We are of opinion that the contract was to be performed within a year, and is therefore not included in the provisions of the fifth clause of the Rev. Stats., ch. 74, § 1. When time is spoken of, any act is within the time named that does not extend beyond it." *Fay v. Alliance Ins. Co.*, 16 Gray (Mass.) 455.

A delivering up of a poor debtor on the thirtieth day from his arrest, although not leaving time to give the statutory notice, is no breach of a recognizance to deliver up "within thirty days." *City Nat. Bank v. Williams*, 122 Mass. 534.

Note Payable "Within" a Certain Time.

—"The note has not been put into the case, and its precise terms are not stated. Nor is it important. No case has been cited in the argument, and we have found none, giving a construction to a note where the promise is to pay a sum of money 'within' a certain time. We are inclined to believe that the maker of such a note may tender the money to the holder at any reasonable time within the period specified, although the holder cannot enforce the payment until the expiration of the time. The time of payment depends entirely upon the agreement of the parties. If the promise was to deliver specific articles, or to perform any other act than the payment of money, 'within' a certain period, we think the party would have the right to tender the performance at any reasonable period, although the other party could not demand it till the last day; and no very sound reason occurs to us why the same rule should not apply to a contract to pay money, giving the maker an option to pay if he finds the holder at the place, in case place be specified. It is true that there is but a slight difference in phraseology between such a note and one payable 'in' a certain time; and perhaps commercial usage may have construed the latter as an engagement to pay at the expiration of the period, so that the party is not at

WITHOUT.—This word commences a number of phrases which are treated in the note.¹

liberty to tender payment before that time." *Buffum v. Buffum*, 11 N. H. 457.

Sale of Land Within a Year.—A party purchased a tract of land stipulating that it should sell *within* one year at the purchase price or over, or the vend- or should make up the deficiency. It was held that the vendee was at liberty to sell the lot at any time *within* the year, although it was contended that he was bound to keep it until the end of the year. *Hakes v. Peck*, 1 Keyes (N. Y.) 505.

Within the Jurisdiction.—See JURISDICTION, vol. 12, p. 316.

1. Without Her Consent—Rape.—(See also AGAINST, vol. 1, p. 325; RAPE, vol. 19, p. 951).—In *Com. v. Burke*, 105 Mass. 376; 7 Am. Rep. 531, it was held that a man who has carnal intercourse with a woman without her consent, while he knows she is insensible, is guilty of rape. "Without her consent" and "against her will" being equivalent.

Without Assistance—Husband and Wife.—The *Louisiana* Code provides that "the wife has the right to administer personally her paraphernal property without the assistance of her husband." In *Miller v. Handy*, 33 La. Ann. 163, the court says: "The terms, 'without assistance,' as used in this article, mean, unquestionably, *without his control, without the necessity of being thereunto authorized by him*, as is the case with many of her acts. It is not incompatible with her personal administration that she should avail herself of the assistance of her husband, if he is willing to render it, provided he act under her authority and merely as her proclaimed agent. Such acts, though performed by him, are still the acts of the wife, under the maxim '*qui facit per alium, facit per se*.' With regard to the administration of her paraphernal property, when she chooses to retain it, a married woman has all the powers of a *feme sole*, including the power to employ agents to aid and represent her in reference thereto. See *Reynolds v. Rowley*, 2 La. Ann. 893; *Dodd v. Orillion*, 14 La. Ann. 68; *Jordan v. Anderson*, 29 La. Ann. 749."

As a Word of Positive Negation.—In *Com. v. Thompson*, 2 Allen (Mass.) 508, it was held that an averment that defendant did keep a certain dog "without said dog being then and there li-

censed according to law," was a sufficient allegation that the dog was not licensed. The court said: "And we think the allegation that the defendant kept 'a dog without said dog being licensed,' is of the same legal import and effect as would be an allegation that he kept 'a dog not licensed,' or 'a dog not being licensed;' that the word 'without' is a word of sufficiently positive negation. And so has it always been regarded. In indictments and informations, under the English statutes, for keeping alehouses without license, and for selling ale and other liquors without license, the precedents contain the averment that A, 'without any license,' or 'without being duly licensed,' did keep a common alehouse, or did sell ale, etc., contrary to the form of the statute in such case made and provided. *Faulkner's Case*, 1 Saund. 249; *Nelson's Justice* (8th ed.) 16, 22; *Archb. on Commitments and Convictions* 116. So, under our Stats. 1852, ch. 322, and 1855, ch. 215, in complaints and indictments against persons for being common sellers, or for making single sales, of spirituous or intoxicating liquor, the form of allegation as frequently is that A was a common seller, or did make sale, of such liquor 'without having any license, appointment or authority,' or 'without being duly authorized,' etc., as is the other form, viz., that A, 'not having any authority,' etc., was a common seller, or did make as ale, of such liquor. And, in numerous instances, motions in arrest of judgment have been overruled, when the former of those allegations was found in the complaints or indictments. See, among other cases, *Com. v. Wilson*, 11 Cush. (Mass.) 412; *Com. v. Clapp*, 5 Gray (Mass.) 98; *Com. v. Kingman*, 14 Gray (Mass.) 85. And under our earlier statutes concerning the sale of spirituous liquors, it was held that an indictment was sufficient which charged a party with being a common seller 'without being first duly licensed therefor.' *Com. v. Tower*, 8 Met. (Mass.) 527. See also *Com. v. Odlin*, 23 Pick. (Mass.) 276, and *State v. Keen*, 34 Me. 505. So a motion in arrest of judgment was overruled in *Com. v. Twitchell*, 4 Cush. (Mass.) 74, where the indictment alleged that the defendant did set up and promote a public exhibition 'without being first duly licensed therefor ac-

cording to law.' It is true that the precise objection now taken to this complaint does not appear to have been ever before presented to the court for adjudication; but we deem the objection groundless, as well on the rules of pleading as upon the precedents. See 2 Burn's Justice (20th ed.) 469, 470; *Com. v. Ober*, 12 Cush. (Mass.) 493."

Without Contradiction.—To say that testimony is without contradiction, is not equivalent to saying that it is true. *Birch v. Hutchings*, 144 Mass. 563.

Without Deduction.—(See also SUCCESSION TAXES, vol. 24, p. 431).—A testator having directed legacies to be paid at the expiration of six months after his decease, without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors. *Barksdale v. Gilliat*, 1 Swanst. 562.

Without Deduction for Benefits—Eminent Domain.—There are various statutory and constitutional provisions enacting that the landowner shall receive compensation for land taken under eminent domain "without deduction for benefits," "irrespective of benefits," etc. These provisions have received statutory construction. See EMINENT DOMAIN, vol. 6, p. 583. In *Giesy v. Cincinnati, etc., R. Co.*, 4 Ohio St. 308, it was held that the expression "irrespective of benefits," and the words "without deduction for benefits," both of which were used in the constitution of *Ohio*, were equivalent in meaning. And in speaking of the compensation to be paid for land condemned for railroad purposes, the court, by Ranney, J., said: "The word 'irrespective' relates to this full compensation and binds the jury to assess the amount, without looking at or regarding any benefits contemplated by the construction of the improvement. Where this is done and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken; which is but saying that nothing shall be deducted from that value on account of such benefits. The opposite construction, so far from requiring the assessment to be made *irrespective* of these benefits, in effect compels the jury to ascertain their value to the property, and to deduct so much as they have increased it; thus using a word introduced for the sole benefit of the property holder in such manner as to deprive him of a portion of the acknowledged

present value of his property, or to allow him to be paid for a part of its value in benefits; and, at the same time, fastens upon the constitution the gross inconsistency of allowing a corporation to procure the right of way upon easier terms than could be done by the public."

Equivalent to "in Good Faith."—"Without notice" and "in good faith" are equivalent terms when used in reference to a *bona fide* purchaser. *Lee v. Bowman*, 55 Mo. 400; *Coover v. Johnson*, 86 Mo. 533.

Without the Jurisdiction.—**Without the State**—(See also "BEYOND THE SEAS, vol. 2, p. 189; LIMITATION OF ACTIONS, vol. 13, p. 742).—In the Statute of Limitations, "beyond the seas" is synonymous with "without the jurisdiction." *Alexandria Bank v. Dyer*, 5 Cranch (C. C.) 403; *Denham v. Holeman*, 26 Ga. 183.

Without Fault.—(See also CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15).—A statute provides for the recovery by an employee from a railroad company, where he has sustained injuries by reason of the negligence of other employees, when he is "without fault" or negligence. In *Central R., etc., Co. v. Lanier*, 83 Ga. 591, the court said: "'Without fault' means that the party suing must not have done anything to contribute to his injury, or must have done everything to prevent the consequences of the company's negligence. In other words, he must show that he did nothing he ought not to have done, and neglected to do nothing he ought to have done. Under this clause of the code, we think this is the clear meaning of 'without fault or negligence.'"

In an action for damages for injuries caused by defendant's negligence, a complaint alleging that the injury was caused "without the fault of plaintiff" sufficiently alleges that it occurred without her fault or negligence. *Mississinewa Min. Co. v. Patton*, 129 Ind. 472.

A statute provided for the separate maintenance of a wife living apart from her husband "without fault." It was held that this meant, without voluntarily assenting to the separation, or without such failure of duty or misconduct on her part as materially contributed to the separation. *Johnson v. Johnson*, 125 Ill. 510.

Without Issue.—See ISSUE, vol. 11, p. 891.

Without Impeachment for Waste.—See WASTE, vol. 28, p. 861.

WITHOUT PREJUDICE—(As to motions, see **MOTIONS**, vol. 15, p. 920; as to letters, see **LETTERS**, vol. 13, p. 257).—This term requires the consideration of the courts most frequently when used in letters passing between parties to a controversy, with the object of obtaining a settlement of their difficulty out of court. The subject has already received treatment, but in the note will be found additional authorities, as well as constructions of the phrase as used in other connections.¹

Sale Without Reserve.—See **AUCTIONS AND AUCTIONEERS**, vol. 1, p. 989.

1. **As an Admission of Right.**—A letter *without prejudice* cannot be treated as an admission of right, and though in *Williams v. Thomas*, 31 L. J. Ch. 674, Kindsley, V. C., said: "The party writing it can use it against the other on the question of costs" (see also *Jones v. Foxall*, 21 L. J. Ch. 725; 15 Beav. 388), yet it has been held recently in the English court of appeals, questioning *Williams v. Thomas*, 31 L. J. Ch. 676, that a letter written without prejudice cannot be looked at as furnishing *good cause* for depriving the successful litigant of costs. *Walker v. Wilsher*, 23 Q. B. Div. 335. This, in fact, seems to establish the principle that a letter without prejudice cannot be read without the consent of both parties. *Healey v. Thatcher*, 8 C. & P. 388; 34 E. C. L. 442.

Negotiation Closed by an Agreement.—But even as regards the rights between the parties, a letter without prejudice is only inadmissible so long as it relates to a negotiation; when the negotiation is closed by an agreement the privilege ceases. *Holdsworth v. Demsdale*, 19 W. R. 798. See also *Hoghton v. Hoghton*, 15 Beav. 278; *Paddock v. Forrester*, 3 M. & G. 903; 42 E. C. L. 470.

Whole Negotiation Covered.—The whole negotiation is covered if its commencement is without prejudice. *Ex p. Harris*, 44 L. J. Bank. 33; *Healey v. Thatcher*, 8 C. & P. 388; 34 E. C. L. 442.

Withdrawal of Suit by Plaintiff.—*Without prejudice* means that the position of the plaintiff is not to be unfavorably affected by the act of withdrawal. All his rights were to remain as they then stood. *Creighton v. Kerr*, 20 Wall. (U. S.) 12.

Dismissal of Appeal.—Where it appeared upon appeal that the statement sent up had not been settled by the judge below; and, on appellant's motion for leave to withdraw it for correction, the appeal was dismissed "without prejudice," and after correction the case

was again taken up, it was held that the dismissal of the first appeal did not operate as an affirmance of the judgment or prevent the second appeal. *Cooper v. Pacific Mut. L. Ins. Co.*, 7 Nev. 116; 8 Am. Rep. 705.

Dismissing Libel.—A decree dismissing a libel for divorce, "without prejudice," even after the evidence has been heard, is not a bar to a new libel for the same cause. *Burton v. Burton*, 58 Vt. 414.

Judgment Without Prejudice.—In *Fisher v. Williams*, 56 Vt. 586, it was held that a judgment was conclusive and could not be collaterally attacked, although rendered *without prejudice* to plaintiff's rights. The court said: "It is contended that the judgment was rendered 'without prejudice' to the plaintiff's right to hold the sum due from the school district in this suit. We know of no practice, nor authority, by which a court can thus qualify a judgment. There was a judgment between the parties to the suit—the claimant and the school district. The plaintiff was not a party to that suit. How any rights could be reserved in the judgment in favor of a person who was neither a party, nor a proper person to be made party, to the suit, is beyond the comprehension of this court. If the suit had been in favor of the defendant against the district, the statute provides that the plaintiff in the trustee suit may have it stayed—beyond ascertaining therein what may be due from the trustee—until his trustee suit is ended. But, beyond this, the statute makes no provision in favor of a plaintiff in a trustee suit in regard to a suit by the defendant against the supposed trustee. There is no such provision in regard to a suit by the claimant against the supposed trustee. When, therefore, the court rendered a judgment, that the fund sought to be attached in this suit belonged to the claimant, it concluded not only the claimant and trustee, but established judicially that the fund was the property of the claimant, and for

WITHOUT RECOURSE—(See also **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 2, p. 313).—A special indorsement in the words usually employed, "without recourse," is an express declaration of the absence of responsibility.¹

But an indorser of a promissory note "without recourse," for value, contracts and engages that the signatures borne by said note as makers, or prior indorsers, are the genuine signatures of the persons thereby represented, and that such note is their valid obligation.²

that reason not attachable by the trustee process as the property of the defendant."

Publication of Testimony.—"The testimony was, by consent, published *without prejudice*, which by the common understanding of solicitors and chancellors is a consent reservation of the right to take additional testimony." *Dixon v. Higgins*, 82 Ala. 284.

1. *Bankhead v. Owen*, 60 Ala. 461. See also *Wilson v. Codman*, 3 Cranch (U. S.) 193; *Overton v. Tracey*, 14 S. & R. (Pa.) 325.

In *Ober v. Goodridge*, 27 Gratt. (Va.) 878, where a note was transferred "without recourse," it was held, under the circumstances of the case, that the transferrer was not liable, although the indorser had been discharged by insufficient notice of dishonor.

2. *Palmer v. Courtney*, 32 Neb. 773; *Seeley v. Reed*, 28 Fed. Rep. 164, *citing* *Daniel on Negotiable Instruments*, § 670; *Challiss v. McCrum*, 22 Kan. 157; 31 Am. Rep. 181. See also *Ticonic Bank v. Smiley*, 27 Me. 225; 46 Am. Dec. 593.

When a note is transferred without recourse, as when transferred by delivery only, the transferrer is exempt from all the ordinary responsibilities which attach to such transfer; but he is not discharged, unless it is otherwise agreed and expressed, from liability upon implied warranty, that the paper so transferred is genuine, and not forged or fictitious; that it is of the kind or description which it purports to be; that the assignor has done nothing, and will do nothing, to prevent the assignee from collecting the claim assigned; that the parties to the instrument are *sui juris*, and capable of contracting; that it has not been paid; and he is liable for any fraud practiced upon the assignee in the transaction of the transfer. *Watson v. Cheshire*, 18 Iowa 202; 87 Am. Dec. 382.

Illegal Consideration.—In *Hannum v. Richardson*, 48 Vt. 508; 21 Am.

Rep. 152, a note was given for liquor sold in violation of the law and was by statute void. Defendant knew its invalidity, transferred it by an indorsement "without recourse," and he was held liable to the vendee. But see *Rayne v. Ditto*, 27 La. Ann. 622, where the consideration was confederate money and the indorsee held not liable.

Valuable Consideration.—As to whether there is a warranty of valuable consideration, see *Blethen v. Lovering*, 58 Me. 437.

Usury.—An indorser of a note, although "without recourse," will be liable to the indorsee or holder, on the implied warranty that the note is a valid obligation for the amount expressed upon its face. If the note is usurious, and the maker successfully interposes the defense of usury, and defeats the collection of the interest reserved in the note, the indorser will be liable over to the indorsee or holder for the deficiency thereby occasioned. *Drennan v. Bunn*, 124 Ill. 175. See also *Freeman v. Brittin*, 17 N. J. L. 227; *Challis v. McCrane*, 22 Kan. 157; 31 Am. Rep. 181; *Delaware Bank v. Jarvis*, 20 N. Y. 226.

Stolen Note.—An indorser, "without recourse," of a treasury note which had been paid, and afterwards stolen and put in circulation, the marks of payment having been fraudulently obliterated, is liable to his indorsee; for these words merely limit his responsibility by the law merchant in the event of the instrument being dishonored. *Frazer v. D'Invilliers*, 2 Pa. St. 200; 4 Am. Dec. 190. Compare *Scofield v. Moore*, 31 Iowa 241.

Signatures.—The vendor of a promissory note who transfers it by indorsement impliedly warrants that the signature of the prior parties whose names appear thereon are genuine, notwithstanding the indorsement is expressed to be without recourse on him. *Dumont v. Williamson*, 18 Ohio St. 516; 98 Am. Dec. 186.

Paid Note.—Where a party agreed to have a bond assigned "without recourse" to another, those words were held not to exempt the contractor from liability when it afterward appeared that it had been previously paid. The court said: "The very possession of the bond, the claiming it as property, as something binding the obligors, precluded the idea that it was at that moment discharged or satisfied; for then it was no bond; it bound nobody; it was not the representative of money. The bond too was payable at a future date. Who could have dreamed that it was already mere wax and paper, not a cent due on it?" *Mays v. Callison*, 6 Leigh (Va.) 230. See also *Ticonic Bank v. Smiley*, 27 Me. 225; 46 Am. Dec. 593; *Frazer v. D'Invilliers*, 2 Pa. St. 200; 4 Am. Dec. 190. But *Compare Scofield v. Moore*, 31 Iowa. 241.

After Maturity.—The payee of a promissory note, who reacquires it after indorsing it over without recourse, then stands in the position of an ordinary transferee. And where the note is reacquired after maturity, he takes it like any other assignee of non-negotiable paper, subject to all antecedent equities. And his rights are not enlarged by the fact that he claims as payee, and not as transferee or indorsee. Thus, where the makers and indorsers of a note were firms having a common member, the assignee after maturity, of the indorser, could not, at law, sue the makers, even though he had previously been payee of the note, and claimed as such. *Calhoun v. Albin*, 48 Mo. 304.

Assignment of a Judgment.—Partly Paid.—Judgment, a part of which had been paid and no record of such payment made, is assigned in the following form: "For value received, we hereby sell and assign all our right, title and interest in this judgment to M. *without recourse* on us." It was held, no fraud being shown, that the assignors were not liable to the assignee for the amount which had been paid on the judgment. The court said: "The assignors transferred their right, title and interest in the judgment *without recourse*." The words used clearly indicate, in the absence of any intention to warrant the validity or value of the judgment, that it was collectible. *Scofield v. Moore*, 31 Iowa 241. *Compare Frazer v. D'Invilliers*, 2 Pa. St. 200; 44 Am. Dec. 190.

Parol Evidence.—In *Youngberg v. Nelson*, 51 Minn. 172, parol evidence 29 C. of L.—34

was held inadmissible to show that an indorser of a note "without recourse" guaranteed the payment. The court said: "The defendant transferred the promissory note of a third party to plaintiff by indorsement 'without recourse,' and the only question necessary to be considered is whether evidence of a contemporaneous oral guaranty of payment was admissible. We are clearly of the opinion that the case falls within the familiar elementary rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written contract. The parties have put their engagement into writing (as evidenced by the qualified indorsement) in terms that are certain as to the object and extent of such engagement. It is therefore conclusively presumed (in the absence of any showing of fraud or mistake) that their whole engagement on the subject covered by the indorsement was reduced to writing. While by the very act of transferring paper, whether by indorsement or mere delivery, a party engages that it is what it purports to be—the valid obligation of those whose names are upon it—and that he has good title to it, yet, when the indorsement is 'without recourse,' the indorser specially declines to assume any responsibility for its payment. According to the meaning of the term in the law merchant, this is the express condition of the contract, as much as if stated in detail in so many words. That evidence of a contemporaneous oral agreement that the indorser should be liable, as guarantor, for the payment of the note, would vary and contradict the terms of such a written contract, would seem self-evident. This court has steadily held, from the early cases of *Levering v. Washington*, 3 Minn. 323, and *Kern v. Von Phul*, 7 Minn. 426; 82 Am. Dec. 105, down to *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, that the implications and intendments which the law merchant has attached to blank indorsements of negotiable paper render them express and complete contracts, which cannot be varied or contradicted by parol."

So parol evidence is inadmissible to change a simple indorsement of a promissory note into an indorsement "without recourse." *Doolittle v. Ferry*, 20 Kan. 230; 27 Am. Rep. 166; *Charles v. Denis*, 42 Wis. 56; 24 Am. Rep. 383; *Dale v. Gear*, 38 Conn. 15; 9 Am. Rep. 353; *Harrison v. McKim*, 18 Iowa 485.

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I. DEFINITION.—A witness is one who appears before a court, judge, or other officer, and is examined under oath or affirmation as to his knowledge of matters undergoing judicial investigation.¹

II. SECURING ATTENDANCE—1. *Subpœna*.—The usual process for bringing witnesses before a court or other tribunal or officer, to give oral testimony, is the writ of *subpœna ad testificandum*.² In case the witness is required to produce documents or writings in his possession or under his control, to be used as evidence, the *subpœna duces tecum* is the proper writ.³

2. *Habeas Corpus ad Testificandum*.—If the person desired as a witness is in custody, or is in the military or naval service, the proper process to secure his attendance is the writ of *habeas corpus ad testificandum*.⁴

3. *Recognizance*.—In criminal cases, the court sometimes requires material witnesses examined at the preliminary hearing to enter into recognizances to attend upon the trial;⁵ and, in case of

1. "A person who, being present before a court, magistrate, or examining officer, orally declares what he has seen or heard or done relative to a matter in question." 2 Abb. Law Dict., tit., "Witness."

"A witness is a means or instrument of evidence; that is, of unwritten or oral evidence. His function is to inform the tribunal or officer before whom he testifies as to matters of fact." Stewart Rapalje in 19 Am. L. Rev. 583.

The term "witness," in its strict legal sense, means one who gives evidence in a cause before the court. *Barker v. Coit*, 1 Root (Conn.) 225.

When the books speak of a witness, they always mean one who gives oral testimony. *U. S. v. Wood*, 14 Pet. (U. S.) 445.

"The word 'witness' is a most general term, including all persons from whose lips testimony is extracted to be used in any judicial proceeding. It embraces deponents as the term is used with us, and affiants equally with persons delivering oral testimony before a jury. The affiant or deponent is always a witness, but a witness is not necessarily an affiant or deponent." Appleton, J., in *Bliss v. Shuman*, 47 Me. 252. It was accordingly held in that case that the statute removing the common law disqualifications of a wit-

ness interested in the event of the cause, either as a party, or otherwise, applied equally to a deponent. To the same effect is *Abshire v. Mather*, 27 Ind. 381.

"Witnesses," in a technical sense, are persons sworn to testify or offered to testify in a cause. *M'Chesney v. Lansing*, 18 Johns. (N. Y.) 388. But in that case it was held that in a statute requiring a justice of the peace, upon appeal, to certify to the court above the proceedings before him, and among other things the names of the witnesses sworn and examined and the names of those offered and rejected, "witnesses" is used in a more comprehensive sense, as synonymous with "evidence."

A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit. *California Code Civ. Proc.*, § 1878.

2. See SUBPENA, vol. 24, p. 158.

For payment of fees and expenses as a condition precedent to compelling attendance, see SUBPENA, vol. 24, p. 166; for the punishment of disobedience to the writ, see SUBPENA, vol. 24, p. 170.

3. See SUBPENA, vol. 24, p. 173.

4. See SUBPENA, vol. 24, p. 172.

5. *Higginson's Case*, 1 Cranch (C. C.) 73; *U. S. v. Butler*, 1 Cranch (C.

manifest unwillingness to attend, may require them to find bail, and in default thereof may commit them until the time appointed for the trial of the cause.¹ In such cases it seems that they are deemed in attendance upon the court during the whole period of their detention, and are, therefore, entitled to their *per diem* witness fees for such period.²

III. COMPETENCY — 1. Persons Interested — a. PARTIES — (1) In General.—It was a general rule of the common law that a party of record who was interested in the event of the suit was not a competent witness for himself or a co-suitor.³ Any pecuniary

C.) 422; *People v. Lee*, 49 Cal. 37; *Ex p. Shaw*, 61 Cal. 58; *Markwell v. Warren County*, 53 Iowa 422; *Bickley v. Com.*, 2 J. J. Marsh. (Ky.) 572; *State v. Grace*, 18 Minn. 398; *Ex p. Mitchell*, 17 N. H. 501; *Hutchins v. State*, 8 Mo. 288; *State v. Stewart*, 1 Law Repos. (N. Car.) 524; *State v. Zellers*, 7 N. J. L. 220; *Means v. State*, 10 Tex. App. 16; 38 Am. Rep. 640.

The court may grant the prisoner permission also to have his witnesses bound in recognizance to appear and give evidence. *State v. Zellers*, 7 N. J. L. 220.

1. *Bennet v. Watson*, 3 M. & S. 1; *Robinson v. Chambers*, 94 Mich. 471; *Markwell v. Warren County*, 53 Iowa 422; *Higginson's Case*, 1 Cranch (C. C.) 73.

But the power to exact an undertaking is confined to witnesses who are examined before the committing magistrate. *Ex p. Shaw*, 61 Cal. 58.

And one who has not appeared before the magistrate as a witness may not be arrested and required to give bail for his appearance at the trial. *Evans v. Rees*, 12 Ad. & El. 55; 40 E. C. L. 23.

A witness who is willing to enter into his own recognizance cannot be committed unless it appears that he intends to evade his obligation to appear and testify. *State v. Grace*, 18 Minn. 398. And in *Bickley v. Com.*, 2 J. J. Marsh. (Ky.) 572, it was held that the witness could not be compelled to give surety for his appearance at all.

2. *Robinson v. Chambers*, 94 Mich. 471; *Higginson's Case*, 1 Cranch (C. C.) 73.

In *Hutchins v. State*, 8 Mo. 290, it is said to have been so decided in the courts of *Louisiana*, but no citation is given. But in *Markwell v. Warren County*, 53 Iowa 422, the contrary was held.

3. *Bridges v. Armour*, 5 How. (U. S.) 91; *Blanchard v. Sprague*, 1 Cliff. (U. S.) 288; *Beebe v. Kaiser*, 19 La. Ann. 270; *Beer v. Word*, 13 La. Ann. 467; *Lucas v. Payne*, 7 Cal. 92; *Weed v. Bishop*, 7 Conn. 129; *Bradley v. Goodyear*, 1 Day (Conn.) 104; *Johnson v. Blackman*, 11 Conn. 342; *Haswell v. Bussing*, 10 Johns. (N. Y.) 128; *Benjamin v. Coventry*, 19 Wend. (N. Y.) 253; *Frear v. Evertson*, 20 Johns. (N. Y.) 142; *Terry v. Dayton*, 31 Barb. (N. Y.) 519; *Marks v. Butler*, 24 Ill. 567; *Ex p. Macay*, 84 N. Car. 63; *Little v. Arrowsmith*, 16 N. J. L. 221; *Anderson v. Bradie*, 7 Yerg. (Tenn.) 297; *Evans v. Gibbs*, 6 Humph. (Tenn.) 405; *Evans v. Hardgrove*, 11 Tex. 210; *Nalle v. Gates*, 20 Tex. 315; *Kirksey v. Kirksey*, 41 Ala. 626; *Janes v. Mercer University*, 17 Ga. 515; *McNabb v. Lockhart*, 18 Ga. 495; *Lingan v. Henderson*, 1 Bland (Md.) 236; *Adams v. Leland*, 7 Pick. (Mass.) 62; *Fischer v. Morse*, 9 Gray (Mass.) 440; *Sears v. Dillingham*, 12 Mass. 358; *Smith v. Smith*, 1 Allen (Mass.) 231; *Nason v. Thatcher*, 7 Mass. 398; *Fox v. Whitney*, 16 Mass. 118; *Murphy v. Carter*, 23 Gratt. (Va.) 485.

In actions not founded on contract, persons named in the process and pleadings as parties, but not served with the summons, were competent witnesses. *Robinson v. Frost*, 14 Barb. (N. Y.) 536; *Stockham v. Jones*, 10 Johns. (N. Y.) 21; *Conwell v. Smith*, 4 Ind. 359; *Wakeley v. Hart*, 6 Binn. (Pa.) 316; *Entriken v. Brown*, 32 Pa. St. 364.

But where it appeared that parties not served were actually co-trespassers with those served and had evaded the service of the writ, it was held that they were not competent witnesses for the defense. *Lloyd v. Williams*, Cas. temp. Hardw. 123; *Cotton v. Luttrell*, 1 Atk. 452.

interest, however small, even a primary liability for costs, was sufficient to bring a party within the operation of the rule.¹ There are many well considered cases in which it was held that interest in the event of the suit was the only reason for the rule against the competency of parties to the record,² and, accordingly, a party who was a mere trustee, without interest in the

And the same was true in actions *ex contractu*, unless the witness was sufficiently interested in the event of the action to disqualify him had he not been named as a party. *Purviance v. Dryden*, 3 S. & R. (Pa.) 402; *Leroy v. Johnson*, 2 Pet. (U. S.) 186; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Taylor v. Hancock*, 14 La. Ann. 704; *Steigers v. Gross*, 7 Mo. 261. The contrary was held in *Parke v. Bird*, 3 Pa. St. 360.

In such case he was competent as a witness for the plaintiff, although jointly liable upon the contract sued on. *Baugh v. Culler*, 12 Md. 6. See also *Blackett v. Weir*, 5 B. & C. 385; 11 E. C. L. 257.

But where he was interested, he was not competent for the defense, although no process had been served on him. *Van Norden v. Striker*, 9 Wend. (N. Y.) 286.

A misnomer of one of the defendants will not operate to take him out of the rule excluding parties of record. *Van Norden v. Striker*, 9 Wend. (N. Y.) 286; *Robinson v. Neal*, 5 T. B. Mon. (Ky.) 214.

1. *Foley v. Mason*, 6 Md. 37; *Owings v. Emery*, 7 Gill (Md.) 405; *Selby v. Clayton*, 7 Gill (Md.) 240; *Wade v. Lynch*, 21 Md. 537; *Kennedy v. Evans*, 31 Ill. 258; *Essex Bank v. Rix*, 10 N. H. 201; *Sears v. Dillingham*, 12 Mass. 358; *Fox v. Whitney*, 16 Mass. 118; *Adams v. Leland*, 7 Pick. (Mass.) 62; *Patterson v. Cobb*, 4 Fla. 485; *Bellamy v. Cains*, 3 Rich. (S. Car.) 354; *Gray v. Ottolengui*, 12 Rich. (S. Car.) 101; *Scott v. Watkins*, 2 Smed. & M. (Miss.) 233; *Lucas v. Payne*, 7 Cal. 95; *Chenoweth v. Fielding*, 2 Metc. (Ky.) 517; *Walker v. McKnight*, 15 B. Mon. (Ky.) 467; 61 Am. Dec. 190; *Cogbill v. Cogbill*, 2 Hen. & M. (Va.) 467; *Stein v. Bowman*, 13 Pet. (U. S.) 219; *Bridges v. Armour*, 5 How. (U. S.) 94.

A party who was a mere trustee, without interest in the question in dispute, was, when liable for costs, incompetent as a witness. *Phillips v. Bucks*, 1 Vern. 230; *Dowdeswell v. Nott*, 2

Vern. 317; *Davis v. Morgan*, 1 Tyr. 457; 1 C. & J. 587; *Baerman v. Radenius*, 7 T. R. 659; *Hawkins v. Hawkins*, 2 Law Repos. (N. Car.) 627; *Rex v. Governor, etc., of Poor*, 3 East 7.

A guardian or *prochein ami* representing an infant was incompetent when liable for costs. *Clutterbuck v. Huntingtower*, 1 Stra. 506; *James v. Hatfeild*, 1 Stra. 548; *Hopkins v. Neal*, 2 Stra. 1026; *Sproule v. Botts*, 5 J. J. Marsh. (Ky.) 162. But since Lord Denman's Act, 6 & 7 Vict., ch. 85, a *prochein ami* suing for an infant is admissible as a witness. *Sinclair v. Sinclair*, 13 M. & W. 640.

An objection on account of interest in the costs must be made at the trial and cannot be first urged on the hearing of a case saved. *Essex Bank v. Rix*, 10 N. H. 201.

A garnishee in a foreign attachment was not a competent witness against the plaintiff, even though he paid the debt due from him into court, where he was liable for costs if he resisted the plaintiff's claim. *Wood v. Ludwig*, 5 S. & R. (Pa.) 446.

2. *Norden v. Williamson*, 1 Taunt. 378; *Worrall v. Jones*, 7 Bing. 395; 20 E. C. L. 177; *Jackson v. Barron*, 37 N. H. 494; *Essex Bank v. Rix*, 10 N. H. 201; *Beebe v. Kaiser*, 19 La. Ann. 270; *Coopwood v. Foster*, 12 Smed. & M. (Miss.) 718; *Safford v. Lawrence*, 6 Barb. (N. Y.) 566; *Miller v. McCan*, 7 Paige (N. Y.) 457; *Talbot v. Talbot*, 23 N. Y. 19; *Wooten v. Nall*, 18 Ga. 609; *Neal v. Lamar*, 18 Ga. 746; *Central R., etc., Co. v. Hines*, 19 Ga. 203; *Foster v. Leeper*, 29 Ga. 297; *Robert v. Boynton*, 30 Ga. 939; *Duffee v. Pennington*, 1 Ala. 506; *Prewett v. Marsh*, 1 Stew. & P. (Ala.) 17; 21 Am. Dec. 645; *Shellenbarger v. Norris*, 2 Ind. 285; *Draper v. Vanhorn*, 12 Ind. 352; *Johnson v. Blackman*, 11 Conn. 342; *Wilson v. Allen*, 1 Jones Eq. (N. Car.) 24; *Sargeant v. Sargeant*, 18 Vt. 371; *Day v. Cummings*, 19 Vt. 496; *Paine v. Tilden*, 20 Vt. 503; *Corrie v. Calder*, 6 Rich. (S. Car.) 198; *Block v. Chase*, 15 Mo. 344; *Barker v. Ayers*, 5 Md. 202.

Willings v. Consequa, Pet. (C. C.) 301, supports the rule of the cases above cited, but the Supreme Court of the *United States* has disapproved the doctrine of this case. See *Scott v. Lloyd*, 12 Pet. (U. S.) 145; *Stein v. Bowman*, 13 Pet. (U. S.) 219.

In *Steele v. Phoenix Ins. Co.*, 3 Binn. (Pa.) 311, Tilghman, C. J., said: "The fact is that in almost every instance the plaintiff is interested either in the subject of the suit or in the costs, and, therefore, the conclusion may have been drawn without sufficient reflection that in no case can he be a witness. The reason of the law is the life of the law. Now, what good reason is there why a man's testimony should be excluded merely because his name is placed on the record as a party to a suit in which he has no manner of interest?" Notwithstanding this strong language, which is certainly in accord with the English rule, the court gradually drifted to the conclusion that a party of record, though free of interest, was not a competent witness except by consent of all the parties. *Swanzy v. Parker*, 50 Pa. St. 441; 88 Am. Dec. 549.

In *Worrall v. Jones*, 7 Bing. 395; 20 E. C. L. 177, it appeared that one of the defendants had suffered judgment by default and was called as a witness for the plaintiff. He had no further interest in the event of the suit, but the other defendant objected to his testifying on the ground that he was a party. It was held that he was a competent witness. *Tindal, C. J.*, said: "No case has been cited, nor can any be found, in which a witness has been refused upon the objection in the abstract that he was a party to the suit. On the contrary, many have been brought forward in which parties to the suit who have suffered judgment by default, have been admitted as witnesses against their own interest; and the only inquiry seems to have been, in a majority of the cases, whether the party called was interested in the event or not, and the admission or rejection of the witness has depended upon the result of this inquiry."

In *Sargeant v. Sargeant*, 18 Vt. 378, *Redfield, J.*, said: "It is well settled that the person who is party of record may, if he consent, be sworn as a witness and give evidence in the cause, either when he has no interest in the event of the suit, or when he is called to give evidence for the party whose interest is contrary to his own." *Citing Worrall v. Jones*, 7 Bing. 395; 20

E. C. L. 177, and *Norden v. Williamson*, 1 Taunt. 378.

In *Paine v. Tilden*, 20 Vt. 563, the same learned judge said: "The mere objection that the witness is a party to the record when he has no interest in the event of the suit, or is called to testify against his interest, has been too often decided by this court to be of no force to be again brought in question."

In *Brown v. Brown*, 4 Taunt. 752, and *Mant v. Mainwaring*, 8 Taunt. 139, the witnesses were not free from interest in the issue and the cases were doubtless correctly decided. But if they were ever authority on the point that the naked fact of one's being a party of record was sufficient to disqualify him as a witness, they were deliberately overruled in *Worrall v. Jones*, 7 Bing. 395; 20 E. C. L. 177. See opinion of Lord Denman, C. J., in *Pipe v. Steele*, 2 Ad. & El. N. S. 733; 42 E. C. L. 888.

The true rule was not that a witness should be excluded merely because he was a party to the suit, but that a party to the issue tried should not be examined as a witness. *Safford v. Lawrence*, 6 Barb. (N. Y.) 566; *Chenoweth v. Fielding*, 2 Metc. (Ky.) 517.

A nominal defendant to a bill in equity, against whom no decree is prayed, is a competent witness for the complainant. *Ragan v. Echols*, 5 Ga. 71; *Clendaniel v. Hastings*, 5 Harr. (Del.) 408.

The payee of a note, who was the nominal plaintiff in a suit against the maker for the benefit of the holder, was a competent witness for the defendant in the suit if he were willing to testify. *Coopwood v. Foster*, 12 Smed. & M. (Miss.) 718; *Johnson v. Blackman*, 11 Conn. 342.

A plaintiff was competent to prove special damages to the property of a co-plaintiff, he himself having no interest in the matter. *Draper v. Vanhorn*, 12 Ind. 353.

An administrator who was one of the plaintiffs in a suit might be examined as a witness for the plaintiffs, after releasing to the heirs his claim to commissions and paying into court a sum sufficient to meet all costs accrued and to accrue in any event, unless it appeared that he was in danger of being involved in a *devastavit*. *Heckert v. Haine*, 6 Binn. (Pa.) 16; *Patton v. Ash*, 7 S. & R. (Pa.) 116; *Ash v. Patton*, 3 S. & R. (Pa.) 300.

event of the proceedings, or liability for costs, was held to be a competent witness.¹ But, on the other hand, cases are not wanting in which it was held to be the policy of the law to exclude parties of record from the witness box, independently of pecuniary interest in the event, in order to avoid temptations to fraud and perjury.²

But a mere promise to pay the costs was not sufficient. A deposit of the money must be made. *Hoak v. Hoak*, 5 Watts (Pa.) 80.

Where one of two co-defendants appealed and the other did not, it was held that the one who did not appeal, having no further interest in the event of the suit, was competent as a witness as to matters which remained to be determined. *Wellborn v. Rogers*, 24 Ga. 558; *Hodges v. Mullikin*, 1 Bland (Md.) 503.

In a suit on an administration bond, the ordinary, being a nominal plaintiff in his official capacity, without interest in the event of the suit or liability for costs, was a competent witness to prove the bond. *Price v. Gregory*, 4 McCord (S. Car.) 261.

1. *Fotherby v. Pate*, 3 Atk. 604; *Johnson v. Cunningham*, 1 Ala. 249; *Main v. Newson*, Anth. (N. Y.) 18; *McLaughlin v. McLaughlin*, 16 Mo. 242; *Hale v. Meegan*, 39 Mo. 272; *Neville v. Demeritt*, 2 N. J. Eq. 321; *Jones v. Sasser*, 1 Dev. & B. (N. Car.) 452; *Harvey v. Alexander*, 1 Rand. (Va.) 219; 10 Am. Dec. 519; *Taylor v. Moore*, 2 Rand. (Va.) 563; *Eacho v. Cosby*, 26 Gratt. (Va.) 112; *Spalding v. Bull*, 1 Duv. (Ky.) 311; *Drum v. Simpson*, 6 Binn. (Pa.) 478; 6 Am. Dec. 490; *Keim v. Taylor*, 11 Pa. St. 163; *Ryerss v. Presbyterian Congregation*, 33 Pa. St. 114; *King v. Cloud*, 7 Pa. St. 467; *Cox v. McKean*, 56 Pa. St. 343.

But if he were liable for the costs, he was not a competent witness. *Adams v. Leland*, 7 Pick. (Mass.) 62; *Neville v. Demeritt*, 2 N. J. Eq. 321; *Stone v. Bibb*, 2 Ala. 100.

2. *Smith v. Moore*, 4 Ill. 462; *Gillett v. Sweat*, 6 Ill. 475; *Goodwin v. Harrison*, 6 Ala. 438; *Fox v. Whitney*, 16 Mass. 118; *Page v. Page*, 15 Pick. (Mass.) 373; *Columbian Mfg. Co. v. Dutch*, 13 Pick. (Mass.) 125; *Benjamin v. Coventry*, 19 Wend. (N. Y.) 353; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *Hopkins v. Banks*, 7 Cow. (N. Y.) 650; *Chenango v. Birdsall*, 4 Wend. (N. Y.) 453; *Terry v. Dayton*, 31 Barb. (N.

Y.) 519; *Gilmore v. Bowden*, 12 Me. 412; *Kennedy v. Niles*, 14 Me. 54; *Wing v. Andrews*, 59 Me. 505; *Canty v. Sumter*, 2 Bay (S. Car.) 93; *Knight v. Packard*, 3 McCord (S. Car.) 71; *Bridges v. Armour*, 5 How. (U. S.) 94; *DeWolf v. Johnson*, 10 Wheat. (U. S.) 384; *Scott v. Lloyd*, 12 Pet. (U. S.) 145; *Stein v. Bowman*, 13 Pet. (U. S.) 219; *disapproving Willings v. Consequa*, Pet. (C. C.) 301.

"It is an inflexible rule of evidence that parties of record, whether in civil actions or criminal prosecutions, are not admissible as witnesses." *Com. v. Marsh*, 10 Pick. (Mass.) 57; *Page v. Page*, 15 Pick. (Mass.) 373.

"The common-law rule is that a party to the record cannot be a witness, unless in actions of tort. In no other case can a party to the record give evidence to go to the jury on the merits of a cause." *Hackett v. Martin*, 8 Me. 77; *Austin v. Fuller*, 12 Barb. (N. Y.) 360.

In *New York*, the courts of chancery did not follow the doctrine laid down by the courts of law in that state, but admitted a party as a witness where he was free of interest. *Norton v. Woods*, 5 Paige (N. Y.) 249; *Miller v. McCan*, 7 Paige (N. Y.) 451.

The inconvenience and hardship which resulted from the rejection of witnesses, on the mere technical ground that they were parties of record, occasionally brought the court of chancery to the rescue of parties whose only witnesses were so disqualified. Thus, in *Norton v. Woods*, 5 Paige (N. Y.) 249, where the only witness for the defense was a nominal plaintiff and could not testify in a court of law, although free of interest, the court enjoined the real plaintiff from proceeding at law, in order that the controversy might be settled in a court of equity where the nominal plaintiff was competent to testify.

So, also, in *Miller v. McCan*, 7 Paige (N. Y.) 451, it appeared that the payee of a promissory note brought an action at law against the principal debtor and his surety. The principal debtor and the payee had made an agreement for

(2) *Corporators*.—In actions by and against public corporations or *quasi* corporations a distinction was formerly made, in *England* and some of the states of the Union, between rated and ratable inhabitants; the former being held incompetent as witnesses by reason of being parties interested in the event, and the latter being held competent.¹ But the remoteness of the private interest, and the difficulty of securing justice when the rule was strictly enforced, led to its early abolition by statute.² When, however, the witness was personally interested in the event of the proceedings, as where he was called to prove a custom or right common to all the inhabitants of the place, he was not competent because, if the claim were sustained, the record of the proceedings might be used as evidence in support of a similar claim on his part.³ But where a public corporation was a party to an

an extension of the time of payment, which operated as a complete discharge of the surety, but he was unable to prove this defense at law, as the principal debtor, his only witness, was a party, and, therefore, disqualified as a witness, although his interest was exactly balanced between the parties, as he was liable to one or the other of them in any event. The court awarded the surety a perpetual injunction against the collection of the note from him personally.

1. 1 Phill. Ev. (5th Am. ed.), *pp. 40, 57; *Doe v. Murrell*, 8 C. & P. 134; 34 E. C. L. 327; *Com. v. Baird*, 4 S. & R. (Pa.) 141; *Chester v. Rockingham*, *Brayt* (Vt.) 239; *Rex v. Little Lumley*, 6 T. R. 157. See also *Rex v. Prosser*, 4 T. R. 19; *Rex v. South Lynn*, 5 T. R. 664; *Oxenden v. Palmer*, 2 B. & Ad. 236; 22 E. C. L. 64; *Rex v. Auckland*, 1 Ad. & El. 744; 28 E. C. L. 197; *Davis v. Morgan*, 1 Tyr. 457; *Rex v. Netherthong Tp.*, 2 M. & S. 337.

An inhabitant of a state which sued in the courts of another state, was a competent witness in the case. *Connecticut v. Bradish*, 14 Mass. 296.

That a witness was liable to be rated and compelled to pay taxes was too remote and contingent an interest to render him incompetent as a witness. *Falls v. Belknap*, 1 Johns. (N. Y.) 486; *Bloodgood v. Overseers of Poor*, 12 Johns. (N. Y.) 285; *State v. Davidson*, 1 Bailey (S. Car.) 35; *Rex v. Kirdford*, 2 East 559; *Marsden v. Stansfield*, 7 B. & C. 815; 14 E. C. L. 137.

In ejectment by a person, to recover a cottage taken from him by the parish officers as being a parish house, an in-

habitant who had ratable property in the parish but was not rated was a competent witness for the defendant under the Stat. 54 Geo. III., ch. 170, § 9. *Doe v. Murrell*, 8 C. & P. 134; 34 E. C. L. 327.

2. In *England*, the disability of rated inhabitants was partially removed by 54 Geo. III., ch. 170, § 9, and was entirely removed by 3 & 4 Vict., ch. 26. But, notwithstanding these statutes, such an inhabitant may not be compelled to testify against the corporation, and his declarations may be proved as admissions against interest. *Reg. v. Adderbury*, 5 Q. B. 187; 48 E. C. L. 187. See also *Rex v. Woburn*, 10 East 395; *Rex v. Hardwick*, 11 East 578.

In *Pennsylvania*, the disqualification of rated inhabitants was removed by the act of April 16, 1840. *Barnet v. School Directors*, 6 W. & S. (Pa.) 46. See also *Thornbury v. Directors of Poor*, 12 S. & R. (Pa.) 110; *McFarland v. Moyamensing Tp.*, 12 S. & R. (Pa.) 297, where it appears that some modifications of the common-law rule were made by two earlier statutes.

In *Vermont*, such inhabitants were also rendered competent by statute. *Peacham v. Carter*, 21 Vt. 515.

3. *Prewit v. Tilly*, 1 C. & P. 140; 11 E. C. L. 347; *Moore v. Griffin*, 22 Me. 350. See also *Burton v. Hinde*, 5 T. R. 174.

Thus, an inhabitant of a town was not a competent witness to prove a custom for the inhabitants to dig clams in a certain spot, *Lufkin v. Haskell*, 3 Pick. (Mass.) 355; or to prove a right of way by prescription common to all the inhabitants, *Odiorne v. Wade*, 8

action which involved only the rights of the corporation as such, the inhabitants of the same were competent witnesses, and such interest as they had in the event of the action, being remote and common to all, was held to go only to their credibility.¹ Thus inhabitants of a public corporation to which property was devised or bequeathed for charitable purposes, were competent witnesses to attest the will.² So, also, a member of a private eleemosynary corporation, who had no pecuniary interest in the matter in controversy and had no private or personal interest in the property held by it, was a competent witness in a suit in which the corporation was a party.³

Pick. (Mass.) 518; or to prove a right of fishery common to the inhabitants, *Jacobson v. Fountain*, 2 Johns. (N. Y.) 170; but he was competent to prove a public right of fishing in all the citizens of the state. *Gould v. James*, 6 Cow. (N. Y.) 369.

And upon an issue as to whether the owners of property in a certain district were, by immemorial usage, liable to a common burden, an owner of property in such district was not competent to disprove the liability, because, by removing the liability, he added to the value of his estate. *Rhodes v. Ainsworth*, 1 B. & Ald. 87.

1. *Hunter v. Marlboro*, 2 Woodb. & M. (U. S.) 175; *Fuller v. Hampton*, 5 Conn. 416; *Smith v. Barber*, 1 Root (Conn.) 207; *Canning v. Pinkham*, 1 N. H. 353; *Eustis v. Parker*, 1 N. H. 273; *Schenck v. Corshen*, 1 N. J. L. 219; *Orange v. Springfield*, 4 N. J. L. 211; *Roll v. Maxwell*, 5 N. J. L. 568; *Tuskaloosa v. Wright*, 2 Port. (Ala.) 235; *Maysville v. Shultz*, 3 Dana (Ky.) 10; *Barada v. Carondelet*, 8 Mo. 644; *Mann v. Yazoo*, 31 Miss. 574; *Doe v. Hillsborough*, 1 Dev. & B. (N. Car.) 177; *Hunter v. Sandy Hill*, 6 Hill (N. Y.) 407; *Watertown v. Cowen*, 4 Paige (N. Y.) 510; *Van Wormer v. Albany*, 15 Wend. (N. Y.) 262; *City Council v. King*, 4 McCord (S. Car.) 487; *Pond v. Sage*, 1 D. Chip. (Vt.) 250; *Sawyer v. Alton*, 4 Ill. 127; *Jonesborough v. McKee*, 2 Yerg. (Tenn.) 167; *Lewis v. San Antonio*, 7 Tex. 288; *Kemper v. Victoria*, 3 Tex. 135; *Middleton v. Frost*, 4 C. & P. 16; 19 E. C. L. 255.

If the witness had no more private or personal interest in the subject-matter of the suit than any other inhabitant or citizen of the county, he was competent; in such case his interest was too remote, contingent, and minute to dis-

qualify him. *Ezell v. Giles County*, 3 Head (Tenn.) 583.

One who was a party by reason of being an officer of a public corporation was not on that account disqualified. *Van Wormer v. Albany*, 15 Wend. (N. Y.) 262; *Bennington v. M'Gennes*, N. Chip. (Vt.) 45.

In a prosecution by the state, the inhabitants of a town to which the law appropriated the penalty, if recovered in the prosecution, were competent witnesses. *State v. Woodward*, 34 Me. 293. And the same was true in actions *qui tam*, where the town was entitled to part of the penalty to be recovered. *Pond v. Sage*, 1 D. Chip. (Vt.) 250.

The members of a school committee who were inhabitants of the school district, were competent witnesses in a suit to which the district was a party. *Hill v. School Dist. No. 2*, 17 Me. 316; *Allen v. School Dist. No. 2*, 15 Pick. (Mass.) 35; *Holbrook v. School Trustees*, 22 Ill. 539.

The trustees of an institution of learning, which was a party to an action, were competent witnesses. *Hershey v. Clarksville Inst.*, 15 Ark. 128. As were also the trustees of a school fund in an action in the name of the corporation, if they were not personally named as parties. *School Fund Trustees v. Reed*, 39 Me. 41.

2. *Eustis v. Parker*, 1 N. H. 273; *Gass v. Gass*, 3 Humph. (Tenn.) 278; *Cornwell v. Isham*, 1 Day (Conn.) 35; 2 Am. Dec. 50; *Haven v. Hilliard*, 23 Pick. (Mass.) 10. See also the celebrated opinion of Lord Camden, in the case of *Doe v. Kersey*, printed as a note to *Cornwell v. Isham*, 1 Day (Conn.) 41; 2 Am. Dec. 50.

3. *Miller v. Mariner's Church*, 7 Me. 51; 20 Am. Dec. 341; *M. E. Church v. Wood*, 5 Ohio 283; *Congregational Soc. v. Perry*, 6 N. H. 164; 25 Am. Dec.

The foregoing rules are applicable only to corporations not created for the private emolument of their members. Although corporations sue and are sued in their corporate names, and their members are not technically parties of record, it is nevertheless true that the members constitute the corporation; and where a private business corporation, organized for the pecuniary gain of its members, was a party to an action, the common-law rule excluding parties of record from the witness box was held to be applicable to its stockholders when they were proposed as witnesses on its behalf.¹ A stockholder's competency might,

455; *Davies v. Morris*, 17 Pa. St. 205; *Shortz v. Unangst*, 3 W. & S. (Pa.) 45; *Sorg v. First German Evangelical St. Paul's Congregation*, 63 Pa. St. 156; *Matter of Kip*, 1 Paige (N. Y.) 601; *Hershy v. Clarksville Inst.*, 15 Ark. 128; *Hebrew Congregation v. U. S.*, 6 Ct. of Cl. 241; *Fletcher v. Greenwell*, 5 Tyr. 316; *M'Gahey v. Alston*, 2 M. & W. 206. See also *Cooper v. Sisters of Providence*, 16 Ind. 164.

Members of a corporation created for pious and charitable purposes, which was made the residuary legatee in a will, were held to be competent witnesses on the question of the sanity of the testator. *Nason v. Thatcher*, 7 Mass. 398.

In *Burdine v. Grand Lodge*, 37 Ala. 478, it was held that a member of the society of Free Masons was a competent witness for the society, as he had no pecuniary interest in a suit to which the society was a party. And it was further held that the court would take judicial notice that the grand and subordinate lodges of Free Masons within the state constituted a charitable or eleemosynary corporation. To the same effect is *Trapnall v. Burton*, 24 Ark. 371.

Members of the society of Shakers were competent witnesses for each other, although they held their property in common. *Wells v. Lane*, 8 Johns. (N. Y.) 462. They were likewise competent in suits in which the deacons were parties, and no releases were necessary unless the matter in litigation directly concerned the common property. *Richardson v. Freeman*, 6 Me. 57; *Anderson v. Brock*, 3 Me. 243.

But in *Stone v. Congregational Soc.*, 14 Vt. 86, wherein the defendant corporation was sued in assumption, it was held that members of the society were not competent witnesses for the defense, on the ground that they were interested in the event of the action. See

also *Chester v. Rockingham, Brayt.* (Vt.) 239.

A trustee of an eleemosynary corporation which was a party to an action was not a competent witness for it when he was primarily liable for costs, although he had a remedy over. *Rex v. Governor, etc., of Poor*, 3 East 7.

1. *Montgomery, etc., Plank-road Co. v. Webb*, 27 Ala. 618; *Alabama, etc., R. Co. v. Sanford*, 36 Ala. 703; *Thrasher v. Pike County R. Co.*, 25 Ill. 393; *Porter v. Rutland Bank*, 19 Vt. 410; *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 265; *Blen v. Bear River, etc., Water, etc., Co.*, 20 Cal. 602; 81 Am. Dec. 132. *Contra, Costa Coal Mines R. Co. v. Moss*, 23 Cal. 329; *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 324; *Stevenson v. Simmons*, 4 Jones (N. Car.) 12; *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318; *Watson v. Lisbon Bridge*, 14 Me. 201; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *Kentucky Bank v. M'Williams*, 2 J. J. Marsh. (Ky.) 256. *Compare Washington Bank v. Palmer*, 2 Sandf. (N. Y.) 686; *Doe v. Tooth*, 3 Y. & J. 19; *Davis v. Morgan*, 1 Tyr. 457; *City Council v. King*, 4 McCord (S. Car.) 487.

The liability of the company for costs was a sufficient interest to exclude a shareholder. *Southern L. Ins., etc., Co. v. Cole*, 4 Fla. 359.

The executor of a stockholder, being one of the residuary legatees, was not a competent witness for the company. *North America Bank v. Wycoff*, 4 Dall. (U. S.) 151.

The fact that a witness was a stockholder in a corporation to which the plaintiff was indebted, did not render him incompetent as a witness for the plaintiff. *Simons v. Vulcan Oil, etc., Co.*, 61 Pa. St. 220.

Members of a corporation were competent to prove the signature of a

however, be restored by a *bona fide* sale and transfer of his stock,¹ unless he was by statute made personally liable for the debts of the corporation, in which case no disposition he might make of his stock would restore his competency so long as his personal liability for the debt sued for continued to exist.² But a stock-

subscriber to an agreement to take and pay for shares in the corporation. *Danville, etc., Turnpike Road Co. v. Burdett*, 7 Dana (Ky.) 99.

Where the corporation was a garnishee, a member of it was a competent witness. *Jackson v. U. S. Bank*, 10 Pa. St. 61.

An officer of the corporation who was not a stockholder, a party of record, or interested in the event of the action, might testify on behalf of the company. *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250; *National F. Ins. Co. v. Crane*, 16 Md. 260; 77 Am. Dec. 289; *Middletown Sav. Bank v. Bates*, 11 Conn. 519. Neither might a stockholder be compelled to testify against the company. *Oldtown Bank v. Houlton*, 21 Me. 501.

1. *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 300; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466; *Swatara Bank v. Green*, 3 Watts (Pa.) 374; *Meighen v. Bank*, 25 Pa. St. 288; *Tuolumne County Water Co. v. Columbia, etc., Water Co.*, 10 Cal. 193; *Smith v. Tallahassee Branch Cent. Plank-road Co.*, 30 Ala. 650; *Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236; *Union Bank v. Owen*, 4 Humph. (Tenn.) 338.

A release to the corporation was not sufficient. It was necessary for him to transfer his stock in order to become a witness for the corporation. *Thrasher v. Pike County R. Co.*, 25 Ill. 393.

But it was not necessary, for the purpose of restoring the competency of the witness, that the transfer should be registered on the books of the company in accordance with the by-laws. *Utica Bank v. Smalley*, 2 Cow. (N. Y.) 777; 14 Am. Dec. 526; *Gilbert v. Manchester Iron Mfg. Co.*, 11 Wend. (N. Y.) 627; *Delaware, etc., R. Co. v. Irick*, 23 N. J. L. 321.

The directors of a bank might release the cashier from liability, in order to render him competent to prove that he had, by mistake, given too much credit to a depositor. *Lewis v. Eastern Bank*, 32 Me. 90.

2. *McAuley v. York Min. Co.*, 6 Cal. 80; *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 265; *Wyman*

v. American Powder Co., 8 Cush. (Mass.) 168.

In such cases the competency of the witness depended on whether he was personally liable at the time of the trial. If he was, he was an interested party and was incompetent to testify. *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 453.

One who held stock in trust in order that he might be eligible to the office of secretary of the company, to which stockholders only were eligible, was not a competent witness for the company when he was liable for the debts of the company by reason of appearing on the books thereof as a stockholder. *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 319.

In an action brought against a stockholder on his individual liability, for a debt incurred by the company, the plaintiff could not prove the defendant's liability by another stockholder of the same corporation, as the latter was incompetent, on the ground of interest. *Pierce v. Kearney*, 5 Hill (N. Y.) 82.

And where a director was sued for a debt of his company, under a statute making him personally liable for such debt, when he assented to the declaring of an unlawful dividend, a stockholder of such company was not a competent witness for the plaintiff, the director having no recourse to the company, because he was directly interested in fastening the burden of the debts upon the defendant, to the relief of the company. *Hill v. Frazier*, 22 Pa. St. 320.

In *New Hampshire*, it was held that where a stockholder had assigned his stock before the trial, he was competent as a witness, unless it were shown that all the facts existed which were required by statute to render his liability fixed and certain. *Manchester Bank v. White*, 30 N. H. 456. That the corporation, if successful in the case at bar, would have a larger fund out of which to pay other debts for which the witness might be liable, was held not to be a sufficient objection to his competency. *White Mountains R. Co. v. Eastman*, 34 N. H. 134.

holder might testify, for the enlightenment of the court, to collateral matters not involving the issues to go to the jury.¹

(3) *Effect of a Default.*—A defendant who had been defaulted in an action *ex contractu*, if he had no further interest in the costs or the event of the action, was, in those jurisdictions where parties were excluded on the sole ground of interest, a competent witness for his co-defendants.² But in actions *ex delicto*, a

1. Schuylkill, etc., Nav. Co. v. Diffebach, 1 Yeates (Pa.) 367.

A stockholder was competent to produce and identify the books and other papers of the company in his custody. Peake v. Wabash R. Co., 18 Ill. 88; Ryder v. Alton, etc., R. Co., 13 Ill. 516. But the rule was confined to keepers and depositaries of corporate documents. Blen v. Bear River, etc., Water, etc., Co., 20 Cal. 602; 81 Am. Dec. 132; Union Bank v. Ridgely, 1 Har. & G. (Md.) 324; Wiggin v. First Free-will Baptist Church, 8 Met. (Mass.) 301.

A stockholder might testify to his official acts in the corporation, York, etc., R. Co. v. Pratt, 40 Me. 447; and was competent to prove the service of a notice on behalf of the company. Huntress v. Patten, 20 Me. 28; Union Canal Co. v. Loyd, 4 W. & S. (Pa.) 393.

So, also, he was competent to prove the acceptance of a supplement or amendment of its charter on the part of his company. Fell v. McHenry, 42 Pa. St. 41.

2. *Effect of Default in Actions ex contractu.*—Essex Bank v. Rix, 10 N. H. 201; Manchester Bank v. Moore, 19 N. H. 564; Pipe v. Steele, 2 Ad. & El. N. S. 733; 42 E. C. L. 888; Worrall v. Jones, 7 Bing. 395; 20 E. C. L. 177; 5 M. & P. 244; Kincaid v. Purcell, 1 Ind. 324; Brooks v. McKinney, 5 Ill. 309.

And the same was true in equity as to a defendant against whom the bill was taken *pro confesso*. Pingree v. Coffin, 12 Gray (Mass.) 288. But so long as the defendant was interested in the question of costs he was not competent. Louisiana Bank v. Hudson, 13 La. Ann. 600.

Partners.—A defendant who had suffered judgment by default was not a competent witness on behalf of the plaintiff, to prove a partnership between himself and other defendants, because he was interested in making the other defendants liable for a share of the debt. Brown v. Brown, 4 Taunt. 752; Mant v. Mainwaring, 8 Taunt. 139; Green v. Sutton, 2 M. & Rob. 270;

Miller v. M'Clenachan, 1 Yeates (Pa.) 144; Cody v. Cody, 31 Ga. 619; Rich v. Husson, 4 Sandf. (N. Y.) 115; Alexander v. Crosthwaite, 44 Ill. 359; Fairchild v. Amsbaugh, 22 Cal. 572; Glasscock v. McRae, 6 La. Ann. 284. But he was competent to prove that his co-defendants were not his partners, as such testimony would be against his interest. Culbertson v. Holden, 8 Bush (Ky.) 161; Scott v. Jones, 5 Ala. 694; Gooden v. Morrow, 8 Ala. 486; Aicardi v. Strang, 38 Ala. 326; Smith v. Knight, 71 Ill. 148; 22 Am. Rep. 94; Thomas v. Mohler, 25 Md. 36.

But in Williams v. Soutter, 7 Iowa 435, it was held that a defaulted defendant, against whom no final judgment had been rendered, was not competent to prove that another defendant was not his partner.

In actions upon joint contracts, it was held that a defaulted defendant was not a competent witness for his co-defendants where the defense set up by the defendants who had pleaded was not personal in its nature, but went to the whole cause of action and would, if sustained, deprive the plaintiff of the benefit of the default, because in such cases the party offered as a witness, although in default, was by no means free of interest. Brown v. Brown, 4 Taunt. 752; Walton v. Tomlin, 1 Ired. (N. Car.) 593; King v. Lowry, 20 Barb. (N. Y.) 532; Bull v. Strong, 8 Met. (Mass.) 11; Vinal v. Burrill, 18 Pick. (Mass.) 29; Thornton v. Blaisdell, 37 Me. 190.

In 1 Phillips Ev. (5th Am. ed.), p. 38, *45, it is said that it was ruled by Lord Kenyon, C. J., in an action against two defendants on a joint contract, that one of them, who had suffered judgment by default, was incompetent as a witness for the other for the purpose of negating the contract. For if negated as to one, the contract failed as to the other, and the plaintiff could make no use of his judgment by default against the witness, who was consequently interested in obtaining a verdict for the defendants. Citing Brown v. Fox,

defaulted defendant was not a competent witness for his co-defendants, because in such actions the jury assess the damages as well as try the issues of fact, and a default does not free a defendant from interest in the question of damages.¹

MS. Ex. Assizes, 1789, cited by Dallas, J., in *Mant v. Mainwaring*, 8 Taunt. 141. See also *Lake v. Munford*, 4 Smed. & M. (Miss.) 318.

In *Gilmore v. Bowden*, 12 Me. 412, the court rested the rejection of the witness on the sole ground that he was a party of record. And in *Walton v. Tomlin*, 1 Ired. (N. Car.) 593, the same reasoning was adopted, although the court observed that the witness was not free of interest in that case.

In *Bradlee v. Neal*, 16 Pick. (Mass.) 501, and *Chaffee v. Jones*, 19 Pick. (Mass.) 260, defaulted defendants were admitted on behalf of their co-defendants, under the *Massachusetts Stat.* of 1834, ch. 189.

Neither was a defaulted defendant, sued on a joint contract, competent for the plaintiff if his co-defendant objected, because his ultimate interest lay on the side of the plaintiff. It is true that if he testified in favor of his co-defendant he might completely defeat the plaintiff in that particular action and escape costs himself, but it thereby laid the foundation for a separate action against himself, and it was clearly to his interest to fasten a joint liability upon the defendants. *Shaw, C. J.*, in *Columbian Mfg. Co. v. Dutch*, 13 Pick. (Mass.) 125.

1. In *Actions ex Delicto*.—In *Ward v. Haydon*, 2 Esp. 552, Lord Kenyon, at nisi prius, said that a defendant in an action of trover, who had suffered judgment by default, was a competent witness for his co-defendants. But this case has been overruled.

In *Mash v. Smith*, 1 C. & P. 577; 11 E. C. L. 478, which was a similar case, Best, C. J., said: "If this man's evidence is to be admitted to give a complexion to the case it may go to reduce the damages against him, and, therefore, I am of opinion he is clearly interested and ought not to be received."

And in *Thorpe v. Barber*, 5 C. B. 675; 57 E. C. L. 675, the court followed the reasoning of Best, C. J., in *Mash v. Smith*, 1 C. & P. 577; 11 E. C. L. 478, and disapproved the doctrine laid down by Lord Kenyon in *Ward v. Haydon*, 2 Esp. 552.

To the same effect are *Bohun v.*

Taylor, 6 Cow. (N. Y.) 313; *Chase v. Lovering*, 27 N. H. 295; *Gerrish v. Cummings*, 4 Cush. (Mass.) 391; *Wood v. Kelley*, 30 Me. 47.

In *Gerrish v. Cummings*, 4 Cush. (Mass.) 391, Shaw, C. J., said: "In an action of trover, after one defendant was defaulted the other pleaded, and, on a trial of the issue, Bonney, who pleaded, called Cummings, who was defaulted as a witness, first generally, next as a witness upon the question of joint hiring and not on the question of damages, but he was rejected. The court are of opinion that he was not a competent witness, on the ground of interest, and was rightly rejected. In an action of trover there can be but one assessment of damages. Though one defendant is defaulted and the other found guilty, yet there must be a joint judgment. The verdict, which is to fix the amount of damages, fixes it as well for the party defaulted as for the party who pleaded. The defaulted defendant, therefore, has a direct interest in favor of his co-defendant, the party who called him, to reduce the damages." Citing *Thorpe v. Barber*, 5 C. B. 675; 57 E. C. L. 675.

But it seems that he was competent for the plaintiff, *Wren v. Heslop*, 12 Jur. 600; 7 L. J. Q. B. 313; although it was ruled otherwise in the earlier case of *Chapman v. Graves*, 2 Campb. 333, note. See also *Ballard v. Noaks*, 2 Ark. 45; *Kennedy v. Philip*, 13 Pa. St. 408.

A defendant in ejectment, who had suffered judgment by default, was competent on behalf of the plaintiff to prove another defendant in possession. *Doe v. Green*, 4 Esp. 198.

And it has been held, also, that he might, under such circumstances, be a witness for another defendant who had pleaded. Buller's N. P. 286, citing *Dormer v. Fortescue*, Willes 343, note.

In trespass against several defendants, where some of them did not plead and no judgment by default was taken against them, it was held that they might be witnesses for their co-defendants, as no evidence was offered against them and their interest was in the question at issue and not in the verdict. *Wakely v. Hart*, 6 Binn. (Pa.) 316.

(4) *Effect of a Nolle Prosequi, or Separate Verdict.*—If a *nolle prosequi* were entered as to a defendant, it put an end to the proceedings so far as he was concerned, and his competency as a witness was restored.¹ So, also, in actions *ex delicto* against several defendants, if, at the conclusion of the proof, there was a defendant against whom there was no evidence whatever, the court might, upon motion, dismiss the action as to him,² or direct a separate verdict in his favor, in order to restore his competency as a witness for his co-defendants.³ But if there was any evidence against him which should be passed upon by the jury, the court would not thus interfere, but would let the trial take its

1. *Moody v. Rex*, 2 B. & C. 558; 9 E. C. L. 177; *Affalo v. Fourdrinier*, 6 Bing. 306; 19 E. C. L. 89. See also *Hawkesworth v. Showler*, 12 M. & W. 45; *Wood v. Dodgson*, 2 M. & S. 195; *Man v. Ward*, 2 Atk. 229; *Spencer v. Harrison*, 2 C. & K. 429; 61 E. C. L. 429.

In *Emmett v. Butler*, 7 Taunt. 607, Park, J., said: "In a case tried before Le Blanc, J., at Lancaster, the case of a joint contract, one defendant was allowed to be examined in an action on a joint contract where a *nolle prosequi* had been actually entered after a plea of bankruptcy."

In assumpsit against several partners, one of them pleaded his discharge in bankruptcy, and thereupon a *nolle prosequi* was entered as to him. It was held that he was a competent witness for his co-partners, provided he released all his interest in the surplus of his effects. *Butcher v. Forman*, 6 Hill (N. Y.) 583.

But in *Irwin v. Shumaker*, 4 Pa. St. 199, wherein a *nolle prosequi* was entered as to a defendant, after a plea of discharge in bankruptcy, the court held that he was not thereby rendered competent as a witness for his co-defendants.

2. *Elwell v. Martin*, Ware (U. S.) 53; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Van Deusen v. Van Slyck*, 15 Johns. (N. Y.) 223; *Barney v. Cuttler*, 1 Root (Conn.) 489.

"Where a material witness for the plaintiff is by mistake made a defendant, the court will, on motion, suffer his name to be struck out of the record, even after issue joined, and then he may be examined." 1 Phil. Ev. (5th Am. ed.), p. 46, star p. 54, citing 1 Sid. 441; *Buller's N. P.* 285. See also *Berrington v. Fortesque*, Cas. temp. Hardw., 162, 163.

3. *Bates v. Conkling*, 10 Wend. (N.

Y.) 390; *Campbell v. Hood*, 6 Mo. 211; *Brown v. Burrus*, 8 Mo. 26; *Benoist v. Sylvester*, 26 Mo. 585; *Over v. Blackstone*, 8 W. & S. (Pa.) 71; *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 53; *Beasley v. Bradley*, 2 Swan (Tenn.) 180.

In trespass against two who severally pleaded the general issue, it was held to be a matter of discretion with the court to permit one to be tried before the other, in order that, if he were acquitted, he might be competent as a witness; but if they were tried together and one was acquitted and the other convicted, the one convicted should not be granted a new trial in order that he might have the benefit of the other's testimony. *Sawyer v. Merrill*, 10 Pick. (Mass.) 16. See also *Dougherty v. Dorsey*, 4 Bibb (Ky.) 207; *Gilmore v. Bowden*, 12 Me. 412; *Ranny v. Church*, 2 Root (Conn.) 420.

But where several defendants joined in a justification of the trespass, it was held that the court could not sever the justification and say in advance that one should be acquitted and another not, when they all put themselves on the same terms. *Bates v. Conkling*, 10 Wend. (N. Y.) 392; *Higby v. Williams*, 16 Johns. (N. Y.) 217.

One of several defendants in an action *ex delicto*, being acquitted in a justice's court, was not a competent witness on the trial of an appeal when the opposite party appealed. *Bates v. Conkling*, 10 Wend. (N. Y.) 389.

But where one of two defendants appealed from a judgment against both of them, the other was a competent witness on the trial of the appeal, as his failure to appeal left him without further interest in the proceedings. *Goodhue v. Palmer*, 13 Ind. 457.

Where one of the defendants pleaded infancy, that issue might be tried first, and it being found in his favor he

regular course.¹ As to whether or not a separate verdict might be directed for this purpose in actions *ex contractu*, the decisions are not in harmony.²

(5) *Exceptions to the Rule*—(a) *At Common Law*.—There were some recognized exceptions to the rule excluding the testimony

might be sworn and examined as a witness. *Rohrer v. Morningstar*, 18 Ohio 579.

In an action of tort against two co-defendants, if one of them has been separately tried and acquitted, the other may, upon his trial, examine the acquitted defendant as a witness. *Carpenter v. Crane*, 5 Blackf. (Ind.) 119.

Time to Direct Verdict.—The decisions are not harmonious as to what is the proper time to direct a separate verdict for this purpose. In some cases it was held that it should not be done until all the evidence on both sides was in. *Wright v. Paulin*, R. & M. 128; *Huxley v. Berg*, 1 Stark. 98; 2 E. C. L. 46; *Wynne v. Anderson*, 3 C. & P. 596; 14 E. C. L. 471.

But in *Child v. Chamberlain*, 6 C. & P. 213; 25 E. C. L. 362, Parke, J., said it was settled by the unanimous opinion of the judges that the separate verdict should be directed at the conclusion of the plaintiff's case. To the same effect are *Russell v. Rider*, 6 C. & P. 416; 25 E. C. L. 463; *Bates v. Conkling*, 10 Wend. (N. Y.) 390; *Cochran v. Ammon*, 16 Ill. 316; *Hood v. Mathis*, 21 Mo. 308.

Again it was held to be a matter within the discretion of the court. *Sowell v. Champion*, 6 Ad. & El. 407; 33 E. C. L. 92; *White v. Hill*, 6 Q. B. 487; 51 E. C. L. 487. See also *Over v. Blackstone*, 8 W. & S. (Pa.) 71; *Brown v. Burrus*, 8 Mo. 26; *Prettyman v. Dean*, 2 Harr. (Del.) 494.

In the exercise of this discretion, *Wilde, C. J.*, after animadverting on the practice of joining parties for the purpose of excluding their testimony, directed a verdict for a defendant so joined at once upon the conclusion of the plaintiff's case. *Neilau v. Hanny*, 2 C. & K. 710; 61 E. C. L. 710.

1. *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Van Deusen v. Van Slyck*, 15 Johns. (N. Y.) 223; *Bates v. Conkling*, 10 Wend. (N. Y.) 390; *Campbell v. Hood*, 6 Mo. 211; *Steamboat Prairie Rose v. Cross*, 34 Mo. 109; *Dallas, J.*, in *Emmett v. Butler*, 7 Taunt. 607; *Brotherton v. Livingston*, 3 W. & S. (Pa.) 334.

2. **In Actions *ex Contractu*.**—In an action *ex contractu*, it was held that where a party was improperly joined as a defendant, the court or jury, upon application, should first pass upon his case, and after his discharge he might be examined as a witness for the other defendants. *Domingo v. Getman*, 9 Cal. 97; *Brown v. Lewis*, 25 Mo. 335. See also *Harrison v. Johnson*, 18 N. J. Eq. 420. But it is doubtful whether the court has authority to sever the issues in such cases.

In *Schermerhorn v. Schermerhorn*, 1 Wend. (N. Y.) 119, which was an action of assumpsit on a promissory note against five defendants, two of the defendants pleaded their discharge in insolvency; the trial court instructed the jury to pass on the liability of one of them first, and, after a verdict in his favor, he was admitted as a witness for his co-defendants. The result was a verdict for the defendants, which, upon appeal, was set aside and a new trial ordered. See also comments upon this case, by *Harris, J.*, in *Safford v. Lawrence*, 6 Barb. (N. Y.) 569, and *Berry v. Stevens*, 71 Me. 503, where, in an action of assumpsit, it was held that the court should not allow a separate verdict for one of the defendants, in order to qualify him as a witness for his co-defendants.

Bankruptcy of Party.—The mere pleading of a bankrupt or insolvent discharge was not alone sufficient to render a party a competent witness. *Raven v. Dunning*, 3 Esp. 25; *Currie v. Child*, 3 Campb. 283; *Given v. Albert*, 5 W. & S. (Pa.) 338. See also *Safford v. Lawrence*, 6 Barb. (N. Y.) 570.

In *Currie v. Child*, 3 Campb. 283, Lord Ellenborough refused to order a separate verdict in favor of a defendant who had established the issue of bankruptcy in order that he might be qualified as a witness in the case. And a similar ruling was made in *Emmett v. Butler*, 7 Taunt. 599. But in the later case of *Bate v. Russell*, M. & M. 332; 22 E. C. L. 327, the court permitted a separate verdict in favor of a bankrupt defendant, who was then admitted as a competent witness. See also *Aflalo*

of parties to the record; for example, where the defendant had, by other evidence, been proved guilty of gross fraud, willful interference with the plaintiff's property, or spoliation thereof, the plaintiff himself was competent to prove the amount of his damages where other evidence on the question was not obtainable.¹ In many cases, the necessity for such evidence, in order to prevent a failure of justice, was regarded as the true reason for the exception;² and this reasoning being followed to its logical conclusion, it was held that in actions against carriers and innkeepers for the loss of baggage, where the liability of the bailee was

v. Fourdrinier, 6 Bing. 306; 19 E. C. L. 89; *Hawkesworth v. Showler*, 12 M. & W. 45.

In *Steele v. Phoenix Ins. Co.*, 3 Binn. (Pa.) 306, it was held that a plaintiff, who, after the commencement of a suit, made an assignment and received his discharge, was a competent witness, provided all the costs were paid before he was sworn. But the doctrine of this case was completely exploded in *McClelland v. Mahon*, 1 Pa. St. 364. And in two later cases, *Wolf v. Fink*, 1 Pa. St. 435; 44 Am. Dec. 141, and *Bittinger v. Keys*, 2 Pa. St. 459, it was held that a party who was a certified bankrupt at the time of the bringing of the action, was not a competent witness, although free of interest. To the same effect is *Mills v. Lee*, 4 Hill (N. Y.) 549.

1. In *Herman v. Drinkwater*, 1 Me. 27, it appeared that the defendant, the master of a ship, broke open the plaintiff's trunk and rifled it of its contents. The delivery of the trunk to the defendant and his tortious acts having been proved *aliunde*, it was held that the plaintiff was competent to testify to the particular contents of the trunk, on the ground of necessity. See also *Garvey v. Camden, etc., R. Co.*, 1 Hilt. (N. Y.) 280.

So where bailiffs, in serving an execution, embezzled money which they discovered secretly hidden in a wall, and otherwise despoiled the debtor's goods, it was held that the debtor, who sued them for the recovery of the money and other damages, was a competent witness to prove his damages. *Childrens v. Saxby*, 1 Vern. 207; 1 Eq. Cas. Abr. 229. See also *Anonymous*, cited in *East India Co. v. Evans*, 1 Vern. 308, where it appeared that a man ran away with a casket of jewels.

So, also, in an action against the Hundred, under the statute of Winton,

to recover damages for the robbery of the plaintiff, he was competent *ex necessitate* to prove the robbery and the amount of his damages. *Bennet v. Hundred of Hertford*, Sty. 233, 2 Rolle 685; *Norris' Peake* 223, note. And in an action against a county for the destruction of property by a mob, the plaintiff might testify to the ownership and value of wearing apparel destroyed; but was not competent to prove the destruction of household furniture, etc. *County v. Leidy*, 10 Pa. St. 45.

In *Queener v. Morrow*, 1 Coldw. (Tenn.) 123, it appeared that a trunk containing about \$2,500 in bank notes had been feloniously taken from the plaintiff's dwelling house. He brought an action, as for money had and received, against the defendant for the amount alleged to have been in the trunk. The felonious taking of the trunk was proved, and there was evidence tending to fix the liability on the defendant; and it was held that the plaintiff himself was competent to testify to the amount of money in the trunk, he being unable to establish the fact by any other evidence.

2. It was laid down in *Buller's N. P.* 289, that a party who has an interest will be admitted where no other evidence is reasonably to be expected.

And in *Lancum v. Lovell*, 9 Bing. 465; 23 E. C. L. 335, this doctrine was approved by all the judges in *England*. To the same effect is *Lampley v. Scott*, 24 Miss. 528.

In *U. S. v. Clark*, 96 U. S. 41, Miller, J., said: "We are of opinion that by the rules of evidence derived from the common law, as it is understood in the *United States*, whenever it becomes important to ascertain the contents of a box, trunk, or package, which has been lost or destroyed under circumstances that make someone liable in a court of

established by other evidence, the plaintiff was competent to prove the list of articles lost and their value, if other proof could not be obtained.¹ But in other jurisdictions, it was held that the plaintiff's testimony was admitted only *in odium spoliatoris*, and, consequently, should be excluded where nothing more culpable than negligence was chargeable to the bailee.²

justice for the loss, and the loss and liability are established by other testimony, the owner or party interested in the loss, though he may be a party to the suit, is a competent witness to prove the contents so lost or destroyed. This is one of those exceptions to the rigorous rule of the common law excluding parties and persons having an interest in the result of the suit from becoming witnesses in their own behalf, which has been ingrafted upon that system. It is founded in the necessity of permitting the only party who knows the matter to be proved to testify, in order to prevent an absolute failure of justice, where his right to relief has been established by other evidence. We are aware that there is a conflict of authority on this point, but we believe the preponderance is in favor of the proposition we have stated, and looking at it as a matter of principle, in the light of the progress of legislation and judicial decision in the direction of more liberal rules of evidence, we have no hesitation in adopting it in the absence of legislation by Congress on the subject."

But a party might not testify in his own behalf, if it appeared that another person knew the same facts, although such person resided in another state. *Evans v. Hardgrove*, 11 Tex. 210.

1. In 12 Viner's Abr. 24, pl. 34, it is said: "On a trial at Bodmyr, *coram* Montague, B., against a common carrier, a question arose about the things in a box, and he declared that this was one of those cases where the party himself might be a witness *propter necessitatem rei*. For everyone did not show what he put into his box." This language is quoted and followed in *Douglass v. Montgomery*, etc., R. Co., 37 Ala. 641; 79 Am. Dec. 76; *Pettigrew v. Barnum*, 11 Md. 445; 69 Am. Dec. 212; *Clark v. Spence*, 10 Watts (Pa.) 336.

To the same effect are *Dibble v. Brown*, 12 Ga. 217; 56 Am. Dec. 460; *Kitchen v. Robbins*, 29 Ga. 713; *Indiana Cent. R. Co. v. Gulick*, 19 Ind. 83; *Parmelee v. McNulty*, 19 Ill. 556; No-

lan *v. Ohio*, etc., R. Co., 39 Mo. 114; *Williams v. Frost*, 39 Mo. 516; *Taylor v. Monnot*, 4 Duer (N. Y.) 116; *Oppenheimer v. Edney*, 9 Humph. (Tenn.) 393; *Johnson v. Stone*, 11 Humph. (Tenn.) 419. See also *U. S. v. Clark*, 96 U. S. 37.

In *Illinois*, it was held that under such circumstances the plaintiff was competent to prove the contents of the lost trunk from the necessity of the case, but not to prove the value of the trunk or of its contents, unless it was shown that other evidence could not be had. *Illinois Cent. R. Co. v. Taylor*, 24 Ill. 323; *Davis v. Michigan Southern*, etc., R. Co., 22 Ill. 278; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; 76 Am. Dec. 749.

In *Pennsylvania*, the rule was confined to such articles as were necessary for the convenience and use of the traveler, *Clark v. Spence*, 10 Watts (Pa.) 335; and the plaintiff was incompetent to prove that the trunk contained money, or the amount thereof. *David v. Moore*, 2 W. & S. (Pa.) 230. But there seems to be no reason for this restriction of the rule, where the amount of money is not in excess of the passenger's necessary expenses on his journey, and it was so held in *Johnson v. Stone*, 11 Humph. (Tenn.) 419.

The exception was confined to baggage and did not extend to contracts of affreightment. *Wright v. Caldwell*, 3 Mich. 51; *Adams Express Co. v. Haynes*, 42 Ill. 90.

A party was not competent to prove the delivery of his baggage to the bailee. *Pope v. Hall*, 14 La. Ann. 324.

2. In *Snow v. Eastern R. Co.*, 12 Met. (Mass.) 44, which was an action against a railroad company to recover damages for the loss of a trunk by their negligence, it was held that the plaintiff was not a competent witness, although he had no other evidence. After commenting upon the authorities, the court said: "These cases proceed upon the criminal character of the act and are limited in their nature. The present case does not fall within the principle. Here was no robbery, no

If a written instrument which was material evidence in the case could not be produced upon the trial, and it was established by proof *aliunde* that it once existed, a party was competent to testify to collateral matters necessary to lay a foundation for the introduction of secondary evidence of its contents.¹ And generally, in preliminary matters which were auxiliary to the trial, and

tortious taking away by the defendants, no fraud committed. It is simply a case of negligence on the part of carriers. The case is not brought within any exception to the common rule, and is a case of defective proof on the part of the plaintiff, not arising from necessity but from want of caution. To admit the plaintiff's oath in cases of this nature would lead, we think, to much greater mischiefs in the temptation to frauds and perjuries than can arise from excluding it. If the party about to travel, places valuable articles in his trunk, he should put them under the special charge of the carrier, with a statement of what they are and of their value, or provide other evidence beforehand of the articles taken by him." To the same effect are *Smith v. North Carolina R. Co.*, 1 Winst. (N. Car.) 203; *Packard v. Northcraft*, 2 Metc. (Ky.) 439; *Garvey v. Camden*, etc., R. Co., 1 Hilt. (N. Y.) 280. Block v. The Trent, 18 La. Ann. 664, was decided upon the statutes of the State of Louisiana rather than upon the principles of the common law.

In *Christian v. U. S.*, 7 Ct. of Cl. 431, it was held that the exception should be confined to cases where the defendant was a wrongdoer.

1. Although a party was not competent to prove the execution or contents of such instrument, he was competent, after proof of its execution, to prove the loss or destruction of the same, in order to the proof of its contents by other witnesses. *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483; *Tayloe v. Riggs*, 1 Pet. (U. S.) 591, per Marshall, C. J.; *Doe v. Winn*, 5 Pet. (U. S.) 233, per Story, J.; *Boyle v. Arledge*, *Hempst.* (U. S.) 620; *DeLane v. Moore*, 14 How. (U. S.) 253; *Kellogg v. Norris*, 10 Ark. 18; *Moore v. Maxwell*, 18 Ark. 469; *Davis v. Spooner*, 3 Pick. (Mass.) 284; *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *Donelson v. Taylor*, 8 Pick. (Mass.) 390; *Poignand v. Smith*, 8 Pick. (Mass.) 278; *Page v. Page*, 15 Pick. (Mass.) 368; *Blanton v. Miller*, 1 Hayw. (N. Car.) 4; *Seekright v. Bogan*, 1 Hayw. (N. Car.) 176; *Smiley v. Dewey*, 17

Ohio 156; *M'Dowell v. Hall*, 2 Bibb (Ky.) 630; *Hamit v. Lawrence*, 2 A. K. Marsh. (Ky.) 366; *Hart v. Strode*, 2 A. K. Marsh. (Ky.) 115; *Drake v. Vaughan*, 6 J. J. Marsh. (Ky.) 145; *Meeker v. Jackson*, 3 Yeates (Pa.) 442; *Chamberlain v. Gorham*, 20 Johns. (N. Y.) 144; *Jackson v. Frier*, 16 Johns. (N. Y.) 193; *Fitch v. Bogue*, 19 Conn. 289; *Witter v. Latham*, 12 Conn. 392 (*overruling* *Coleman v. Wolcott*, 4 Day (Conn.) 388); *Read v. Brookman*, 3 T. R. 151; *McNiel v. McClintock*, 5 N. H. 355; *Ben v. Peete*, 2 Rand. (Va.) 539.

Where evidence had been given from which the jury might infer that the plaintiff had been in possession of a lottery ticket, it was held that he was a competent witness to prove its loss. *Snyder v. Wolfey*, 8 S. & R. (Pa.) 328.

In *North Carolina*, it was held in the two early cases of *Blanton v. Miller*, 1 Hayw. (N. Car.) 4; *Seekright v. Bogan*, 1 Hayw. (N. Car.) 176, that a plaintiff was competent to prove the loss of his deed. But in the later case of *Cotton v. Beasley*, 2 Murph. (N. Car.) 259, it was held that a plaintiff was not competent to prove the loss of a bond on which he sued in a court of law, but that he might do so in a court of equity, where he would be required to enter into a bond to indemnify the defendant against any demand that might subsequently be made upon the bond on which he sued. To the same effect are *Davis v. Benbow*, 2 Bailey (S. Car.) 427, and *Penfield v. Cook*, 1 Aik. (Vt.) 96.

Where the claim was founded on a book account and the books were lost, a party might be examined on oath to prove the loss of the books, though their contents must be proved by other witnesses. *Smiley v. Dewey*, 17 Ohio 156.

A party was competent to prove that a subscribing witness to a deed was dead, in order to let in secondary proof of its execution. *Douglass v. Sanderson*, 1 Yeates (Pa.) 15; 2 Dall. (Pa.) 116; *Jackson v. Davis*, 5 Cow. (N. Y.) 123; 15 Am. Dec. 451.

did not involve the main question in issue, and were addressed to the court for its decision, the oath of a party might be received for the enlightenment of the court.¹

(b) *In Equity*.—The sworn answer of a defendant in a suit in equity is evidence for him, as well as against him, in so far as it is responsive to the bill. The complainant, by calling upon him to answer the allegations of the bill, thereby admits his credibility as a witness; and the positive denials of the answer are conclusive, unless they are overcome by the testimony of two witnesses or of one witness supported by corroborating circumstances.² When,

So, also, a party was competent to prove notice to the adverse party to produce a paper in question. *Jordan v. Cooper*, 3 S. & R. (Pa.) 564; *Siltzell v. Michael*, 3 W. & S. (Pa.) 329.

1. *Marshall, C. J.*, in *Taylor v. Riggs*, 1 Pet. (U. S.) 591, citing *Forbes v. Wale*, 1 W. Bl. 532; *Morrow v. Saunders*, 3 Moore 671; *Fortescue's Case*, Godb. 193; *Anonymous*, Godb. 326; *Jackson v. Frier*, 16 Johns. (N. Y.) 193. See also *Soresby v. Sparrow*, 2 Stra. 1186; *Jevens v. Harridge*, 1 Saund. 9; *Cook v. Remington*, 6 Mod. 237; *Ward v. Apprice*, 6 Mod. 264.

2. *Glynn v. Bank of England*, 2 Ves. 38; *Pemby v. Mathew*, 1 Bro. C. C. 52; *Arnot v. Biscoe*, 1 Ves. 95; *Janson v. Rany*, 2 Atk. 140; *Speed v. Martin*, 2 Comyns 587; *Walton v. Hobbs*, 2 Atk. 19; *Christ-College v. Widdrington*, 2 Vern. 283; *Kingdome v. Boakes*, Prer. 238; *Plampin v. Betts*, 1 Vern. 272; *Alam v. Jourdan*, 1 Vern. 161; *Morphett v. Jones*, 1 Swanst. 172; *Mortimer v. Orchard*, 2 Ves. Jr. 243; *Cranston v. Johnston*, 3 Ves. Jr. 171; *Bidulph v. St. John*, 2 Sch. & L. 532; *Evans v. Bicknell*, 6 Ves. Jr. 174; *Lindsay v. Lynch*, 2 Sch. & L. 1; *Cooth v. Jackson*, 6 Ves. Jr. 40; *Savage v. Brocksopp*, 18 Ves. Jr. 326; *Cooke v. Clayworth*, 18 Ves. Jr. 12; *Dawson v. Massey*, 1 Ball & B. 224; *Pilling v. Armitage*, 12 Ves. Jr. 78; *Watts v. Hyde*, 12 Jur. 661; *Keys v. Williams*, 3 Y. & C. 55; *Jordan v. Money*, 5 H. L. Cas. 185 (*reversing* 21 L. J. Ch. 893); *Hughes v. Blake*, 6 Wheat. (U. S.) 468; *Langdon v. Goddard*, 2 Story (U. S.) 267; *Daniel v. Mitchell*, 1 Story (U. S.) 172; *Cushing v. Smith*, 3 Story (U. S.) 556; *Towne v. Smith*, 1 Woodb. & M. (U. S.) 115; *Morgan v. Tipton*, 3 McLean (U. S.) 339; *Tobey v. Leonard*, 2 Wall. (U. S.) 423; *Johnson v. Richardson*, 38 N. H. 353; *Moors v. Moors*, 17 N. H. 483; *Dodge v. Griswold*,

12 N. H. 577; *Hollister v. Barkley*, 11 N. H. 501; *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362; *Stearns v. Stearns*, 23 N. J. Eq. 167; *Neville v. Demeritt*, 2 N. J. Eq. 321; *Bird v. Styles*, 18 N. J. Eq. 297; *DeHart v. Baird*, 19 N. J. Eq. 423; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 92; *Stafford v. Bryan*, 1 Paige (N. Y.) 239; *Ruhlig v. Wiegert*, 49 Mich. 399; *Matteson v. Morris*, 40 Mich. 52; *Roberts v. Salisbury*, 3 Gill & J. (Md.) 425; *Watkins v. Stockett*, 6 Har. & J. (Md.) 435; *Dance v. Dance*, 56 Md. 437; *Jones v. Belt*, 2 Gill (Md.) 106; *Voshell v. Hynson*, 26 Md. 83; *Camp v. Simon*, 34 Ala. 126; *Panton v. Tefft*, 22 Ill. 367; *Barton v. Moss*, 32 Ill. 50; *Fish v. Stubbings*, 65 Ill. 492; *Stevenson v. Mathers*, 67 Ill. 123; *Myers v. Kinzie*, 26 Ill. 36; *Appleton v. Horton*, 25 Me. 23; *Pusey v. Wright*, 31 Pa. St. 387; *White v. Hampton*, 10 Iowa 238; *Gillett v. Robbins*, 12 Wis. 319; *Spence v. Dodd*, 19 Ark. 166; *Hill v. Bush*, 19 Ark. 522; *Clark v. Oakley*, 4 Ark. 236; *Roberts v. Totten*, 13 Ark. 609; *Purcell v. Purcell*, 4 Hen. & M. (Va.) 511; *Beverley v. Walden*, 20 Gratt. (Va.) 147; *Powell v. Manson*, 22 Gratt. (Va.) 177; *Gray v. Faris*, 7 Yerg. (Tenn.) 155; *Stephens v. Orman*, 10 Fla. 9; *Petty v. Taylor*, 5 Dana (Ky.) 598; *Mason v. Peck*, 7 J. J. Marsh. (Ky.) 301; *Green v. Tanner*, 8 Met. (Mass.) 422; *Martin v. Sale*, Bailey Eq. (S. Car.) 1; *Rowe v. Cockrell*, Bailey Eq. (S. Car.) 126; *Magwood v. Lubbock*, Bailey Eq. (S. Car.) 382; *Johnson v. Slawson*, Bailey Eq. (S. Car.) 463; *Hughes v. Blackwell*, 6 Jones Eq. (N. Car.) 73; *Hill v. Williams*, 6 Jones Eq. (N. Car.) 242.

In some cases there may be circumstantial evidence strong enough of itself to overcome the answer. *Gould v. Williamson*, 21 Me. 273.

In *Clark v. Van Riemsdyk*, 9 Cranch

however, the answer contains new matter, not responsive to the allegations of the bill or to the interrogatories included in or appended to the same, which is put in issue by replication, the defendant's sworn answer is not proof of such matter. He must establish allegations so made by independent proof, in like manner as the complainant must establish the allegations of the bill when they are put in issue by the answer.¹ But if no replication is filed, and the case is heard on bill, answer and exhibits, without proof, the allegations in a sworn answer, whether responsive to the bill or not, must be considered as true.²

(U. S.) 154, Marshall, C. J., said: "The general rule that either two witnesses or one witness with probable circumstances will be required to outweigh an answer asserting a fact responsively to a bill, is admitted. The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance."

The answer may itself bring to light circumstances which will impair the evidential value of the denial. *East India Co. v. Donald*, 9 Ves. Jr. 275.

The right of a defendant to have his answer taken as evidence is co-extensive with his obligation to answer. *Pierson v. Clayes*, 15 Vt. 53; *Blaisdell v. Bowers*, 40 Vt. 126; *Dunham v. Gates, Hoffm. Ch. (N. Y.)* 185.

Where the answer is upon information and belief and contains no positive denial, the complainant is not required to increase the weight of his evidence to overcome the answer. *Benson v. Woolverton*, 15 N. J. Eq. 158. See also *ANSWER*, vol. 1, p. 609.

1. *Clements v. Moore*, 6 Wall. (U. S.) 299; *Reid v. McCallister*, 49 Fed. Rep. 16; *Seitz v. Mitchell*, 94 U. S. 580; *Tobin v. Walkinshaw*, 1 McAll. (U. S.) 26; *Randall v. Phillips*, 3 Mason (U. S.) 378; *U. S. Bank v. Beverly*, 1 How. (U. S.) 134; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *McCoy v. Rhodes*, 11 How. (U. S.) 141; *Clarke v. White*, 12 Pet. (U. S.) 178; *Robinson v. Cathcart*, 3 Cranch (C. C.) 379; *Gordon v. Bell*, 50 Ala. 213; *Barton v. Barton*, 75 Ala. 400; *Lucas v. Darien Bank*, 2 Stew. (Ala.) 280; *M'Gowen v. Young*,

2 Stew. & P. (Ala.) 161; *Brandon v. Cabiners*, 10 Ala. 155; *Roberts v. Stigleman*, 78 Ill. 120; *O'Brian v. Fry*, 82 Ill. 274; *Wells v. Houston*, 37 Vt. 245; *McDaniels v. Barnum*, 5 Vt. 279; *Mott v. Harrington*, 12 Vt. 199; *Cannon v. Norton*, 14 Vt. 178; *Lane v. Marshall*, 15 Vt. 85; *Pierson v. Clayes*, 15 Vt. 93; *McDonald v. McDonald*, 16 Vt. 630; *Allen v. Mower*, 17 Vt. 61; *Sanborn v. Kittredge*, 20 Vt. 632; 50 Am. Dec. 58; *Fisler v. Porch*, 10 N. J. Eq. 243; *Neville v. Demeritt*, 2 N. J. Eq. 321; *Dickey v. Allen*, 2 N. J. Eq. 40; *Winans v. Winans*, 19 N. J. Eq. 220; *Roberts v. Birgess*, 20 N. J. Eq. 139; *Brown v. Kahnweiler*, 28 N. J. Eq. 311; *Fey v. Fey*, 27 N. J. Eq. 213; *Ingersoll v. Stiger*, 46 N. J. Eq. 513; *Voorhees v. Voorhees*, 18 N. J. Eq. 223; *Hart v. Carpenter*, 36 Mich. 403; *Leach v. Fobes*, 11 Gray (Mass.) 506; 61 Am. Dec. 732; *New England Bank v. Lewis*, 8 Pick. (Mass.) 113; *O'Brien v. Elliot*, 15 Me. 125; 32 Am. Dec. 137; *Bradley v. Webb*, 53 Me. 462; *Wakeman v. Grover*, 4 Paige (N. Y.) 23; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 89; *Jones v. Belt*, 2 Gill (Md.) 106; *Carter v. Leeper*, 5 Dana (Ky.) 263; *Garlick v. M'Arthur*, 6 Wis. 450; *Ives v. Hazard*, 4 R. I. 14; 67 Am. Dec. 500; *Dease v. Moody*, 31 Miss. 617; *Jones v. Jones*, 1 Ired. Eq. (N. Car.) 332; *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362; *Busby v. Littlefield*, 33 N. H. 76; *Rogers v. Mitchell*, 41 N. H. 154; *Pusey v. Wright*, 31 Pa. St. 387; *Purcell v. Purcell*, 4 Hen. & M. (Va.) 511.

This rule applies only to matters not stated or inquired of in the bill. There is no foundation for a distinction, in this regard, between matter of denial and matter of affirmance, if both are responsive to the bill. *Bellows v. Stone*, 18 N. H. 465.

2. *Cherry v. Belcher*, 5 Stew. & P.

The rule excluding the testimony of parties of record was never enforced with the same severity in chancery as at common law. One who was a party in his own right was not permitted to be a witness for himself.¹ A plaintiff might, however, before filing his replication, obtain an order for the examination of a defendant, upon a suggestion that he was not interested in the event and subject to all just exceptions to the admissibility of the evidence to be taken and considered at the hearing,² but he could have no decree against such defendant for any relief involving the matters upon which he was examined.³

(Ala.) 133; *Perkins v. Nichols*, 11 Allen (Mass.) 542; *Copeland v. Crane*, 9 Pick. (Mass.) 73; *Tainter v. Clark*, 5 Allen (Mass.) 66; *Rogers v. Mitchell*, 41 N. H. 154; *Stone v. Moore*, 26 Ill. 165; *Mason v. McGirr*, 28 Ill. 322; *Trout v. Emmons*, 29 Ill. 433; *Buntain v. Wood*, 29 Ill. 504; *Chambers v. Rowe*, 36 Ill. 171; *Dale v. M'Evers*, 2 Cow. (N. Y.) 118; *Reed v. Reed*, 16 N. J. Eq. 248; *Gaskill v. Sine*, 13 N. J. Eq. 130; *Russell v. Moffitt*, 6 How. (Miss.) 303; *Jones v. Mason*, 5 Rand. (Va.) 577; 16 Am. Dec. 761; *Doolittle v. Gookin*, 10 Vt. 265.

1. *Casey v. Beachfield*, Pre. Ch. 411; *Gilbert's Eq. Rep.* 98; *Fyler v. Newcombe*, 14 Jur. 1039; 19 L. J. Ch. N. S. 278; *Foot v. Silsby*, 3 Blatchf. (U. S.) 507; *Webb v. Fitch*, 1 Root (Conn.) 177; *Livingston v. Bird*, 1 Root (Conn.) 255; *Lingan v. Henderson*, 1 Bland (Md.) 268; *Mixell v. Lutz*, 34 Ill. 388.

2. *Lee v. Atkinson*, 2 Cox 413; *Franklyn v. Colquhoun*, 16 Ves. Jr. 218; *Murray v. Shadwell*, 2 Ves. & B. 401; *Casey v. Beachfield*, Pre. Ch. 411; *Anonymous*, 2 Ch. Cas. 214; *Suffolk v. Greenville*, 3 Ch. Rep. 89; *Gwynn v. Petty*, Toth. 71; *Fyfield v. Vinore*, Cary 45; *Barret v. Gore*, 3 Atk. 401; *Meadbury v. Isdall*, 9 Mod. 438; *Gibson v. Albert*, 10 Mod. 19; *Man v. Ward*, 2 Atk. 228; *Blake v. Blake*, 1 Ir. Eq. 198; *Watson v. Pym*, Fl. & K. 192; 3 Ir. Eq. 344; *White v. Scott*, Fl. & K. 69; *Wilcox v. Hill*, 11 Mich. 260.

A defendant could not be examined after the replication to his answer was filed. *Winter v. Kent*, Dick. 599; *Holmes v. Arundel*, 3 Beav. 303; *Ward v. Ward*, 4 Beav. 223; *Walker v. Tilly*, 9 Ir. Eq. 261; *Baker v. Thurnall*, 6 Beav. 333.

But it was otherwise if he was not a defendant in his own right. *Crookhall v. Smith*, 2 Fowl. Exch. Pr. 101.

If the replication had been filed, it

might, on motion, be amended by striking out the name of the defendant sought to be examined. *Hardcastle v. Shafto*, 2 Fowl. Exch. Pr. 100.

A defendant could not be examined as a witness without first obtaining an order of the chancellor to that effect. *Clagett v. Hall*, 9 Gill & J. (Md.) 80; *Wheeler v. Emerson*, 2 Blackf. (Ind.) 293; *Second Cong. Soc. v. First Cong. Soc.*, 14 N. H. 315; *Thomas v. Graham*, Walk. (Mich.) 117; *Pusey v. Wright*, 31 Pa. St. 387; *DeWolf v. Johnson*, 10 Wheat. (U. S.) 367. See also *Bogert v. Bogert*, 2 Edw. Ch. (N. Y.) 399.

3. *Weymouth v. Boyer*, 1 Ves. Jr. 417; *Ellis v. Deane*, 3 Moll. 53; *Champion v. Champion*, 15 Sim. 101; *Rowland v. Witherden*, 3 Macn. & G. 568; 21 L. J. Ch. N. S. 480; *Atty. Gen'l v. Drew*, 3 De G. & S. 488; 13 Jur. 1066; *Lingan v. Henderson*, 1 Bland (Md.) 268; *Palmer v. Van Doren*, 2 Edw. Ch. (N. Y.) 192; *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 127; *Ragan v. Echols*, 5 Ga. 71.

But a decree might be had against him upon other matters concerning which he was not examined. *Nightingale v. Dodd*, Ambl. 583; *Mos. 229*; *Palmer v. Van Doren*, 2 Edw. Ch. (N. Y.) 192.

The plaintiff's examination of a defendant, who was such in a representative capacity only, and had no personal interest in the matter in controversy, was not sufficient ground for dismissing the bill as to him. *Tamlyn v. Reynolds*, 7 Jur. 166; *Bradley v. Root*, 5 Paige (N. Y.) 632.

The plaintiff, by examining as a witness a defendant who was primarily liable to him, thereby precluded himself from having a decree against either him or a defendant secondarily liable. *Thompson v. Harrison*, 1 Cox 344; *Goold v. O'Keeffe*, Beat. 356;

So, also, a defendant might obtain an order for the examination of a co-defendant, upon a suggestion that the latter was not interested in the matters upon which it was proposed to examine him, leaving the question of interest to be determined at the hearing upon the evidence.¹ If, at that time, it appeared that the witness was interested, though only to the extent of liability for costs, his deposition was excluded.² But a plaintiff was not permitted to examine a co-plaintiff as a witness without the consent of the defendant.³ The proper course to pursue, in such cases, was to move to amend the bill by striking out the name of the desired witness as a complainant and joining him as a defendant, if he were a necessary party.⁴ Neither might the defendant examine a plaintiff, except by consent, unless he was merely a nominal plaintiff without beneficial interest in the matter in controversy.⁵

(6) *In Criminal Proceedings*—(a) *Defendants*.—At common law a prisoner on trial for a capital crime was not entitled to counsel,

Bradley v. Root, 5 Paige (N. Y.) 632; Ragan v. Echols, 5 Ga. 71.

But the examination of one defendant was not a valid objection to a decree against others not examined, if, in order to obtain the relief prayed against them, a decree against the party examined was not necessary. Rowland v. Witherden, 3 Macn. & G. 568; 21 L. J. Ch. N. S. 480; Smith v. Smith, 6 Hare 524; Palmer v. Van Doren, 2 Edw. Ch. (N. Y.) 192.

1. Dixon v. Parker, 2 Ves. 219; Murray v. Shadwell, 2 Ves. & B. 401; Hurd v. Partington, Younge 307; Fletcher v. Glegg, Younge 345; Smith v. Pincombe, 1 H. & Tw. 250; 18 L. J. Ch. 211; 13 Jur. 158; Paris v. Hughes, 1 Keen 1; Steed v. Oliver, 5 Hare 492; Daniell v. Daniell, 3 De G. & S. 357; 13 Jur. 164; Neville v. Demeritt, 2 N. J. Eq. 321; Harrison v. Johnson, 18 N. J. Eq. 420; Mixell v. Lutz, 34 Ill. 388.

An order for the examination of one defendant by another did not issue as of course after decree. Dungannon v. Skinner, 1 Hog. 281; Franklin v. Colquhoun, 16 Ves. Jr. 218.

The ground of permitting a defendant to be examined for a co-defendant was that the plaintiff might unite distinct claims with a view of depriving the defendants of each other's evidence. Murray v. Shadwell, 2 Ves. & B. 401; Hubbard v. Hewlett, 2 Madd. 468; Piddock v. Brown, 3 P. Wms. 288.

A defendant against whom relief was prayed might be examined as a witness by a co-defendant against whom differ-

ent relief was prayed. Ashton v. Parker, 14 Sim. 632; 9 Jur. 574; Daniell v. Daniell, 3 De G. & S. 357; 13 Jur. 164.

But two defendants who had exactly the same defense were not competent witnesses for each other. Monday v. Guyer, 1 De G. & S. 182; 11 Jur. 861; Carrington v. Pell, 3 De G. & S. 512.

2. Eade v. Lingood, 1 Atk. 204; Barret v. Gore, 3 Atk. 402; Dixon v. Parker, 2 Ves. 219; Clarke v. Wyburn, 12 Jur. 613.

To exclude the deposition of a defendant, it was necessary to show his interest in the matters upon which his testimony bore. It was not sufficient to show an interest in the subject-matter of the suit generally. Ellis v. Deane, 3 Moll. 58.

3. Hungate v. Fothergill, 2 Fowl. Exch. Pr. 125; Phillips v. Bucks, 1 Vern. 230; *In re* Christie, 1 Dea. & C. 290; Benson v. Chester, Jac. 577; Fereday v. Wightwick, 4 Russ. 114; 6 L. J. Ch. 60; Edwards v. Goodwin, 10 Sim. 123. See also Day v. Cummings, 19 Vt. 499.

4. Eckford v. DeKay, 6 Paige (N. Y.) 565; Motteux v. Mackreth, 1 Ves. Jr. 142; Ewer v. Atkinson, 2 Cox 393.

5. Kilmurry v. Crew, Dick. 60; Hewatson v. Tookey, Dick. 799 (*disapproving* Throughton v. Getley, Dick. 382); Fereday v. Wightwick, 4 Russ. 114; 6 L. J. Ch. 60; Fisher v. Fisher, 11 Jur. 419; 16 L. J. Ch. N. S. 320.

A defendant might examine a plaintiff by the consent of all parties. Wheat-

unless some question of law arose in the progress of the trial requiring the argument of counsel for its elucidation.¹ In such cases, and in others where the prisoner had no counsel, the defendant was entitled to make an unsworn statement to the jury setting forth the material facts of the case from his point of view, and he was not subject to cross-examination on such statement.² In some jurisdictions, where the prisoner's incompetency to testify in his own behalf has not been removed by statute, great progress has been made in that direction by the enactment of statutes permitting all defendants in criminal proceedings to take the stand if they so desire and make statements to the jury concerning the facts and circumstances of the case.³ These statements, while not technically a part of the evidence, are, nevertheless, in the nature of evidence and are to be considered by

ley v. Smith, Dick. 650; Walker v. Wingfield, 15 Ves. Jr. 178.

If a plaintiff, who was without interest in the event of the suit, was a necessary witness for the defense, an order might be obtained for his examination. Hougham v. Sandys, 2 Sim. & Stu. 221. See also M'Niece v. Agnew, 2 Ir. Eq. 445.

1. 4 Bl. Com. 355; 2 Hawk P. C. 400.

2. It was generally held that if a prisoner were defended by counsel he should not himself be permitted to make a statement to the jury in addition to the defense of his counsel. Reg. v. Boucher, 8 C. & P. 141; 34 E. C. L. 328; Reg. v. Burrows, 2 M. & Rob. 124; Reg. v. Rider, 8 C. & P. 539; 34 E. C. L. 521; Reg. v. Manzano, 8 Cox C. C. 321; Reg. v. Teste, 4 Jur. N. S. 244; Reg. v. Taylor, 1 F. & F. 535. But in some cases the court permitted the prisoner to make a statement in addition to his counsel's address to the jury. Reg. v. Stephens, 11 Cox C. C. 669; Reg. v. Shimmin, 15 Cox C. C. 122; Reg. v. Malings, 8 C. & P. 242; 34 E. C. L. 371.

But these cases were not regarded as precedents with respect to the general practice in such cases. Reg. v. Walkling, 8 C. & P. 243; 34 E. C. L. 372.

In Reg. v. Malings, 8 C. & P. 242; 34 E. C. L. 371, Alderson, B., said: "On trials for high treason the prisoner was always permitted to make his own statement after the counsel had addressed the jury."

The prisoner was not entitled to have his counsel make the statement for him. Reg. v. Shimmin, 15 Cox C. C. 122; Reg. v. Beard, 8 C. & P. 142; 34 E. C. L.

328; Reg. v. Butcher, 2 M. & Rob. 228. Although this was permitted in Reg. v. Weston, 14 Cox C. C. 346. See also People v. Lopez, 2 Edm. Sel. Cas. (N. Y.) 262. This was the subject of much discussion in England as late as 1881, when it was determined, by resolution of all the judges liable to be called on to preside at criminal trials (Stephen and Hawkins, JJ., dissenting), that counsel for a prisoner should not make any statements of alleged facts on the authority of the prisoner which it was not proposed to prove in evidence. See 1 Roscoe Crim. Ev. (8th Am. ed.) * 220.

3. In Georgia, in all criminal trials, the accused may make to the court and jury such statement as he may deem proper in his defense; such statement not to be made under oath and to have such force only as the jury may think right to give it; provided that the prisoner shall not be compelled to answer any questions on cross-examination. Code of Georgia (1882), § 4637.

The law of Florida is substantially the same as that of Georgia, except that the statement is made under oath. Rev. Stats. of Florida (1892), § 2908.

In Wyoming, the defendant in all criminal cases has his option either to be sworn and examined as a witness or to make a statement to the jury without being sworn. Rev. Stats. of Wyoming (1887), § 3288.

In Michigan and Alabama, prisoners were formerly permitted to make only an unsworn statement to the jury. But in both of those states they are now made competent witnesses for themselves. See Michigan Laws 1881; Act No. 245 (Pub. Acts 1881, p. 335);

the jury, who may give them such credit as, in their judgment, they merit.¹

But at common law a prisoner on trial for a criminal offense is not a competent witness in his own behalf.² Neither are persons jointly indicted and tried for the same offense competent witnesses for each other, or for the prosecution.³ So far there is

and Criminal Code of *Alabama*, § 4473, Act of February 17, 1885.

The solicitor should not argue on the prisoner's failure to make a statement. *Robinson v. State*, 82 Ga. 535. And it is error to charge the jury that they may consider such failure. *Bird v. State*, 50 Ga. 585.

But counsel may comment on the statement in their addresses to the jury. *Beasley v. State*, 71 Ala. 328; *Reg. v. Malings*, 8 C. & P. 242; 34 E. C. L. 371.

It is objectionable for the court to discredit the prisoner's statement by comparing it with the evidence and pointing out discrepancies. *Tucker v. State*, 57 Ga. 503. But it is not objectionable to tell the jury to consider it in connection with all the evidence, facts, and circumstances of the case. *People v. Jones*, 24 Mich. 215.

The court may prevent the prisoner from making long rambling statements of irrelevant matter, but he should not be restricted to stating such facts only as are admissible in evidence. *Coxwell v. State*, 66 Ga. 309; *Loyd v. State*, 45 Ga. 58; *Montross v. State*, 72 Ga. 261; 53 Am. Rep. 840; *Howard v. State*, 73 Ga. 83.

When making their statements, prisoners may not be examined by their own counsel. *Chappell v. State*, 71 Ala. 322; *Hawkins v. State*, 29 Fla. 554; *Brown v. State*, 58 Ga. 212. Neither may they be cross-examined by counsel for the prosecution. *Chappell v. State*, 71 Ala. 322; *Whizenant v. State*, 71 Ala. 383; *Hawkins v. State*, 29 Fla. 554.

The court should *sua sponte* prevent any interference with the prisoner while making his statement, either by questions or suggestions from the jury, the attorney for the prosecution, or his own attorney. *Hawkins v. State*, 29 Fla. 554. But the court should, upon request of the prisoner's counsel, make such suggestions to him as will relieve him from embarrassment and enable him to make his statement complete if he desires to do so. *People v. Annis*, 13 Mich. 511.

In *Michigan* it was allowable to

cross-examine the defendant on his statement, but the cross-examination was confined to matter contained in the statement. *Gale v. People*, 26 Mich. 157; *People v. Thomas*, 9 Mich. 321.

It is competent for the prosecution to introduce evidence in rebuttal to disprove the prisoner's statement. *Burden v. People*, 26 Mich. 162; *Holsenbake v. State*, 45 Ga. 43; *Hanvey v. State*, 68 Ga. 612. And the prisoner's statement, made upon a former trial in the same case, may be put in evidence by the prosecution and shown to be false. *People v. Arnold*, 43 Mich. 303; 38 Am. Rep. 182.

As the defendant does not make his statement in the capacity of a witness, his previous statements are admissible for the purpose of proving his guilt, but are not admissible for the purpose of impeachment. *Ortiz v. State*, 30 Fla. 256. See also *Chappell v. State*, 71 Ala. 322.

1. *Ross v. State*, 59 Ga. 248; *Jones v. State*, 65 Ga. 506; *Stewart v. State*, 66 Ga. 90; *McConnell v. State*, 67 Ga. 635; *Brown v. State*, 60 Ga. 210; *Reich v. State*, 63 Ga. 616; *Underwood v. State*, 88 Ga. 47; *Maher v. People*, 10 Mich. 212; 81 Am. Dec. 781; *DeFoe v. People*, 22 Mich. 224; *People v. Arnold*, 40 Mich. 710; *Chappell v. State*, 71 Ala. 322; *Beasley v. State*, 71 Ala. 328; *Williams v. State*, 74 Ala. 18; *Miller v. State*, 15 Fla. 577.

It is error for the judge to charge that the statement of the defendant is not sufficient, in general, to overcome the testimony of a sworn credible witness. The jury should be left free to give the statement such credence as they may think proper. *Day v. State*, 63 Ga. 667; *Durant v. People*, 13 Mich. 351; *Barber v. State*, 13 Fla. 675.

2. *Harwell v. State*, 10 Lea (Tenn.) 544; *Hoagland v. State*, 17 Ind. 488; *Whelchell v. State*, 23 Ind. 89.

3. *Reg. v. Payne*, L. R., 1 C. C. 349; 12 Cox C. C. 118; *Henderson v. State*, 70 Ala. 23; 45 Am. Rep. 72; *Lemasters v. State*, 10 Ind. 391; *State v. Blennerhassett*, Walk. (Miss.) 7.

An act of the legislature making a

no conflict of authority. The decisions, however, are not harmonious as regards the competency of persons jointly indicted but tried separately. There are many cases in which it is held that accomplices jointly indicted with the prisoner at the bar, but not put upon trial with him, are competent witnesses either for or against him.¹ On the other hand, it is held that an order of severance does not affect the general rule; and that where persons are jointly charged with the commission of a crime, one

defendant on trial for a criminal offense a competent witness for himself, does not make his co-defendants in the same indictment competent to testify for him. *Foster v. State*, 45 Ark. 328.

One of several persons jointly indicted for the same offense is not a competent witness for the prosecution, and it is fatal error to permit him to testify, the other defendants objecting, so long as the indictment against him is not disposed of. *Edgerton v. Com.*, 7 Bush (Ky.) 142; *People v. Donnelly*, 2 Park. Cr. Rep. (N. Y.) 182.

Separate Indictment.—An accomplice separately indicted is a competent witness for or against another indicted for the same offense. *U. S. v. Henry*, 4 Wash. (U. S.) 428; *U. S. v. Troax*, 3 McLean (U. S.) 224; *U. S. v. Lee*, 4 McLean (U. S.) 103; *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 139; *U. S. v. Hunter*, 1 Cranch (C. C.) 446; *McKenzie v. State*, 24 Ark. 636. See also *Lucre v. State*, 7 Baxt. (Tenn.) 148.

No Indictment.—The fact that a witness is an accomplice of a defendant does not affect his competency if he is not indicted. *Brown v. State*, 24 Ark. 620; *McKenzie v. State*, 24 Ark. 636; *Tinckler's Case*, 1 East P. C. 354.

The wife of one of several defendants, jointly indicted and tried with others for the same offense, was not a competent witness for her husband's co-defendants. *Com. v. Manson*, 2 Ashm. (Pa.) 31; *Collier v. State*, 20 Ark. 37; *Com. v. Easland*, 1 Mass. 15; *Rex v. Locker*, 5 Esp. 107; *Reg. v. Thompson*, 12 Cox C. C. 202; *L. R.*, 1 C. C. 377; *Rex v. Hood*, 1 M. C. C. 281; *Rex v. Smith*, 1 M. C. C. 289; *Reg. v. Den-slow*, 2 Cox C. C. 230. And the same was true of the husband of one of the prisoners. *Rex v. Serjeant*, R. & M. 352.

But the rule was otherwise if the defendants were tried separately, although jointly indicted. *Thompson v. Com.*, 1 Metc. (Ky.) 13; *Com. v. Manson*, 2 Ashm. (Pa.) 31; *Moffit v. State*, 2 Humph. (Tenn.) 99; 36 Am.

Dec. 301; *Com. v. Easland*, 1 Mass. 15; *State v. Anthony*, 1 McCord (S. Car.) 285; *State v. Burnside*, 37 Mo. 343.

The husband of an accomplice who was not indicted, was held to be a competent witness against the prisoner. *Reg. v. Halliday*, Bell C. C. 257; 8 Cox C. C. 298.

Where two persons were jointly indicted for burglary, it was held that the wife of one of the prisoners was a competent witness to prove that she took to the house of the other the property that was found there. *Reg. v. Sills*, 1 C. & K. 494; 47 E. C. L. 494.

But the wife of an accomplice could not be compelled to testify against her husband's co-defendant where her testimony would tend to criminate her husband. *Rex v. Ast*, Car. C. L. 66.

1. *Reg. v. Lyons*, 9 C. & P. 555; 38 E. C. L. 224; *Winsor v. Reg.*, L. R., 1 Q. B. 390; *Reg. v. Bradlaugh*, 15 Cox C. C. 217; *Marler v. State*, 67 Ala. 55; 42 Am. Rep. 95; *State v. Brien*, 32 N. J. L. 414; *Noyes v. State*, 41 N. J. L. 418; *Carroll v. State*, 5 Neb. 35; *George v. State*, 39 Miss. 570; *Allen v. State*, 10 Ohio St. 287; *Brown v. State*, 18 Ohio St. 496; *Everett v. State*, 6 Ind. 495; *Marshall v. State*, 8 Ind. 498; *Sloan v. State*, 9 Ind. 565; *Hunt v. State*, 10 Ind. 69; *State v. Spencer*, 15 Ind. 249; *People v. Labra*, 5 Cal. 183; *People v. Newberry*, 20 Cal. 439; *Jones v. State*, 1 Ga. 610; *Poteete v. State*, 9 Baxt. (Tenn.) 261; *Lazier v. Com.*, 10 Gratt. (Va.) 708; *State v. Stewart*, 51 Iowa 312; *State v. Nash*, 10 Iowa 81, *overruling State v. Nash*, 7 Iowa 347.

Where it is proposed to call an accomplice, jointly indicted with the prisoner, as a witness for the prosecution, it is the better practice to dispose of the indictment as to him by *nolle prosequi*, a verdict of acquittal at the request of the prosecution, or by judgment of conviction if he has pleaded guilty. *Cockburn*, C. J., in *Winsor v. Reg.*, L. R., 1 Q. B. 312. But it is not

of them is not a competent witness upon the trial of another, so long as they stand jointly indicted for that offense.¹ An order for a separate trial is not a matter of right. It rests within the sound discretion of the court whether the trial shall be joint or separate.²

If a material witness for the prosecution is joined in the indictment, he may be rendered competent as a witness by the entry of a *nolle prosequi* as to him, or by his acquittal upon motion of counsel for the prosecution before the opening of the case.³ And if, at the conclusion of the case for the prosecution, there is a defendant against whom there is no evidence, it is the usual practice for the court, on motion of counsel for the other defendants, to direct his acquittal, in order that he may be a competent witness for the defense.⁴ But if there is any evidence against him, the court may overrule the motion to direct a separate verdict in his favor for this purpose.⁵

necessary to do so. *Reg. v. Payne*, L. R., 1 C. C. 349; *Reg. v. Bradlaugh*, 15 Cox C. C. 217.

1. *Moss v. State*, 17 Ark. 327; 65 Am. Dec. 433; *Brown v. State*, 24 Ark. 620; *Foster v. State*, 45 Ark. 328; *Collier v. State*, 20 Ark. 37; *Adwell v. Com.*, 17 B. Mon. (Ky.) 310; *People v. Bill*, 10 Johns. (N. Y.) 95; *People v. Williams*, 19 Wend. (N. Y.) 377; *Com. v. Marsh*, 10 Pick. (Mass.) 57; *State v. Mills*, 2 Dev. (N. Car.) 420; *State v. Dunlop*, 65 N. Car. 288; *Latshaw v. Territory*, 1 Oregon 141; *Baker v. U. S.*, 1 Minn. 207; *State v. Dumphey*, 4 Minn. 438; *Shay v. Com.*, 36 Pa. St. 305; *Staup v. Com.*, 74 Pa. St. 458; *Kehoe v. Com.*, 85 Pa. St. 127; *McMillen v. State*, 13 Mo. 34; *State v. Roberts*, 15 Mo. 28; *State v. Edwards*, 19 Mo. 674; *State v. Martin*, 74 Mo. 547; *U. S. v. Reid*, 12 How. (U. S.) 361. See also *Rutter v. State*, 4 Tex. App. 57; *Crutchfield v. State*, 7 Tex. App. 65; *Warfield v. State*, 35 Tex. 736.

2. *U. S. v. Marchant*, 12 Wheat. (U. S.) 480; *U. S. v. Wilson*, 1 Baldw. (U. S.) 78; *U. S. v. Gibert*, 2 Sumn. (U. S.) 20; *Com. v. Manson*, 2 Ashm. (Pa.) 32; *State v. Henry*, 16 Me. 203; *State v. Wise*, 7 Rich. (S. Car.) 412; *State v. Smith*, 2 Ired. (N. Car.) 402; *Bixbee v. State*, 6 Ohio 86; *People v. Vermilyea*, 7 Cow. (N. Y.) 108; *Rex v. Noble*, 15 How. St. Tr. 731; 9 Harg. St. Tr. 1.

3. *Rex v. Rowland*, R. & M. 401; *Winsor v. Reg.*, L. R., 1 Q. B. 312; *Reg. v. Owen*, 9 C. & P. 83; 38 E. C. L. 44; *Rex v. Sherman*, Cas. temp. Hardw. 303; *State v. Clump*, 16 Mo. 385.

A *nolle prosequi* restores the compe-

tency of one jointly indicted with the prisoner, although he has, since the entry of the *nolle prosequi*, been separately indicted for the same offense. *McKenzie v. State*, 24 Ark. 636.

4. *Hawk. P. C.*, ch. 46, § 98; 1 Hale P. C. 306; *Rex v. Mutineers of the Bounty*, cited in *Rex v. Suddis*, 1 East 306; *Rex v. Bedder*, 1 Sid. 237; *Rex v. Davis*, 3 Keb. 136; *Fraser's Case*, 1 M'Nally 56; *State v. Shaw*, 1 Root (Conn.) 134; *Fitzgerald v. State*, 14 Mo. 413; *State v. Roberts*, 15 Mo. 61; *People v. Bill*, 10 Johns. (N. Y.) 95; *State v. Blennerhassett*, Walk. (Miss.) 7. See also *U. S. v. Davidson*, 4 Cranch (C. C.) 576; *U. S. v. Fenwick*, 4 Cranch (C. C.) 676. But he is not a competent witness until he is acquitted, although there may be no evidence against him. *State v. Carr*, 1 N. J. L. 1.

5. *Brister v. State*, 26 Ala. 109; *Shay v. Com.*, 36 Pa. St. 305. See also *State v. Alexander*, 2 Mill (S. Car.) 171; *Pennsylvania v. Leach*, Add. (Pa.) 352.

In *Com. v. Eastman*, 1 Cush. (Mass.) 218; 48 Am. Dec. 506, the court said: "The submitting of the distinct case of one of several defendants to the jury during the progress of a trial is a discretionary power vested in the presiding judge peculiarly within his province and to be exercised only upon his views of the evidence. If there is any evidence against such defendant, there is no legal right in the other defendants to insist upon a finding separately as to him, with a view of using him, if acquitted, as a witness for them, although the presiding judge may strongly incline to the opinion that

One of a number of persons jointly charged with the commission of a crime, who has been separately tried and convicted, or has pleaded guilty, is, after judgment is pronounced in his case, a competent witness for or against his co-defendants, unless he is rendered infamous by the judgment of the court.¹ And, according to the weight of authority, such a defendant is a competent witness upon the trial of his co-defendants before he receives his sentence, since after conviction, or a plea of guilty, he is no longer a party to the issue.² But in some jurisdictions, it has been held that he is not competent to testify at the trial of those jointly indicted with him until judgment is rendered in his case, because, until then, he remains a party to the record, and the proceedings are not at an end in respect to him.³

(b) *Accomplices*.—(See also *infra*, this title, *Credibility of Witnesses*).—A mere confession of guilt, without a conviction and sentence, is not sufficient to render a person legally infamous.

the weight of evidence is altogether in his favor."

1. Reg. v. Lyons, 9 C. & P. 555; 38 E. C. L. 224; Rex v. Fletcher, 1 Stra. 633; 4 C. & P. 250; 19 E. C. L. 369; State v. Stotts, 26 Mo. 307; State v. Jones, 51 Me. 125; Strawhern v. State, 37 Miss. 422.

The wife of a defendant who has been convicted is a competent witness against her husband's co-defendant. Reg. v. Williams, 8 C. & P. 283; 34 E. C. L. 391.

A convict, under sentence of death, is incapable of being a witness. Reg. v. Webb, 11 Cox C. C. 133.

2. Reg. v. George, 1 C. & M. 111; 41 E. C. L. 66; Reg. v. Hinks, 2 C. & K. 462; 61 E. C. L. 462; 1 Den. C. C. 84; Reg. v. Drury, 3 C. & K. 190; Reg. v. Arundal, 4 Cox C. C. 260; Com. v. Smith, 12 Met. (Mass.) 238; Lee v. State, 51 Miss. 566; State v. Jones, 51 Me. 125; Delozier v. State, 1 Head (Tenn.) 45.

In Rex v. Lafone, 5 Esp. 155, Lord Ellenborough rejected the testimony of a co-defendant who had suffered judgment, but this case has not been followed as a precedent in England. Thus, in Reg. v. George, 1 C. & M. 111; 41 E. C. L. 66, it appeared that two persons were jointly indicted for housebreaking. One of them pleaded guilty, and the other pleaded not guilty, and was tried. It was held that the prisoner who had pleaded guilty was a competent witness for his co-defendant, although no sentence had been passed on him. And in Reg. v. Hinks, 2 C. & K. 462; 61 E. C. L. 462, decided in 1845, it

appeared that three persons were jointly indicted for larceny. Two of them pleaded not guilty and were tried; the third pleaded guilty and was offered as a witness for the prosecution at the trial of the other two. It was objected that he was incompetent, on the ground that no judgment had been pronounced against him, but the court permitted him to be examined, and reserved the point for the opinion of the fifteen judges, who, upon consideration of the case, were of opinion that, at common law, he was a competent witness against the other two prisoners.

In Com. v. Smith, 12 Met. (Mass.) 238, Shaw, C. J., said: "The question in the present case is whether a co-defendant who has pleaded guilty, but has not been sentenced, can be called as a witness for the prosecution. It has been held that a co-defendant who has not been tried, cannot be called as a witness for one put on trial separately. Com. v. Marsh, 10 Pick. (Mass.) 57. So it has been held in *New York*, that a party in the same indictment cannot be a witness for his co-defendant upon his trial, until he has been acquitted or convicted, *People v. Bill*, 10 Johns. (N. Y.) 95; but the reason does not apply to one who, by conviction on his own confession, has ceased to be a party to the issue to be tried. *Rex v. Fletcher*, 1 Stra. 633. And in a late case, where a co-defendant had pleaded guilty to a charge of housebreaking, and was called as a witness before sentence, he was admitted. *Reg. v. George*, 1 C. & M. 111; 41 E. C. L. 66."

3. *Henderson v. State*, 70 Ala. 23; 45

Therefore, an avowed *particeps criminis*, who is not under sentence for the commission of an infamous offense, is a competent witness upon the trial of his associates in crime, unless he is jointly indicted and tried with them.¹ The fact that he is called to testify under a promise of immunity from punishment, goes only to his credibility and does not affect his competency,² although Sir Matthew Hale appears, at one time, to have entertained a different opinion.³ The rule is said to be founded on

Am. Rep. 72; *State v. Bruner*, 65 N. Car. 499; *Kehoe v. Com.*, 85 Pa. St. 137; *State v. Young*, 39 N. H. 283.

1. *Layer's Case*, 19 How. St. Tr. 373; *Tongue's Case*, Kel. 17; 1 Hale P. C. 303; *Rex v. Rookwood*, 4 St. Tr. 681; *Tinckler's Case*, 1 East P. C. 354; *Rex v. Long*, 6 C. & P. 179; 25 E. C. L. 343; *McKenzie v. State*, 24 Ark. 636; *Brown v. Com.*, 2 Leigh (Va.) 769; *Kinchelow v. State*, 5 Humph. (Tenn.) 9; *Solander v. People*, 2 Colo. 48; *State v. Thornton*, 26 Iowa 79; *State v. Dietz*, 67 Iowa 220; *State v. Pepper*, 11 Iowa 347; *State v. Schlagel*, 19 Iowa 169; *Parsons v. State*, 43 Ga. 197; *Phillips v. State*, 34 Ga. 502; *Lopez v. State*, 34 Tex. 133; *Bruton v. State*, 21 Tex. 337; *Sumpter v. State*, 11 Fla. 247; *Keech v. State*, 15 Fla. 591; *People v. Garnett*, 29 Cal. 622; *People v. Ames*, 39 Cal. 403; *People v. Melvane*, 39 Cal. 614; *State v. Crowley*, 33 La. Ann. 782; *State v. Cook*, 20 La. Ann. 145; *Gray v. People*, 26 Ill. 344; *Cross v. People*, 47 Ill. 152; 95 Am. Dec. 474; *Johnson v. State*, 2 Ind. 652; *Ayers v. State*, 88 Ind. 275; *Territory v. Corbett*, 3 Mont. 50; *Noland v. State*, 19 Ohio 131; *State v. Potter*, 42 Vt. 495; *State v. Howard*, 32 Vt. 380; *People v. Haynes*, 55 Barb. (N. Y.) 450; 38 How. Pr. (N. Y.) 369; *People v. Whipple*, 9 Cow. (N. Y.) 707; *People v. Dyle*, 21 N. Y. 578; *Lindsay v. People*, 63 N. Y. 143; *Com. v. Bosworth*, 22 Pick. (Mass.) 397; *Com. v. Savory*, 10 Cush. (Mass.) 535; *Steinham v. U. S.*, 2 Paine (U. S.) 168; *U. S. v. Harries*, 2 Bond (U. S.) 311; *U. S. v. Smith*, 2 Bond (U. S.) 323; *U. S. v. One Distillery*, 2 Bond (U. S.) 399.

Upon the trial of the notorious Johnathan Wild, it appeared that he had under his command a corps of well disciplined thieves, and that his part in the conspiracy was to obtain rewards from the owners of stolen property for helping them to recover possession of it. He was indicted under Stat. 4 Geo. I., ch. 11, § 4, which provided that one

guilty of this offense should suffer as the principal felon who stole the goods, and upon his trial the thief who stole the goods was admitted as a witness for the prosecution. *Wild's Case*, 1 Leach C. C. 17, note (a). See also 2 East P. C., ch. 16, § 155; 2 Russ. on Crimes (9th Am. ed.), *p. 575.

In civil cases, where the commission of a crime is one of the issues of fact, a *particeps criminis* is a competent witness. *Sinclair v. Jackson*, 47 Me. 102; 74 Am. Dec. 476; *Heward v. Shipley*, 4 East 180. See also *Bush v. Ralling*, *Sayer* 289.

In a libel for a divorce, the *particeps criminis* is a competent witness. *Moulton v. Moulton*, 13 Me. 110; *Brown v. Brown*, 5 Mass. 320.

In *Vermont*, it was once held that, on an indictment for adultery, the *particeps criminis* was not competent for the prosecution, *State v. Annice*, N. Chip. (Vt.) 9; but this case was subsequently overruled in *State v. Colby*, 51 Vt. 295.

The fact that the witness is separately indicted for the offense with which the prisoner stands charged does not affect his competency. *People v. Donnelly*, 2 Park. Cr. Rep. (N. Y.) 182; *U. S. v. Henry*, 4 Wash. (U. S.) 428; *U. S. v. Troax*, 3 McLean (U. S.) 224; *U. S. v. Lee*, 4 McLean (U. S.) 103; *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 139; *U. S. v. Hunter*, 1 Cranch (C. C.) 446; *McKenzie v. State*, 24 Ark. 636.

2. Hawk. P. C. b. 2, ch. 46, § 135; 1 Hale P. C. 303; 1 Phil. Ev. (5th Am. ed.) *106; 3 Russ. on Crimes (9th ed.) *596; 1 Rosc. Cr. Ev. (8th Am. ed.) *132; *Tongue's Case*, Kel. 17; *Layer's Case*, 19 How. St. Tr. 373; *Craft v. State*, 3 Kan. 478.

It is no objection to the competency of a witness that he may be entitled to a reward upon the conviction of the prisoner. *U. S. v. Wilson*, 1 Baldw. (U. S.) 90, citing *Fraser's Case*, 1 M'Nally 61, 63.

3. "If a reward be promised a person

necessity, since without the testimony of confederates great offenders would frequently escape punishment for the want of evidence against them;¹ but such testimony should be received with great caution, and as a *particeps criminis* is generally called to testify for the prosecution under an express or implied promise of pardon, or of a discontinuance of the proceedings against him, it is a matter within the sound discretion of the court whether he will be admitted to testify, and thus escape punishment.² And if, when admitted as a witness, he violates the condition upon which he was admitted, by refusing to give a fair, full, and candid statement of the whole transaction, he may be tried and convicted on his own confession;³ but by the performance of the

for giving his evidence before he gives it, this, if proved, disables his testimony. And so, for my own part, I have always thought that if a person have a promise of pardon if he gives evidence against one of his own confederates, this disables his testimony if it be proved upon him." 2 Hale P. C. 280.

1. Hawk. P. C. b. 2, ch. 46, § 94; 1 Phil. Ev. (5th Am. ed.) *107; 1 Rosc. Cr. Ev. (8th ed.) *130; U. S. v. Lancaster, 2 McLean (U. S.) 431; U. S. v. Troax, 3 McLean (U. S.) 224; Marler v. State, 67 Ala. 55; 68 Ala. 580; 42 Am. Rep. 95; Gray v. People, 26 Ill. 344; Earl v. People, 73 Ill. 329.

In Charnock's Case, 12 How. St. Tr. 1454, Lord Holt, addressing the jury, said: "Conspiracies are deeds of darkness as well as of wickedness, the discovery whereof can properly come only from the conspirators themselves, and the evidence of accomplices has been always good proof in all ages; and they are the most proper witnesses, for otherwise, it is hardly possible, if not altogether impossible, to have the full proof of such secret contrivances." This language was referred to with approval by Lord Ellenborough in Despard's Case, 28 How. St. Tr. 488.

2. People v. Whipple, 9 Cow. (N. Y.) 707; Lindsay v. People, 63 N. Y. 143; Wight v. Rindskopf, 43 Wis. 344. See also 1 Rosc. Cr. Ev. (8th Am. ed.) *131, citing Rex v. Mellor, Staff. Summer Ass. 1833; Reg. v. Saunders, Worcester Spring Ass. 1842; Reg. v. Salt, Staff. Spring Ass. 1843; Reg. v. Sparks, 1 F. & F. 388.

In Wight v. Rindskopf, 43 Wis. 344, which was an action by an attorney of a defendant in a former criminal prosecution, for services in inducing the prosecution to permit his client to tes-

tify against his confederates in crime, on condition that he himself would not be punished, Ryan, C. J., after reviewing the authorities on this subject, said: "So, it is seen that courts jealously reserve to themselves, and cautiously exercise, the discretion to admit accomplices as witnesses upon the implied promise of pardon; and that a public prosecutor has no authority to make any such agreement with a defendant in an indictment. It is for the court alone to countenance the escape of an accomplice from punishment for giving evidence against those indicted with him. In a proper case, it is doubtless the duty of a public prosecutor to move for leave to use the accomplice as a witness, but there his discretion stops. And though courts must necessarily trust largely in such cases to the view of the public prosecutor, yet they do not lightly give leave and are always presumed to exercise their own judgment in view of all the circumstances. A public prosecutor may propose to an accomplice to become a witness for the prosecution, but an agreement to use him as a witness upon any condition, without the sanction of the court, is a usurpation of authority, an abuse of official character, and a fraud upon the court."

It is not customary to admit more than one accomplice. Barnesley Rioters' Case, 1 Lew. 5. But under peculiar circumstances more than one may be admitted, Rex v. Noakes, 5 C. & P. 326; 24 E. C. L. 342; especially where they testify to different facts, no one of them being able to prove the whole. Scott's Case, 2 Lew. 36.

3. Moore's Case, 2 Lew. 37; Com. v. Knapp, 10 Pick. (Mass.) 477; 20 Am. Dec. 534. See also 1 Phil. Ev. (5th Am. ed.) *108; 3 Russ. on Cr. (9th Am.

condition in good faith, he acquires an equitable right to a pardon, or an abandonment of the proceedings against him.¹ If, however, he should be indicted for the same offense, such equitable right may not be pleaded in bar, or otherwise interposed as a defense, but proceedings against him may be stayed until an application for relief can be made to the pardoning power.² The competency of an accomplice does not depend upon the ancient and exploded doctrine of approvement.³

(e) *Prosecutors and Informers.*—It was held in an early case that the person aggrieved by an offense, at whose instigation criminal proceedings had been set on foot, was not a competent witness for the prosecution,⁴ but the authority of this case was destroyed by subsequent decisions, in which it was laid down as a general rule that prosecutors were competent witnesses in cases where they had no direct and immediate interest in the event of the proceedings.⁵ A singular exception to this general rule was to

ed.) *598, where the following *mis prius* cases are cited: *Rex v. Burley, coram Garrow, B., Leicester Lent As. 1818; Reg. v. Smith, Gloucester Spring & Sum. As. 1841; Reg. v. Holtham, Staff. Spring As. 1843; Rex v. Stokes, Staff. Spring As. 1837.*

If an accomplice in one crime be also indicted for another, and the fact be within the knowledge of the court, he will not, as a rule, be admitted as a witness, *Anonymous, 2 C. & P. 411; 12 E. C. L. 194*; but if he be so admitted, though he testify in good faith against his accomplices upon one indictment, he will, nevertheless, be put upon his trial on the other and punished upon conviction. *Rex v. Lee, R. & R. C. C. 361; Rex v. Brunton, R. & R. C. C. 454.*

1. *People v. Whipple, 9 Cow. (N. Y.) 707; U. S. v. Lee, 4 McLean (U. S.) 103; Rex v. Rudd, Cowp. 339.*

2. *Rex v. Rudd, Cowp. 339.*
3. *Byrd v. Com., 2 Va. Cas. 490; Sumpter v. State, 11 Fla. 254.*

But the admission of accomplices as witnesses for the prosecution is the modern substitute for the old doctrine of approvement. *State v. Wier, 1 Dev. (N. Car.) 363; People v. Whipple, 9 Cow. (N. Y.) 710.*

"But there is another species of confession which we read much of in our ancient books, of a far more complicated kind, which is called approvement. And that is, when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded, and appeals or accuses others, his accomplices, of the

same crime, in order to obtain his pardon. In this case, he is called an approver or prover, *probator*, and the party appealed or accused is called the appellee. Such approvement can only be in capital offenses, and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it; and if he hath no reasonable and legal exceptions to make to the person of the approver, which, indeed, are very numerous, he must put himself upon his trial, either by battle or by the country; and if vanquished or found guilty, must suffer the judgment of the law, and the approver shall have his pardon *ex debito justitiæ*. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver shall receive judgment to be hanged upon his own confession of the indictment; for the condition of his pardon has failed, namely, the convicting of some other person, and therefore, his confession remains absolute." 4 Bl. Com. 329-330.

4. In *Rex v. Whiting, 1 Salk. 283*, which was a criminal proceeding against the defendant for cheating, it appeared that his mother-in-law had promised him a note for five pounds, but through some trick he obtained her signature to a note for one hundred pounds. Lord Holt, C. J., said that she could not be a witness, for though the verdict upon the information could not be given in evidence in an action upon the note, yet the jury would surely be told of it to influence their verdict.

5. *Rex v. Broughton, 2 Stra. 1229;*

be found in prosecutions for forgery, where it was held that the person whose signature was forged was incompetent to prove the forgery, unless he had a release from those interested in the validity of the instrument.¹ In the *United States*, this exception has been rejected in a number of jurisdictions as having no foundation in principle,² and the same result was reached in *England*,

Reg. v. Sewel, 7 Mod. 118; Reg. v. Mackartney, 1 Salk. 286; State v. Truss, 9 Port. (Ala.) 126; Com. v. Oliver, 3 Bibb (Ky.) 474.

Lord Kenyon laid it down as a rule that no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit or could avail himself of the verdict in the cause so as to give it in evidence on any future occasion in support of his own interest. *Smith v. Prager*, 7 T. R. 58; *Bent v. Baker*, 3 T. R. 27. This rule has the approval of Lord Ellenborough in *Rex v. Boston*, 4 East 572.

See also *Rex v. Ellis*, 2 Stra. 1104; *Rex v. Nunez*, 2 Stra. 1043; prosecutions for perjury, which seem to have been overruled in *Rex v. Broughton*, 2 Stra. 1229, and *Abrahams v. Bunn*, 4 Burr. 2255.

In *State v. Hassett*, 1 Tayl. (N. Car.) 55, the court held that upon a prosecution for perjury, the party against whom the prisoner had previously testified was a competent witness, regarding the doctrine of *Rex v. Ellis*, 2 Stra. 1104, and *Rex v. Nunez*, 2 Stra. 1043, as having been exploded.

The fact that the prosecutor is liable for costs if the prosecution proves to be frivolous, does not render him incompetent. *Baker v. Com.*, 2 Va. Cas. 353; *Gilliam v. Com.*, 4 Leigh (Va.) 688; *State v. Blennerhassett*, Walk. (Miss.) 7.

But it has been held that one who undertakes to indemnify the prosecutor against liability for costs, is not a competent witness for the prosecution. *Com. v. Gore*, 3 Dana (Ky.) 475.

It was held, however, that the fact that a witness for the prosecution had contributed funds to carry it on went only to his credibility. *People v. Cunningham*, 1 Den. (N. Y.) 524; 43 Am. Dec. 709.

1. 2 Hawk. P. C., ch. 46; 1 Phill. Ev. (5th ed.) *59; *Watts' Case*, 3 Salk. 172; *State v. A. W.*, 1 Tyler (Vt.) 260; *State v. Brunson*, 1 Root (Conn.) 307; *State v. Blodgett*, 1 Root (Conn.) 534;

State v. Foster, 3 McCord (S. Car.) 442; *State v. Whitten*, 1 Hill (S. Car.) 100; *State v. Stanton*, 1 Ired. (N. Car.) 424.

In *Rex v. Boston*, 4 East 572, Lord Ellenborough, after stating the general rule, said: "The only anomaly that I know in the law, which may be regarded as an exception to this rule, is in the case of forgery, where a prosecutor shall not be permitted to say that the bond purporting to have been made by him was forged. I put this only as an instance. Upon what principle that anomalous case was so settled I cannot pretend to say, but having been so settled, it may be too much for judges sitting on trials to break in upon it. The anomaly can only be remedied now by the legislature." But it was otherwise if the question of forgery arose as one of the issues of fact in a civil action. *Hunter v. Rex*, 4 B. & Ald. 209; *Furber v. Hilliard*, 2 N. H. 480.

It has been said that the reason of the rule was that the court would, upon conviction of the prisoner, impound the forged instrument so that it could not afterwards be used in evidence against the person whose signature was forged. *Com. v. Snell*, 3 Mass. 82; *Respublica v. Keating*, 1 Dall. (Pa.) 110; *Furber v. Hilliard*, 2 N. H. 480, citing *Tidd* 528; *Shep. Touchst.* 70, 71; 2 East Cr. L. 994; 5 Coke 74, 75.

The person to whom the forged instrument was passed was a competent witness, notwithstanding he had a right of action for damages. *State v. Nettleton*, 1 Root (Conn.) 308.

2. *Pennsylvania v. Farrel*, Add. (Pa.) 246; *Respublica v. Keating*, 1 Dall. (Pa.) 110; *Respublica v. Ross*, 2 Dall. (Pa.) 239; 2 *Yeates* (Pa.) 1; *Respublica v. Weight*, 1 *Yeates* (Pa.) 401; *Com. v. Hutchinson*, 1 Mass. 7; 2 Am. Dec. 1; *Com. v. Snell*, 3 Mass. 82; *Com. v. Peck*, 1 Met. (Mass.) 428; *Com. v. Waite*, 5 Mass. 261; *Territory v. Barran*, 1 Martin (La.) 208; *State v. Foster*, 3 McCord (S. Car.) 442; *People v. Dean*, 6 Cow. (N. Y.) 27; *Noble v. People*, 1 Ill. 54; *Simmons v. State*, 7 Ohio 116; *State v. Phelps*, 11 Vt.

by the enactment of a statute which puts the competency of witnesses in prosecutions for forgery on the same footing as in other criminal proceedings.¹

If the prosecutor would receive a direct benefit as a result of the prisoner's conviction, and without the aid of further proceedings, this was sufficient to disqualify him on the ground of interest, unless he was made competent by statute,² except in cases of

116; 34 Am. Dec. 672; *State v. Shurtliff*, 18 Me. 368.

Furber v. Hilliard, 2 N. H. 481, was not a criminal prosecution, but the court said it was the practice in that state to admit the person whose name was forged in criminal as well as in civil cases. See also *Pope v. Nance*, 1 Stew. (Ala.) 354; 18 Am. Dec. 60; *White v. Green*, 5 Jones (N. Car.) 47.

In *People v. Howell*, 4 Johns. (N. Y.) 206, Kent, C. J., said: "The ancient rule in *England*, that a witness whose name was forged was incompetent to prove the forgery on an indictment, because he was interested in the question, still prevails in their courts, and it was adopted by this court in the year 1794. The grounds or reasons of that decision are not before the public, and we, therefore, do not know them. It is probable that the court assumed the English rule as they found it then existing. But since that time the question of interest in a witness has been investigated and defined with more precision, both in *England* and in this state. The rule now in all such cases, and I believe I may say in almost all criminal cases, except in the case of a forged instrument, is that the witness is to be received if he be not interested in the event of the suit, so that the verdict could be given in evidence in an action in which he was a party. The interest which the witness may have in the question put is no longer the test. That degree of interest goes only to the credit of the witness. The exclusion of the witness in the case of forgery has, therefore, now become an anomaly in the law of evidence, for it is certain that the conviction of the party charged with forging a check cannot be given in evidence in a subsequent civil suit on the check, and as the reason of the old rule has ceased, by a sounder definition of the question of interest, and as it is not now applied to other criminal cases, it would seem to be fit and proper that the rule itself should no longer be applied to the case of forgery."

1. Stat. 9 Geo. IV., ch. 32, § 2.

2. Thus, in an indictment for forcible entry and detainer, where restitution of possession was awarded upon conviction of the defendant, the person whose land was entered upon or withheld by force was not a competent witness. *Rex v. Williams*, 9 B. & C. 549; 17 E. C. L. 440; *Rex v. Beavan*, R. & M. 342; *State v. Fellows*, 2 Hayw. (N. Car.) 340.

In *Republica v. Shryber*, 1 Dall. (Pa.) 68, it was held that the wife of the prosecutor, whose land was forcibly detained, was competent to testify as to the force employed but was not competent upon any other point.

And where the prosecutor or informer was entitled to the whole or a part of a penalty, immediately upon conviction of the offender, he was not a competent witness for the prosecution. *Rex v. Tilly*, 1 Stra. 316; *Rex v. Stone*, 2 Ld. Raym. 1545; *Rex v. Piercy*, Andr. 18; *Rex v. Blaney*, Andr. 240; *Van Evour v. State*, 2 Nott & M. (S. Car.) 309; *State v. Vaughan*, 1 Bay (S. Car.) 283; *Northcot v. State*, 43 Ala. 330. See also a *dictum* in *Sallsbury v. State*, 6 Conn. 104.

But a witness who was entitled to a part of the penalty might be rendered competent by a *bona fide* release of his interest. *City Council v. Haywood*, 2 Nott & M. (S. Car.) 308.

The benefit to be derived by the prosecutor or informer must be certain, otherwise it will not affect his competency. Thus, where it was discretionary with the court whether the offender should be punished by fine or imprisonment, it was held that the prosecutor was a competent witness. *Rex v. Cole*, 1 Esp. 169, *overruling* *Rex v. Blackman*, 1 Esp. 96.

So, where the statute provided that the offender should, upon conviction of larceny on the high seas, be fined not exceeding fourfold the value of the goods stolen, one moiety of the fine to be paid to the owner of such goods, it was held that the owner of the goods was a competent witness, since the court,

robbery or theft, where the prosecutor was a competent witness, although entitled to restoration of his property upon conviction of the offender.¹ If, however, a conviction established only a right of action for a penalty or forfeiture, the prosecutor was a competent witness, because, in order to possess himself of the penalty or forfeiture, an action must be brought against the offender in which the verdict in the criminal prosecution was not admissible as evidence.² But in actions *qui tam* for the recovery of such penalties, the persons entitled to them were not competent witnesses.³ The fact that a witness will be entitled to a reward

in the exercise of its discretion, might impose merely a nominal fine. U. S. v. Murphy, 16 Pet. (U. S.) 203.

Where it is clearly implied from the tenor and provisions of the statute, that the legislature meant to make the prosecutor competent, notwithstanding his immediate interest in the penalty imposed, the case will be considered as a statutory exception to the rule. In *Rex v. Williams*, 9 B. & C. 549; 17 E. C. L. 440, Bayley, J., said: "Where it is plain that the detection and conviction of the offender are the objects of the legislature, the case will be within the exception, and the person benefited by the conviction will, notwithstanding his interest, be competent. Where this is not the case, the general rule will be applicable and the person incompetent." To the same effect are U. S. v. Murphy, 16 Pet. (U. S.) 203; *Murphy v. State*, 28 Miss. 650.

By Stat. 2 Geo. II., ch. 24, which was aimed at bribery in elections, it was provided that if anyone who had violated the act became the first informer against another offender, and the latter were found guilty, the informer, if he had not himself been convicted, should be exonerated from all penalties and disabilities denounced against such offenders; and it was held that informers were competent witnesses on the trial of actions against those concerning whom they had given information, notwithstanding their testimony had a direct tendency to relieve them from punishment. These decisions go upon the ground that it was within the reason and spirit of the act that such persons should be competent to testify. *Heward v. Shipley*, 4 East 180; *Bush v. Ralling*, Sayer 289; *Mead v. Robinson*, Willes 423.

1. *Salisbury v. State*, 6 Conn. 104; *Com. v. Moulton*, 9 Mass. 30; *State v. Casados*, 1 Nott & M. (S. Car.) 91.

As pointed out by the court in *Rex v. Williams*, 9 B. & C. 549; 17 E. C. L. 440, this exception seems to be necessarily implied in Stat. 21 Hen. VIII., ch. 11, which provides that if a felon who robs or takes away any goods, money, or chattels, be attainted by reason of evidence given by the party robbed, or owner of the money, etc., or by any other, by his procurement, the party so robbed, or owner, shall be restored his money, and the court shall award a writ of restitution. But there is a *dictum* of Best, C. J., in *Brook v. Carpenter*, 3 Bing. 297; 11 E. C. L. 108, putting it on the broad ground of public policy. He said: "If you prevent the owner of goods stolen from giving evidence on the trial of an indictment for the felony, because he may, by such evidence, obtain restitution of his goods without an action, you would often defeat public justice. It would be absurd to expect a prosecutor to bring his action after the person who stole his goods is convicted."

An innkeeper, upon whose premises and from whose guest property is stolen, is a competent witness upon the prosecution of the offender, as the event of the prosecution will not affect his liability to the owner. *Salisbury v. State*, 6 Conn. 101.

2. *Rex v. Johnson*, Willes 425, note; *Rex v. Luckup*, Willes 425, note; *Salisbury v. State*, 6 Conn. 104.

3. *Masters v. Drayton*, 2 T. R. 496; *Bill v. Scott*, Kirby (Conn.) 62; *Com. v. Frost*, 5 Mass. 58; *Com. v. Hargheiner*, 1 Ashm. (Pa.) 413.

In an action *qui tam* to recover a statutory penalty for the taking of usurious interest, the borrower is a competent witness when the action is brought by another for his own benefit. *Pettingall v. Brown*, 1 Cai. (N. Y.) 168.

from the government, or from a private individual, upon the conviction of the offender, goes only to his credibility and does not affect his competency.¹

b. PERSONS NOT PARTIES OF RECORD—(1) In General.—At common law it was a general rule that a person who had a direct legal interest in the event of a cause, such as would tend to bias him against the party objecting, was not a competent witness.² A mere interest in the question at issue, however, or a bias of feeling, due to the possession of interests similar to those of the

1. *U. S. v. Wilson*, 1 *Baldw.* (U. S.) 78; *State v. Bennet*, 1 *Root* (Conn.) 249.

In *Rex v. Williams*, 9 *B. & C.* 549; 17 *E. C. L.* 440, *Bayley, J.*, said: "The case of rewards is clear on the grounds of public policy, with a view to the public interest, and because of the principle upon which such rewards are given. The public has an interest in the suppression of crime and the conviction of guilty criminals. It is with a view to stir up greater vigilance in apprehending, that the rewards are given, and it would defeat the object of the legislature, by means of those rewards to narrow the means of conviction, and to exclude testimony which otherwise would have been admissible. It is upon the principle, therefore, that the exclusion of persons entitled to rewards would be inconsistent with the spirit of the acts giving the rewards, and against the grounds of public policy, that their competence is virtually continued. The instance of rewards given by private individuals, which was mentioned in the argument, stands upon a different principle, namely, that the public have an interest, upon public grounds, in the testimony of every person who knows anything as to a crime, and that nothing private individuals can do will take away the right the public have."

2. *Reece v. Johnson*, *Hempst.* (U. S.) 83; *Bean v. Pearsall*, 12 *Ala.* 592; *Athey v. McHenry*, 6 *B. Mon.* (Ky.) 55; *Herrick v. Whitney*, 15 *Johns.* (N. Y.) 240; *Utica Bank v. Mersereau*, 3 *Barb. Ch.* (N. Y.) 584; *Dunbar v. Chevalier*, 28 *Miss.* 161; *Pickett v. Cloud*, 1 *Bailey* (S. Car.) 362; *Eaton v. Gentle*, 1 *Chand.* (Wis.) 10; *Kennedy v. Bossier*, 16 *La. Ann.* 445; *Blum v. Stafford*, 4 *Jones* (N. Car.) 94.

A witness whose debt would have been extinguished by a recovery in the suit was not a competent witness for the plaintiff. *Richardson v. Bartley*, 2 *B. Mon.* (Ky.) 333; *State v. Hal-*

der, 2 *McCord* (S. Car.) 377; 13 *Am. Dec.* 738.

It was a general principle that if the effect of a witness's testimony would be to create, increase, or diminish a fund in which he might be entitled to participate, or to prevent the diminution thereof, he was not competent. *Governor v. Justices*, 20 *Ga.* 359; *Foster v. Rutherford*, 20 *Ga.* 676; *Rome v. Dickerson*, 13 *Ga.* 302; *Stebbins v. Sackett*, 5 *Conn.* 258; *Cleverly v. McCullough*, 2 *Hill* (S. Car.) 445; *Brown v. O'Brien*, 1 *Rich.* (S. Car.) 268; 44 *Am. Dec.* 254; *Johnson v. Alexander*, 14 *Tex.* 382; *Kimball v. Kimball*, 3 *Rawle* (Pa.) 469.

Amount of Interest.—If it were made to appear that the witness was interested in the event of the suit, the amount of the interest was immaterial. However small it might be, the witness was incompetent. *Burton v. Hinde*, 5 *T. R.* 174; *Dowdeswell v. Nott*, 2 *Vern.* 217; *Marquand v. Webb*, 16 *Johns.* (N. Y.) 93; *Gage v. Stewart*, 4 *Johns.* (N. Y.) 293; *Scott v. M'Lellan*, 2 *Me.* 199; *Hunter v. Gatewood*, 5 *T. B. Mon.* (Ky.) 268.

Where the witness had indorsed a negotiable note, but at the risk of the indorsee as to the solvency of the maker, he was held incompetent because he was responsible on an implied warranty that the note was not forged. *Herrick v. Whitney*, 15 *Johns.* (N. Y.) 240.

In Admiralty.—"In courts of prize no person is incompetent merely on the ground of interest. His testimony is admissible subject to all exceptions as to its credibility." *Story, J.*, in *The Anne*, 3 *Wheat.* (U. S.) 445.

The captors, as well as the officers and crew of the captured vessel, were competent witnesses upon an order for further proof. *The Schooner Sally*, 1 *Gall.* (U. S.) 401; *The Grotius*, 9 *Cranch* (U. S.) 368.

In *The Haabet*, 6 *Rob.* 54, and *The Glierktigkeit*, 6 *Rob.* 58, note (a), the affidavits of the captors were rejected

party calling him, was not, generally, sufficient to disqualify him.¹ No objection to the competency of a witness on the ground of interest would be sustained unless he were directly interested in the event of the suit. The true test was whether he would gain or lose by the direct legal operation of the judgment, or could avail himself of the record by giving it in evidence in support of his own interest on some future occasion;² or, to state the rule

on the original hearing. See also *The Drie Gebroeders*, 5 Rob. 343, note (a); *The Amitie*, 5 Rob. 344, note; 6 Rob. 269, note (a); *Robinett v. The Exeter*, 2 Rob. 267.

But the rules as to competency and incompetency of witnesses on the instance side of the court of admiralty, were in general the same as those known to the common law. *Story, J., in The Schooner Boston*, 1 Sumn. (U. S.) 343.

Concerning the exception to the above rule, on the ground of necessity in salvage cases, see *The Schooner Boston*, 1 Sumn. (U. S.) 344; *The Charlotte Caroline*, 1 Dod. 192; *The Ship Henry Ewbank*, 1 Sumn. (U. S.) 432.

1. *Fairchild v. Beach*, 1 Day (Conn.) 266; *Phelps v. Winchel*, 1 Day (Conn.) 269; *Stoddard v. Mix*, 14 Conn. 12; *Wadhams v. Litchfield, etc.*, *Turnpike Co.*, 10 Conn. 416; *Williams v. Jones*, 2 Ala. 314; *Kennon v. M'Rea*, 2 Port. (Ala.) 389; *Stewart v. Conner*, 9 Ala. 803; *VanNuys v. Terhune*, 3 Johns. Cas. (N. Y.) 82; *McLaren v. Hopkins*, 1 Paige (N. Y.) 18; *Stewart v. Kip*, 5 Johns. (N. Y.) 256; *Gould v. James*, 6 Cow. (N. Y.) 369; *Cotchet v. Dixon*, 4 McCord (S. Car.) 311; *Clapp v. Mandeville*, 5 How. (Miss.) 197; *Evans v. Eaton*, 7 Wheat. (U. S.) 356; *Henarie v. Maxwell*, 10 N. J. L. 297; *Harisburg Bank v. Forster*, 8 Watts (Pa.) 307; *Nass v. Vanswearinger*, 7 S. & R. (Pa.) 192; *Rollins v. Taber*, 25 Me. 144; *Todd v. Boone County*, 8 Mo. 431; *Bass v. Peevey*, 22 Tex. 295; *Masters v. Varner*, 5 Gratt. (Va.) 168; 1 Am. Dec. 114.

It was once ruled by all the judges in *England* that one who stood in a like position to that of the party calling him, in another suit involving the same issues, was not competent. *Lock v. Hayton*, *Fortes*, 246. See also *Trelawney v. Thomas*, 1 H. Bl. 308. But the later decisions are to the effect that this circumstance does not render the witness incompetent, but may al-

ways be open to observation as affecting his credibility. *Bent v. Baker*, 3 T. R. 33, per Lord Kenyon; *Fowler v. Collins*, 2 Root (Conn.) 231; *Bliss v. Thompson*, 4 Mass. 488; *Jarboe v. Colvin*, 4 Bush (Ky.) 70; *Woodard v. Spiller*, 1 Dana (Ky.) 179; 25 Am. Dec. 189; *Hoyt v. Wildfire*, 3 Johns. (N. Y.) 518.

In *Bennett v. Hethington*, 16 S. & R. (Pa.) 195, *Gibson, C. J.*, said: "Nothing can be plainer, or of more ready application, than the distinction between interest in the question and interest in the event of the suit. Although the case of the witness be, in every point and particular, the case of the party by whom he is called to testify; although he expect a benefit from the event; and, in short, although he be subject to as strong a bias as can influence the understanding and actions of man; yet, if he be not implicated in the legal consequences of the judgment, he is competent. By legal consequences are meant those that are fixed, certain and actual, and by which an advantage, not depending on a contingency, is to be gained or lost; such, for instance, as being entitled to give the verdict in evidence in another suit on the one hand, or being subjected to an incumbrance or duty on the other. This is what I understand to be the modern rule, as established in this country for its intrinsic excellence and good sense."

2. *Bent v. Baker*, 3 T. R. 27, per Lord Kenyon; *Smith v. Prager*, 7 T. R. 56, per Lord Kenyon; *Rex v. Boston*, 4 East 572, per Lord Ellenborough; *Doe v. Tyler*, 6 Bing. 390; 19 E. C. L. 111, *Tindal, C. J.*; *Buckland v. Tankard*, 5 T. R. 578; *Ward v. Wilkinson*, 4 B. & Ald. 412; *Nix v. Cutting*, 4 Taunt. 18; *Hill v. Miller*, 2 Swan (Tenn.) 659; *Bailey v. Lumpkin*, 1 Ga. 392; *Harvey v. Anderson*, 12 Ga. 69; *Adams v. Rose*, 3 Ga. 277; *Howard v. Brown*, 3 Ga. 523; *Green v. Pickering*, 28 N. H. 360; *Latham v. Kenniston*, 13 N. H. 206; *Burt v.*

in another form, a direct certain beneficial interest went to the competency of a witness, and all contingent, uncertain and remote interests went only to his credibility.¹ And where there was a doubt as to his interest, it was customary to admit him and leave the question of credibility to the jury.²

Nichols, 16 Pick. (Mass.) 560; Com. v. Snell, 3 Mass. 84; Fitch v. Boardman, 12 Conn. 346; Van Nuys v. Terhune, 3 Johns. Cas. (N. Y.) 82; Shirk v. Vanneman, 3 Yeates (Pa.) 196; Osborn v. Cummings, 4 Tex. 10; Massey v. Rogan, 6 Ala. 647; Stewart v. Conner, 9 Ala. 803; Wright v. Lewis, 18 Ala. 194; Coltart v. Laughinghouse, 38 Ala. 190; Estice v. Cockerell, 26 Miss. 127; Ford v. M'Kibbin, 1 Strobh. (S. Car.) 33. See also Masters v. Drayton, 2 T. R. 496; Yardley v. Arnold, 10 M. & W. 141.

Where an action was brought by or against one of a number of persons claiming some right by custom, and the question of the existence and validity of the custom was at issue, the courts used to hold that no one claiming such right by custom was a competent witness, although a stranger to the record, because the judgment obtained would be admissible in evidence for or against him in any subsequent action to determine the validity of his own claim. Walton v. Shelley, 1 T. R. 302; Buller, J.; Falmouth v. George, 5 Bing. 286; 15 E. C. L. 449; Shrewsbury Carpenters, etc. v. Hayward, Doug. 373; Hockley v. Lamb, 1 Ld. Raym. 731; Burton v. Hinde, 5 T. R. 174; Anscorn v. Shore, 1 Taunt. 261; Gould v. James, 6 Cow. (N. Y.) 369. See also opinion of Lord Kenyon, C. J., in Bent v. Baker, 3 T. R. 32.

By Stat. 3 & 4 Wm. IV., ch. 42, § 46, such witnesses were made competent, and it was provided that the verdict or judgment in the case in which they testified should not be admissible in evidence for or against them or any person claiming under them.

Where the question was one in which all citizens of the jurisdiction had an interest, they were competent witnesses, as no other evidence could reasonably be expected. Buller's N. P. 289; Lancum v. Lovell, 9 Bing. 465; 23 E. C. L. 335; Gould v. James, 6 Cow. (N. Y.) 369; Connecticut v. Bradish, 14 Mass. 296.

1. Rex v. Cole, 1 Esp. 169; Burroughs v. U. S., 2 Paine (U. S.) 569; Poe v. Dorrah, 20 Ala. 288; 56 Am.

Dec. 196; Phillips v. Bridge, 11 Mass. 242; Bean v. Bean, 12 Mass. 22; Cornogg v. Abraham, 1 Yeates (Pa.) 84; Lewis v. Manly, 2 Yeates (Pa.) 200; McCaskey v. Graff, 23 Pa. St. 321; 62 Am. Dec. 336; Galbraith v. Scott, 2 Dall. (Pa.) 95; Scull v. Mason, 43 Pa. St. 99; Adams v. Rose, 3 Ga. 277; Howard v. Brown, 3 Ga. 523; Harvey v. Anderson, 12 Ga. 69; Jordan v. Pollock, 14 Ga. 153; Harbin v. Roberts, 33 Ga. 45; Clarke v. Robinson, 5 B. Mon. (Ky.) 57; Smith v. White, 5 Dana (Ky.) 376; Day v. Green, Hard. (Ky.) 124; Easley v. Easley, 18 B. Mon. (Ky.) 86; Millett v. Parker, 2 Metc. (Ky.) 608; Marwick v. Georgia Lumber Co., 18 Me. 49; Blake v. Irish, 21 Me. 450; Frankfort Bank v. Johnson, 24 Me. 490; Sims v. Sims, 3 Brev. (S. Car.) 252; Ford v. M'Kibbin, 1 Strobh. (S. Car.) 33; Smith v. Asbill, 2 Rich. (S. Car.) 546; Hill v. Miller, 2 Swan (Tenn.) 659; Wentworth v. Crawford, 11 Tex. 127; Bigham v. Carr, 21 Tex. 142; Cutter v. Fanning, 2 Iowa 580; Linsley v. Lovely, 26 Vt. 123; Phelps v. Hall, 2 Tyler (Vt.) 399; Stockham v. Jones, 10 Johns. (N. Y.) 21; Ten Eyck v. Bill, 5 Wend. (N. Y.) 55; Melvin v. Melvin, 6 Md. 541; State v. Poteet, 7 Ired. (N. Car.) 356; Jones v. Post, 4 Cal. 14; Griffin v. Alsop, 4 Cal. 406.

But in Robbins v. Butler, 24 Ill. 387, it was held that an interest derived under a parol agreement for the sale of land rendered a witness incompetent, since the Statute of Frauds might not be pleaded.

2. Walton v. Shelley, 1 T. R. 300, Lord Mansfield; Rex v. Bray, Cas. temp. Hardw. 360, Lord Hardwicke; Bent v. Baker, 3 T. R. 32, Lord Kenyon; Richardson v. Dingle, 11 Rich. (S. Car.) 405; Day v. Green, Hard. (Ky.) 124; Offutt v. Twyman, 9 Dana (Ky.) 43; Phelps v. Hall, 2 Tyler (Vt.) 399; Andre v. Bodman, 13 Md. 241; 71 Am. Dec. 628; Jones v. Lowell, 35 Me. 538; West v. Steamboat Berlin, 3 Iowa 532; School Dist. No. 2 v. Rogers, 8 Iowa 316; Platt v. Hedge, 8 Iowa 392; Geisse v. Dobson, 3 Whart. (Pa.) 34.

It was necessary to make it appear that a witness had a legal interest in the event of the suit in order to exclude him. A mere honorary obligation to the party calling him, which could not be enforced at law or in equity, was not sufficient to render him incompetent.¹ And, according to the weight of authority, a belief on the part of the witness that he was interested was not sufficient to exclude him if he were not in fact legally interested.² But, in some jurisdictions, it was held that such a belief rendered a witness incompetent, since it would have as strong a tendency to influence his testimony as the knowledge of an actual interest.³

If a witness acquired an interest in the subject-matter of the suit after he was possessed of knowledge which made him a material witness for one of the parties, he was nevertheless competent, unless such interest was acquired from the party offering him. A party could not thus be deprived of the testimony of a

A mere doubt that a witness would be liable in equity, when he was not liable at law, was not sufficient to exclude him. *Sims v. Sims*, 3 Brev. (S. Car.) 252.

1. *Hill v. Miller*, 2 Swan (Tenn.) 659; *Tilford v. Hayes*, 2 Yerg. (Tenn.) 89; *Long v. Baillie*, 4 S. & R. (Pa.) 222; *Dellone v. Rehmer*, 4 Watts (Pa.) 9; *Carman v. Foster*, 1 Ashm. (Pa.) 133; *M'Causland v. Neal*, 3 Stew. & P. (Ala.) 131; *Beall v. Ridgeway*, 18 Ala. 117; *Mulheran v. Gillespie*, 12 Wend. (N. Y.) 349; *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Moore v. Hitchcock*, 4 Wend. (N. Y.) 292; *Gilpin v. Vincent*, 9 Johns. (N. Y.) 219; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466; *Com. v. Gore*, 3 Dana (Ky.) 474; *Phebe v. Prince*, Walk. (Miss.) 131; *Smith v. Downs*, 6 Conn. 365; *State v. Poteet*, 7 Ired. (N. Car.) 356; *Union Bank v. Knapp*, 3 Pick. (Mass.) 108; 15 Am. Dec. 181; *Orput v. Miller*, 5 Blackf. (Ind.) 571; *Howe v. Howe*, 10 N. H. 88; *Frink v. McClung*, 9 Ill. 569; *Stimmel v. Underwood*, 3 Gill & J. (Md.) 282; *Pederson v. Stoffles*, 1 Campb. 144; *Solarte v. Melville*, 1 M. & Ry. 202.

Thus a person who was liable to an action by the party calling him, in case said party should fail in the action at bar, but who was protected from such an action by the Statute of Limitations, was competent. *Ludlow v. Union Ins. Co.*, 2 S. & R. (Pa.) 119.

2. *Hill v. Miller*, 2 Swan (Tenn.) 659; *Long v. Baillie*, 4 S. & R. (Pa.) 222; *Dellone v. Rehmer*, 4 Watts (Pa.) 9; *Cassiday v. M'Kenzie*, 4 W. & S. (Pa.) 282; 39 Am. Dec. 76; *Commer-*

cial Bank v. Hughes, 17 Wend. (N. Y.) 94; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466; *Havis v. Barkley*, Harp. (S. Car.) 63; *Cotchet v. Dixon*, 4 McCord (S. Car.) 311; *State v. Poteet*, 7 Ired. (N. Car.) 356; *State v. Clark*, 2 Tyler (Vt.) 277; *Gayle v. Bishop*, 14 Ala. 552; *McCabe v. Hand*, 18 Cal. 496; *Coghill v. Boring*, 15 Cal. 213; *Stallings v. Carson*, 24 Ga. 423; *Washington, etc., Turnpike Road v. State*, 19 Md. 239; *Peters v. Beall*, 4 Har. & M. (Md.) 342.

Therefore, proof of a witness's own declarations out of court that he was interested, was not *per se* sufficient to exclude him. *Cotchet v. Dixon*, 4 McCord (S. Car.) 311; *Fernsler v. Carlin*, 3 S. & R. (Pa.) 130; *Peirce v. Chase*, 8 Mass. 487; *George v. Stubbs*, 26 Me. 243; *Nichols v. Holgate*, 2 Aik. (Vt.) 138.

In some cases it was held that proof of such declarations was not admissible to impeach the competency of the witness. *Offutt v. Twyman*, 9 Dana (Ky.) 43; *Stimmel v. Underwood*, 3 Gill & J. (Md.) 282, *overruling* *Colston v. Nichols*, 1 Har. & J. (Md.) 105.

3. *Sentney v. Overton*, 4 Bibb (Ky.) 445; *Elliot v. Porter*, 5 Dana (Ky.) 304; 30 Am. Dec. 689; *Com. v. Gore*, 3 Dana (Ky.) 476; *Com. v. Moore*, 5 J. Marsh. (Ky.) 656; *Phebe v. Prince*, Walk. (Miss.) 131; *Richardson v. Hunt*, 2 Munf. (Va.) 148; *Plumb v. Whiting*, 4 Mass. 518.

If a witness believed himself disinterested, when he was in fact interested, he was incompetent. *Dellone v. Rehmer*, 4 Watts (Pa.) 10; *Phebe v. Prince*, Walk. (Miss.) 134, note.

witness, either by the voluntary act of the witness or through the contrivance of the opposing party.¹

Where the witness was called to testify against his own interest, the rule of exclusion on the ground of interest did not apply.² And where his interest was equally balanced between the parties,

1. *Clapp v. Mandeville*, 5 How. (Miss.) 197; *Doe v. Jackson*, 2 Dev. (N. Car.) 187; *Price v. Wood*, 7 T. B. Mon. (Ky.) 223; *M'Daniel's Will*, 2 J. J. Marsh. (Ky.) 331; *Baylor v. Smithers*, 1 Litt. (Ky.) 105; *Long v. Bailie*, 4 S. & R. (Pa.) 222; *Jones v. Hoskins*, 18 Ala. 489; *Whiting v. Gould*, 1 Wis. 195; *Way v. Arnold*, 18 Ga. 181; *Simons v. Payne*, 2 Root (Conn.) 406; *Phelps v. Riley*, 3 Conn. 266; *Burgess v. Lane*, 3 Me. 165; *Tatum v. Lofton*, *Cooke (Tenn.)* 115; *Bent v. Baker*, 3 T. R. 27; *Barlow v. Vowel*, *Skin*. 586.

In *Hafner v. Irwin*, 4 Ired. (N. Car.) 533, *Ruffin, C. J.*, said: "A witness cannot, by creating by his own act a subsequent interest, without the concurrence of the party calling him, deprive the latter of his evidence. Much less can he do so by agreement with the opposite party. The case of *Forrester v. Pigou*, 1 M. & S. 9, would seem to be contrary. But the case is not satisfactory; for it does not appear to have been finally decided, but was sent back to a second trial in order to ascertain the facts. At all events, it is not sufficient to overturn the established general rule laid down in all the best writers, and received constantly in the courts of this state, and sanctioned by the approbation of this court in *Doe v. Jackson*, 2 Dev. (N. Car.) 187. To sustain the objection would open a wide way for tampering with witnesses, so as to deprive parties of evidence material to their interest, and to which they had a right."

But where the witness acquired an interest, by a *bona fide* contract, in the course of business, without any intent on his part, or that of the parties to the action, to render him incompetent, it seems that the rule did not apply. *Eastman v. Winship*, 14 Pick. (Mass.) 46. See also opinion of Lord Ellenborough in *Forrester v. Pigou*, 1 M. & S. 14.

In *Jackson v. Rumsey*, 3 Johns. Cas. (N. Y.) 237, *Kent, J.*, said: "The interest, in order to exclude the witness, must not have arisen after the fact to which he is called to testify happened, and by his own act, without the inter-

ference or consent of the party by whom he is called; because, in that case, it would be in the power of the witness, and even of the adverse party, to deprive the person wanting his testimony of the benefit of it."

In *England*, the rule seems to have been confined to cases where a fraudulent attempt was made to render the witness incompetent. See opinion of Lord Ellenborough in *Forrester v. Pigou*, 3 Camb. 380; 1 M. & S. 9.

But if the knowledge of such facts came to the witness concurrently with the acquisition of his interest, he was incompetent. *Netherton v. Robertson*, 3 Hayw. (Tenn.) 29.

2. *Norden v. Williamson*, 1 Taunt. 378; *Worrall v. Jones*, 7 Bing. 395; 20 E. C. L. 177; *Oxenden v. Penderic*, 2 Salk. 691; *Van Reimsdyk v. Kane*, 1 Gall. (U. S.) 630; *Cowles v. Whitman*, 10 Conn. 121; 25 Am. Dec. 60; *Brown v. Burke*, 22 Ga. 574; *Englehard v. Slater*, 7 How. (Miss.) 538; *Doe v. Jackson*, 1 Smed. & M. (Miss.) 494; *Commercial Bank v. Wood*, 7 W. & S. (Pa.) 89; *Ralph v. Brown*, 3 W. & S. (Pa.) 395; *Merchand v. Cook*, 4 Greene (Iowa) 115; *Gardner v. Gardner*, 4 Heisk. (Tenn.) 303; *Loftin v. Nally*, 24 Tex. 565; *Tuttle v. Turner*, 28 Tex. 759; *Kennedy v. Barnett*, 1 Bibb (Ky.) 154; *Wright v. Nichols*, 1 Bibb (Ky.) 298; *Sims v. Givan*, 2 Blackf. (Ind.) 461; *Jackson v. Vredenberg*, 1 Johns. (N. Y.) 159; *Lansingburg v. Willard*, 8 Johns. (N. Y.) 428; *Canandarquaa Academy v. McKechnie*, 90 N. Y. 618; *Belt v. Miller*, 4 Har. & M. (Md.) 536.

If a witness was called and testified against his interest he was thereby rendered competent for the other side. *Turner v. Waterson*, 4 W. & S. (Pa.) 171; *Stockton v. Demuth*, 7 Watts (Pa.) 39.

In proceedings by garnishment, where a third person claimed the money attached, the interest of the judgment debtor was in favor of the attaching plaintiff, and he was therefore a competent witness for the garnishee. *Tyler v. Coolbaugh*, 7 Iowa 474.

he was competent for either of them.¹ If there was a preponderance of interest in favor of either party, however slight it might be, it was sufficient to exclude the witness when called by the party in whose favor the excess lay,² but he was competent for the other party because he was then called to testify against his own interest.³

A witness might be incompetent to testify concerning some of the points in controversy and yet be competent as to others in which he had no interest,⁴ unless the verdict would necessarily

1. *Fancourt v. Bull*, 1 Bing. N. Cas. 681; 27 E. C. L. 542; *York v. Blott*, 5 M. & S. 71; *Scott v. Propeller Plymouth*, 6 McLean (U. S.) 463; *Spence v. Mitchell*, 9 Ala. 744; *Standefor v. Chisholm*, 1 Stew. & P. (Ala.) 449; *Governor v. Gee*, 19 Ala. 199; *Lockett v. Child*, 11 Ala. 640; *Elgin v. Hill*, 27 Cal. 372; *Cadwell v. Meek*, 17 Ill. 220; *Muchmore v. Jeffers*, 25 Ill. 199; *Montague v. Mitchell*, 28 Ill. 481; *Kennedy v. Evans*, 31 Ill. 258; *Smalley v. Ellet*, 36 Ill. 500; *Eldridge v. Wadleigh*, 12 Me. 371; *Rhodes v. Myers*, 16 La. Ann. 398; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 308; *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 439; *Adams v. Gardiner*, 13 B. Mon. (Ky.) 197; *Wright v. Nichols*, 1 Bibb (Ky.) 298; *Ford v. McKibbin*, 1 Strobh. (S. Car.) 33; *Alston v. Huggins*, 3 Brev. (S. Car.) 185; *Milward v. Hallett*, 2 Cal. (N. Y.) 77; *Stump v. Roberts*, *Cooke* (Tenn.) 350; *Nessly v. Swearingen*, Add. (Pa.) 144; *Stewart v. Stocker*, 1 Watts (Pa.) 135; *Miller v. Little*, 1 Yeates (Pa.) 26; *Bridges v. Bell*, 13 Mo. 69; *Cushman v. Loker*, 2 Mass. 108; *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237; *Vairin v. Canal Ins. Co.*, 10 Ohio 223; *Andre v. Bodman*, 13 Md. 241; 71 Am. Dec. 628.

Where the witness was liable to one or the other of the parties in any event, and the extent of his liability would not be affected by the event of the suit, his interest was said to be balanced. *Spence v. Mitchell*, 9 Ala. 744; *Pyke v. Searcy*, 4 Port. (Ala.) 52; *Cushman v. Loker*, 2 Mass. 108; *Wright v. Nichols*, 1 Bibb (Ky.) 298; *Douglass v. Holbert*, 7 J. J. Marsh. (Ky.) 1; *Stewart v. Stocker*, 1 Watts (Pa.) 135; *Miller v. Little*, 1 Yeates (Pa.) 26; *Eldridge v. Wadleigh*, 12 Me. 371; *Lewis v. Hodgdon*, 17 Me. 269; *Cutter v. Copeland*, 18 Me. 127; *Norton v. Waite*, 20 Me. 175; *Nute v. Bryant*, 31 Me. 555; *Abbott v. Cobb*, 17 Vt. 593.

The interest of a witness was not balanced between the parties unless it

was equally direct and immediate on both sides. *Brown v. Johnson*, 13 Gratt. (Va.) 644; *Doe v. Roe*, 13 Smed. & M. (Miss.) 466.

It was no ground to exclude a witness whose legal interest was balanced by a liability over, that he might possibly have a better defense against one party than the other. *Starkweather v. Mathews*, 2 Hill (N. Y.) 131.

2. *Jones v. McNeil*, 2 Bailey (S. Car.) 466; *Dille v. Woods*, 14 Ohio 122; *Gill v. Campbell*, 24 Tex. 405.

Where the witness's interest in the subject-matter of the suit was balanced between the parties, but he was liable to one of them for costs, this destroyed the balance and rendered him incompetent for the party to whom he was so liable. *Beach v. Swift*, 2 Conn. 269; *Barnwell v. Mitchell*, 3 Conn. 101; *Bill v. Porter*, 9 Conn. 23; *Seymour v. Harvey*, 11 Conn. 275; *Scott v. McLellan*, 2 Me. 199; *Hubbly v. Brown*, 16 Johns. (N. Y.) 70; *Bridges v. Bell*, 13 Mo. 69; *Hunter v. Gatewood*, 5 T. B. Mon. (Ky.) 268; *Craven v. Updyke*, 3 Blackf. (Ind.) 272; *Cason v. Robson*, 29 Miss. 97; *Bennett v. Dowling*, 22 Tex. 660; *Edmonds v. Lowe*, 8 B. & C. 407; 15 E. C. L. 250.

And liability for costs was sufficient to exclude a witness, although he was without interest in the subject-matter of the suit. *Vason v. Merchants' Bank*, 2 Ga. 140; *Robinson v. Towns*, 30 Ga. 822; *Ware v. Jordan*, 21 Ala. 837; *Ferson v. Sanger*, 1 Woodb. & M. (U. S.) 138; *Mackinley v. McGregor*, 3 Whart. (Pa.) 369; 31 Am. Dec. 522; *Ammidown v. Woodman*, 31 Me. 580; *Hopkinson v. Guildhall*, 19 Vt. 533; *Hoys v. Tuttle*, 8 Ark. 124; 46 Am. Dec. 309. See also *Cowles v. Rowland*, 2 Jones (N. Car.) 219.

3. *Muchmore v. Jeffers*, 25 Ill. 199; *Stokes v. Kane*, 5 Ill. 167; *Turner v. Davis*, 1 B. Mon. (Ky.) 151.

4. *Smith v. Carrington*, 4 Cranch (U. S.) 62, per Marshall, C. J.; *Wright*

include the matter in which he was interested.¹ A person who was not a party to the suit was presumed to be a competent witness, and the party objecting to his testimony had the burden of showing a disqualifying interest.²

(2) *Real Parties in Interest*—(a) *General Rule*.—It was a general rule of the common law that a witness was not competent where his testimony would tend to create, or increase, a fund in which he would be entitled to participate, or would tend to prevent the diminution of the same.³

(b) *Cestui que Trustent*.—Accordingly, a *cestui que trust*, being substantially, though not nominally, a party, was not a competent witness for the trustee in actions concerning the trust estate or fund,⁴ but he was competent for the other side, since in that case he testified against interest.⁵ And his admissions against interest were competent evidence against the trustee so far as they related to matters in which his interest and that of the trustee were identical.⁶

(c) *Bankrupts and Their Creditors*.—So, also, a bankrupt is interested in increasing the estate in the hands of his assignee, since his allowance in many cases depends upon the amount of funds recovered by the assignee, and he is always entitled to any surplus that may remain after payment of his debts and the expenses of the proceedings. Therefore, he was formerly not a competent witness where the effect of his testimony would be to increase

v. Rogers, 3 McLean (U. S.) 229; *Shelton v. Tomlinson*, 2 Root (Conn.) 132; *Rowe v. Cockrell*, Bailey Eq. (S. Car.) 126.

1. In *Gage v. Stewart*, 4 Johns. (N. Y.) 293, the plaintiff sued the defendant in trespass for taking a barrel containing ten gallons of whisky out of his wagon. The witness whose competency was questioned was the owner of the whisky but not of the barrel. It was held that he was incompetent to give evidence concerning the taking of the barrel, since the verdict must necessarily include the whisky, in which he was directly interested.

2. *Cotchet v. Dixon*, 4 McCord (S. Car.) 311; *Adams v. Rose*, 3 Ga. 277; *Smith v. White*, 5 Dana (Ky.) 376. See also *Hall v. Gittings*, 2 Har. & J. (Md.) 112; *Stoddert v. Manning*, 2 Har. & G. (Md.) 144; *Saxon v. Boyce*, 1 Bailey (S. Car.) 66; *Jackson v. Delancey*, 4 Cow. (N. Y.) 427.

3. *Kimball v. Kimball*, 3 Rawle (Pa.) 469; *Wilkinson v. Pittsburgh Farmers'*, etc., Turnpike Co., 6 Pa. St. 398; *Thomas v. Brady*, 10 Pa. St. 167; *Stebbins v. Sackett*, 5 Conn. 258; *Cleverly v. McCullough*, 2 Hill (S. Car.) 445;

Brown v. O'Brien, 1 Rich. (S. Car.) 268; 44 Am. Dec. 254; *Rome v. Dickerson*, 13 Ga. 302; *Governor v. Justices*, 20 Ga. 359; *Foster v. Rutherford*, 20 Ga. 676; *Johnson v. Alexander*, 14 Tex. 382.

4. *Bell v. Smith*, 5 B. & C. 188; 11 E. C. L. 198; *Alabama Bank v. M'Dade*, 4 Port. (Ala.) 252; *Stone v. Stone*, 1 Ala. 582; *Buchanan v. Buchanan*, 46 Pa. St. 186; *Hoak v. Hoak*, 5 Watts (Pa.) 80; *Campbell v. Galbreath*, 5 Watts (Pa.) 423; *St. John v. American Mut. L. Ins. Co.*, 2 Duer (N. Y.) 419.

In ejectment for land conveyed expressly in trust for the support of an infant child, the mother was not a competent witness in behalf of the child, because the trust estate might be so applied as to relieve her of the support of the child. *Jackson v. Cadwell*, 1 Cow. (N. Y.) 622.

5. *Petermans v. Laws*, 6 Leigh (Va.) 523.

6. *Hanson v. Parker*, 1 Wils. 257; *May v. Taylor*, 6 M. & G. 261; 46 E. C. L. 261; *Harrison v. Vallance*, 1 Bing. 45; 8 E. C. L. 394; *Doe v. Wainwright*, 3 N. & M. 598; *Bell v. Ansley*, 16 East 141.

the fund or prevent its diminution.¹ In order to become a competent witness for the assignee, it was necessary for him to obtain his certificate and release his allowance and his claim to the surplus,² and even then he was not competent for the purpose of impeaching or supporting the fiat issued against him.³ If it appeared that he had no interest in the event of the suit to which his assignee was a party, he was competent.⁴ And in an action against his sureties, where he was the principal debtor, he was competent, after his discharge, to prove usury in the contract, since the discharge freed him from all legal liability to either the creditor or the sureties.⁵

The objection to any testimony by a bankrupt which would tend to increase the assets of his estate or prevent the diminution

1. *Butler v. Cooke*, Cowp. 70; *Ewens v. Gold*, Bull. N. P. 43; *Ex p. Burt*, 1 Madd. 46; *Williams v. Williams*, 6 M. & W. 170; *Masters v. Drayton*, 2 T. R. 496; *Goodhay v. Hendry*, 1 M. & M. 319; 22 E. C. L. 321; *Kennett v. Greenwollers*, Peake 3; *Bridges v. Armour*, 5 How. (U. S.) 91; *Colgin v. Redman*, 20 Ala. 650; *Houston v. Prewitt*, 8 Ala. 846; *Coleman v. Tebbetts*, 20 N. H. 408; *Cleverly v. McCullough*, 2 Hill (S. Car.) 445; *Coit v. Owen*, 2 Desaus. Eq. (S. Car.) 456; *Clay's Syndics v. Kirkland*, 4 Martin (La.) 405; *Bates v. Coe*, 10 Conn. 280; *Bussy v. Ady*, 3 Har. & M. (Md.) 97; *Sharp v. Long*, 28 Pa. St. 434.

"A bankrupt who has not obtained his certificate may be a witness against himself, but not for himself; that is, he may be a witness to decrease the fund, but not to increase it." Lord Mansfield, in *Butler v. Cooke*, Cowp. 70. To the same effect is *Colgin v. Redman*, 20 Ala. 650.

Where one of the creditors claimed a special lien on part of the insolvent estate, it was held the interest of the insolvent debtor was balanced, and he was admitted as a witness. *Gilchrist v. Martin*, Bailey Eq. (S. Car.) 492.

2. *Dixon v. Purse*, Peake's Add. Cas. 187; *Schneider v. Parr*, Peake's Add. Cas. 66; *Masters v. Drayton*, 2 T. R. 496; *Goodhay v. Hendry*, 1 M. & M. 319; 22 E. C. L. 321; *Ferguson v. Spencer*, 1 M. & G. 987; 39 E. C. L. 735; *Frow v. Downman*, 11 Ala. 880; *Oldham v. McCormick*, 8 Blackf. (Ind.) 387; *Cully v. Ross*, 7 Blackf. (Ind.) 312; *Dean v. Speakman*, 7 Blackf. (Ind.) 317; *Greene v. Durfee*, 6 Cush. (Mass.) 362; *Jacques v. Marquand*, 6 Cow. (N. Y.) 497.

The witness must not only have been declared a bankrupt but must have received his discharge before his competency would be restored. *Masters v. Drayton*, 2 T. R. 496; *Goodhay v. Hendry*, 1 M. & M. 319; 22 E. C. L. 321; *Tennant v. Strachan*, M. & M. 377; *Dickinson v. Codwise*, 1 Sandf. Ch. (N. Y.) 214. And if he continued liable for the costs after his discharge he was still incompetent. *Bridges v. Armour*, 5 How. (U. S.) 91.

3. He was incompetent to prove his own act of bankruptcy. *Feld v. Curtis*, 2 Stra. 829; *Ewens v. Gold*, Bull. N. P. 43; *Oxlade v. Perchard*, 1 Esp. 287; *Hoffman v. Pitt*, 5 Esp. 25; *Wyatt v. Wilkinson*, 5 Esp. 187. Neither was he competent to prove the petitioning creditor's debt, *Chapman v. Gardner*, 2 H. Bl. 279; *Cross v. Fox*, 2 H. Bl. 279, note (a); *Flower v. Herbert*, 2 H. Bl. 279, note; nor to disprove the alleged act of bankruptcy. *Hoffman v. Pitt*, 5 Esp. 22; *Binns v. Tetley*, M'Clel. & Y. 404; *Sayer v. Garnett*, 7 Bing. 103; 20 E. C. L. 63.

Since it was in some cases to the bankrupt's interest to support the commission and in others to defeat it, he was held incompetent for either purpose, on the ground of policy and convenience, in order to avoid complicated inquiries to determine on which side his interest lay. *Sayer v. Garnett*, 7 Bing. 103; 20 E. C. L. 63.

4. *Wright v. Rogers*, 3 McLean (U. S.) 229; *Onion v. Fullerton*, 19 Vt. 317; *Boas v. Hetzel*, 3 Pa. St. 298.

5. *Carman v. White*, 4 Humph. (Tenn.) 301; *Fellows v. American L. Ins., etc., Co.*, 1 Sandf. Ch. (N. Y.) 203; *Morse v. Hovey*, 1 Sandf. Ch. (N. Y.) 187; 11 Barb. (N. Y.) 100.

thereof, applied also to an insolvent debtor who made an assignment for the benefit of his creditors, and if his future acquisitions of property were liable to be seized to satisfy the judgment rendered in the insolvency proceedings, he could not be made a competent witness by releasing his surplus to the assignee.¹

The creditors of a bankrupt or of an insolvent debtor are the persons primarily interested in the fund which comes into the possession of the assignee, as it is to that they must look for the payment of their debts. At common law, they were not competent witnesses where their testimony would tend to preserve or increase the fund.² Neither were they competent witnesses to support the bankruptcy, as they were directly interested in having the debtor's whole estate applied to the payment of his debts,³ but they were competent to prove fraud on the part of the debtor in order to prevent his obtaining his discharge.⁴ A creditor who had sold his claim against the insolvent estate, or had made a valid agreement to sell it, had no further interest in the matter and was, therefore, a competent witness.⁵

(d) *Persons Interested in the Estates of Decedents.*—In an action by or against the executor or administrator of a deceased person, the result of which might either have increased or decreased the value of the decedent's estate, heirs at law and persons entitled to distributive shares of such estate were not formerly competent

1. *Delafield v. Freeman*, 6 Bing. 294; 19 E. C. L. 85; 4 C. & P. 67; 19 E. C. L. 277; *Rudge v. Ferguson*, 1 C. & P. 253; 11 E. C. L. 380; *Wilkins v. Ford*, 2 C. & P. 344; 12 E. C. L. 161; *Wilkinson v. Pittsburgh Farmers, etc.*, *Turnpike Co.*, 6 Pa. St. 398.

In the following cases, persons who had made assignments for the benefit of creditors were admitted as witnesses for their respective assignees, under statutes excluding only parties and persons for whose immediate benefit the action was brought. *Krum v. Beard*, 31 Mo. 505; *Allen v. Hudson River Mut. Ins. Co.*, 19 Barb. (N. Y.) 442; *Jones v. East Soc. of M. E. Church*, 21 Barb. (N. Y.) 161; *Legee v. Burbank*, 2 E. D. Smith (N. Y.) 419; *Allen v. Franklin F. Ins. Co.*, 9 How. Pr. (N. Y. Supreme Ct.) 501; *Symonds v. Peck*, 10 How. Pr. (N. Y. Supreme Ct.) 395; *Davies v. Cram*, 4 Sandf. (N. Y.) 355; 2. *Shuttleworth v. Bravo*, 1 Stra. 507; *Cherer v. Sodo*, 3 C. & P. 10; 14 E. C. L. 185; *Carr v. Hilton*, 1 Curt. (U. S.) 390; *Corps v. Robinson*, 2 Wash. (U. S.) 388; *Jacks v. Nichols*, 3 Sandf. Ch. (N. Y.) 317; *Phoenix v. Dey*, 5 Johns. (N. Y.) 427; *Marland v. Jefferson*, 2 Pick. (Mass.) 240.

In *Jacks v. Nichols*, 3 Sandf. Ch. (N.

Y.) 317, it was held that the fact that the witness was a preferred creditor was immaterial, unless it were shown that there were sufficient assets to pay his claim independently of the matter in controversy. But in the later case of *Duel v. Fisher*, 4 Den. (N. Y.) 516, the court said that the incompetency of a witness would not be presumed from doubtful circumstances, and accordingly held the objector had the burden of showing that the fund in hand was insufficient to pay the claim of a witness who was a preferred creditor.

In an action between other parties, concerning the title to property after it had been disposed of by an assignee in bankruptcy, the petitioning creditor was competent to prove his debt upon proof of which the commission of bankruptcy was issued. *Farrington v. Farrington*, 4 Mass. 237.

3. *Adams v. Malkin*, 3 Campb. 543; *Green v. Jones*, 2 Campb. 411; *Ex p. Malkin*, 2 Rose 27; *Ex p. Osborne*, 2 Ves. & B. 177; *Crooke v. Edwards*, 2 Stark. 303; 3 E. C. L. 419, *overruling* *Williams v. Stevens*, 2 Campb. 301.

4. *Green's Case*, 2 Dall (U. S.) 268; *Cutler v. Taylor*, 1 Sandf. (N. Y.) 593.

5. *Heath v. Hall*, 4 Taunt. 326; *Granger v. Furlong*, 2 W. Bl. 1273.

witnesses in behalf of the personal representative,¹ but they might become competent by releasing all their interest in the estate to the personal representative, as such,² and they were, of

1. *Mathews v. Smith*, 2 Y. & J. 426; *Allington v. Bearcroft*, Peake's Add. Cas. 212; *McGuire v. Shelby*, 20 Ala. 456; *McLemore v. Nuckolls*, 37 Ala. 662; *Coate v. Coate*, 37 Ala. 695; *M'Kinney v. M'Kinney*, 2 Stew. (Ala.) 17; *Brown v. Hicks*, 1 Ark. 232; *White v. Derby*, 1 Mass. 239; *Foster v. Nowlin*, 4 Mo. 18; *Carter v. Graves*, 6 How. (Miss.) 9; *Spears v. Burton*, 31 Miss. 547; *Dillard v. Wright*, 11 Smed. & M. (Miss.) 455; *M'Intyre v. Ledyard*, 1 Smed. & M. Ch. (Miss.) 91; *King v. King*, 9 N. J. Eq. 44; *Anderson v. Primrose*, Dudley (Ga.) 216; *Denny v. Booker*, 2 Bibb (Ky.) 427; *Brown v. Durbin*, 5 J. J. Marsh. (Ky.) 170; *Smith v. Morgan*, 8 Gill (Md.) 133; *Dunnington v. Dunnington*, 3 Har. & J. (Md.) 279; *Sawyer v. Tappan*, 14 N. H. 352; *Weigel's Succession*, 18 La. Ann. 49; *Cox v. Wilson*, 2 Ired. (N. Car.) 234; *Fagin v. Cooley*, 17 Ohio 44; *Kimball v. Kimball*, 3 Rawle (Pa.) 469; *Asay v. Hoover*, 5 Pa. St. 21; 40 Am. Dec. 713; *Buchanan v. Buchanan*, 46 Pa. St. 186; *Kershaw Dist. v. Bracey*, 2 Bay (S. Car.) 542; *Scott v. Young*, 4 Paige (N. Y.) 542; *Allen v. Blanchard*, 9 Cow. (N. Y.) 631. See also *Vultee v. Rayner*, 2 Hall (N. Y.) 376; *Botts v. Fitzpatrick*, 5 B. Mon. (Ky.) 397; *Cushman v. Blakesly*, 3 Greene (Iowa) 542; *Lazare v. Jacques*, 15 La. Ann. 599; *Shepard v. Ward*, 8 Wend. (N. Y.) 542.

The heirs of a deceased mortgagor were not, in a suit by an assignee to redeem, competent to prove the assignment fraudulent, for that would be to establish their own title. *Randall v. Phillips*, 3 Mason (U. S.) 378.

Where the ancestor had made a will, it was held that one who would have been a distributee of his estate, had he died intestate, was a competent witness, unless it was shown that he was interested under the will. *M'Kinna v. Hayter*, 2 Hawks. (N. Car.) 422.

A husband was not a competent witness in behalf of an estate of which his wife was a distributee. *Caperton v. Calison*, 1 J. J. Marsh. (Ky.) 396; *Terry v. Belcher*, 1 Bailey (S. Car.) 568.

Where the issue was whether the deceased left anyone related to him with in the degrees entitled to claim a share

of his estate, one claiming to be next of kin was not a competent witness. *State v. Greenwell*, 4 Gill & J. (Md.) 407.

In the following cases it was held that distributees were competent witnesses under statutory changes of the law: *Perry v. McGuire*, 31 Mo. 287; *Stein v. Weidman*, 20 Mo. 17 (*overruling* Penn v. Watson, 20 Mo. 13); *Butt v. Butt*, 1 Ohio St. 222; *Gunnison v. Lane*, 45 Me. 165; *Nash v. Reed*, 46 Me. 168; *Wheeler v. Towns*, 43 N. H. 56; *Swofford v. Gray*, 8 Ind. 508.

Co-executors.—In an action against the personal representative of a deceased co-executor to recover a legacy, upon the allegation that the funds for its payment came to the hands of such deceased co-executor, the surviving executor was not a competent witness for the plaintiff. *Doebler v. Snively*, 5 Watts (Pa.) 225.

2. *Hall v. Alexander*, 9 Ala. 219; *Dent v. Portwood*, 17 Ala. 242; *Hernndon v. Givens*, 19 Ala. 313; *Boon v. Nelson*, 2 Dana (Ky.) 391.

One who had transferred his entire interest in the estate was competent. *Sylvester v. Downer*, 20 Vt. 355.

So, also, was an heir who had conveyed his share of the real estate and released to the administrator as such, his interest in the personal property. *Reed v. Gilbert*, 32 Me. 519.

A distributee who had received his share and settled with the administratrix, was held to be a competent witness for her upon executing and delivering to her a release of all his interest in the recovery, the possible liability to refund in case of further claims against the estate, not then exhibited, being considered too remote and contingent to affect his competency, in the absence of proof of such outstanding claims. *Spann v. Ballard*, 1 Rice (S. Car.) 440.

Where co-heirs had executed mutual deeds of partition, one of them was held to be a competent witness for another in an action against a third party involving the title to the plaintiff's part of the estate. *Morris v. Harris*, 9 Gill (Md.) 19. But in *Asay v. Hoover*, 5 Pa. St. 21; 40 Am. Dec. 713, it was held that those heirs who had conveyed all their interest in the estate of the

course, competent to testify against interest without executing releases.¹

A residuary legatee was not, at common law, a competent witness to protect or increase the fund upon which the residuum of the estate depended.² And a specific legatee was not competent in behalf of the estate if there appeared to be any probability of an abatement of his legacy.³ But a specific legatee who had been paid, was a competent witness for the executor in the absence of a showing that the remaining funds would not be sufficient to meet the liabilities of the estate. In such cases, the possibility that the legatee might be called upon to refund was considered too remote and contingent to affect his competency as a witness.⁴ And where a legatee's interest was such

decendent to another heir, who was a party of record, were not competent witnesses for him.

A release by a distributee of his interest in the property in dispute, without releasing his entire interest in the estate, was not sufficient to restore his competency, *Smith v. Morgan*, 8 Gill (Md.) 133; *Coate v. Coate*, 37 Ala. 695; *Allen v. Blanchard*, 9 Cow. (N. Y.) 631; unless the personal representative also released his interest in the estate from all liability for the costs of the action. *King v. King*, 9 N. J. Eq. 44; *Baxter v. Buck*, 10 Vt. 548. But in *Boynton v. Turner*, 13 Mass. 391, it appeared that a minor had hired a chaise to carry his sick brother home, and on his return a stage coach was driven against the chaise and it was upset and broken. His father's executrix brought an action against the driver of the coach for damages done to the chaise, and it was held that the son who had driven the chaise was made a competent witness for the executrix by a release of all his interest in any judgment which might be obtained in the case.

1. *Richmond v. Cross*, 13 Mo. 75; *Cox v. Wilson*, 2 Ired. (N. Car.) 234.

In a proceeding to test the validity of a will which gave to the widow of the deceased a larger portion than she would have received under the Statute of Distribution, her heirs, she being dead, were held competent to defeat the will but not to sustain it. *Roberts v. Trawick*, 17 Ala. 55; 52 Am. Dec. 164.

2. *Baker v. Tyrwhitt*, 4 Campb. 27; *Campbell v. Tousey*, 7 Cow. (N. Y.) 64; *Lampton v. Lampton*, 6 T. B. Mon. (Ky.) 620; *Dimond v. McDowell*, 7 Watts (Pa.) 510; *Austin v. Bradley*, 2

Day (Conn.) 466; *La Rue v. Boughaner*, 4 N. J. L. 115.

The residuary legatee was competent in behalf of a specific legatee under the same will. *Nunn v. Owens*, 2 Strobb. (S. Car.) 101.

3. *Strong v. Finch*, Minor (Ala.) 256; *Temple v. Ellett*, 2 Munf. (Va.) 452; *Hedges v. Boyle*, 7 N. J. L. 68.

The widow of a mortgagor who was a legatee under his will was not a competent witness for the defense in an action to foreclose the mortgage. *Mester v. Zimmerman*, 7 Ill. App. 156.

On the trial of an issue *devisavit vel non*, a legatee under the will was a competent witness against its validity, *Landis v. Landis*, 1 Grant's Cas. (Pa.) 248; unless he would, as a distributee, receive a greater share of the estate by defeating the will; in which case he was incompetent from interest to testify against it. *Roberts v. Trawick*, 13 Ala. 68. But he might then testify in support of it. *Clark v. Vorce*, 19 Wend. (N. Y.) 232.

A legatee was competent for the executor, in an action against him for the price of a suit of mourning furnished the widow, as this was not a funeral expense which should be borne by the estate. *Johnson v. Baker*, 2 C. & P. 207; 12 E. C. L. 92.

4. *Clarke v. Gunnon*, 1 Ry. & M. 31; *Clealand v. Huey*, 18 Ala. 346; *Johnson v. Lewis*, 8 Ga. 460; *Cornell v. Vanartsdalen*, 4 Pa. St. 364; *Mesick v. Mesick*, 7 Barb. (N. Y.) 120; *Higgins v. Morrison*, 4 Dana (Ky.) 106.

Where the will had been proved twenty-seven years before the witness, a legatee, was called to testify, it was presumed that the legatee had been paid, and, there not being anything in

as would exclude him, he might be rendered competent by releasing the same before testifying.¹

So, also, a devisee who took under the will a vested interest in the testator's real estate was not, at common law, a competent witness in support of the will.² And if it were to his interest to defeat the will, he was not competent to testify against it.³ In an action by a creditor against the executor to charge the land devised with the payment of the testator's debts, a devisee was not a competent witness for the defendant.⁴ In ejectment against a devisee, a co-devisee, a tenant in common of the defendant, not being in actual possession, was held to be a competent witness for the defense.⁵

(3) *Persons Jointly Interested with a Party*.—In a contest between a member of a firm and a third party, concerning partnership matters, another member of the firm was not a competent witness for his co-partner, because he was directly interested in protecting the firm.⁶ In case a member of the firm was sued

the case to show that he would be called upon to refund, he was held to be competent. *Levers v. Van Buskirk*, 4 Pa. St. 315.

In *Willcocks v. Phillips*, 1 Wall. Jr. (C. * C.) 47, it appeared that the legatee had been voluntarily paid by the executor after notice of the claim against the estate then in litigation, and that if said claim were established, the estate would not be sufficient to pay it. Nevertheless, the paid legatee was admitted as a competent witness for the executor, since by the law of the jurisdiction neither the executor nor the creditor could recover the legacy back.

A specific legatee was a competent witness unless there was reasonable probability that his legacy must be resorted to for the payment of debts. *Learey v. Littlejohn*, 1 Murph. (N. Car.) 406; *Carlisle v. Burley*, 3 Me. 250.

1. *Lowe v. Jolliffe*, 1 W. Bl. 364; *Goodtitle v. Welford*, Doug. 139; *Martin v. Mitchell*, 28 Ga. 382; *Whelpley v. Loder*, 1 Dem. (N. Y.) 368; *Loder v. Whelpley*, 111 N. Y. 239; *Meehan v. Rourke*, 2 Bradf. (N. Y.) 385; *Reeve v. Crosby*, 3 Redf. (N. Y.) 74; *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235.

It has been held that a residuary legatee was rendered competent for the executor by assigning to him individually all his interest in the cause of action, and his releasing the residuary share of the witness from all liability for the costs of the action. *Steininger v. Hoch*, 42 Pa. St. 432. But such legatee would not have been competent

if his residuary share had not been relieved of liability for costs. *Baker v. Tyrwhitt*, 4 Campb. 27.

In some cases, it has been held that a subscribing witness to a will may not testify in proceedings to determine its validity, unless he were a competent witness at the time the will was executed. *Vrooman v. Powers*, 47 Ohio St. 191; *Huie v. McConnell*, 2 Jones (N. Car.) 455.

2. *Hilliard v. Jennings*, 1 Ld. Raym. 595; cited in *Windham v. Chetwynd*, 1 Burr. 424; *Pyke v. Crouch*, 1 Ld. Raym. 730.

3. Thus, where he would take a greater interest as heir at law than was devised to him, he was not competent to testify in opposition to the will. *Canfield v. Ball*, 8 N. J. Eq. 582. And the same was true where a devisee under a prior will was offered to impeach a subsequent one under which he took nothing, because if the will were defeated the prior one might take effect. *Hall v. Hall*, 17 Pick. (Mass.) 373.

4. *Norris v. Johnston*, 5 Pa. St. 287. See also *Bloor v. Davies*, 7 M. & W. 235.

5. *Jackson v. Nelson*, 6 Cow. (N. Y.) 248. The court rested this decision on the ground that the interest of the witness was in the question and not in the event of the action, since he could not be turned out of actual possession as a result of judgment, and not being a party to the action he would not be bound by the judgment, and the record could not be given in evidence against him.

6. *Goodacre v. Breame*, Peake N. P.

individually for a partnership debt, it was held, in some jurisdictions, that a co-partner, not joined as a defendant, was a competent witness for the plaintiff, on the ground that his testimony was against interest, as he would be liable to the defendant for his proportionate share of the debt in case the plaintiff recovered;¹ but according to the weight of authority, he was not competent for the plaintiff to prove either the partnership or the

C. 174; *Young v. Bairner*, 1 Esp. 103; *Evans v. Yeatherd*, 2 Bing. 133; 9 E. C. L. 345; *Hare v. Munn*, Mo. & Mal. N. P. C. 241, note a; *Cheyne v. Koops*, 4 Esp. 112; *Jackson v. Galloway*, 8 C. & P. 480; 34 E. C. L. 489; *Cochran v. Cunningham*, 16 Ala. 448; 50 Am. Dec. 186; *Myers v. Gilbert*, 18 Ala. 467; *Bill v. Porter*, 9 Conn. 23; *Hooker v. Johnson*, 8 Fla. 453; *Randolph v. Govan*, 14 Smed. & M. (Miss.) 9; *Choteau v. Raftt*, 20 Ohio 132; *Weston v. Hunt*, 19 Mo. 505.

In *Robertson v. Mills*, 2 Har. & G. (Md.) 98, a co-partner of the defendant was admitted for the defense, the effect of his testimony being to charge himself with the whole debt and exonerate the defendant.

Effect of Release.—A partner of a defendant, who was not sued, could not, according to the weight of authority, be rendered competent for the defense, by being released from his liability to contribute, because it was still to his interest to protect the firm by preventing the seizure and sale of the defendant's interest therein. *Young v. Bairner*, 1 Esp. 103; *Cheyne v. Koops*, 4 Esp. 112; *Simons v. Smith*, 1 Ry. & M. 29; *Cline v. Little*, 5 Blackf. (Ind.) 486; *Tomkins v. Beers*, 2 Root (Conn.) 498; *Black v. Marvin*, 2 P. & W. (Pa.) 138; *McCoy v. Lightner*, 2 Watts (Pa.) 351; *Carter v. Connell*, 1 Whart. (Pa.) 398; *Wells v. Peck*, 23 Pa. St. 155; *Scott v. Watkins*, 2 Smed. & M. (Miss.) 239. See also *Little v. Clarke*, 36 Pa. St. 114; *White v. Jones*, 14 La. Ann. 692.

The English rule was afterwards so far modified as to admit the co-partner of the defendant, provided the defendant and the witness executed mutual releases. *Wilson v. Hirst*, 4 B. & Ad. 760; 24 E. C. L. 156. See also *White v. Tucker*, 9 Iowa 100; *Chapman v. Andrews*, 3 Wend. (N. Y.) 240.

In some jurisdictions, however, it was held that a release by the defendant from all liability to contribute, rendered his co-partner, not joined as a party, a competent witness for him.

LeRoy v. Johnson, 2 Pet. (U. S.) 194; *Bagley v. Osborn*, 2 Wend. (N. Y.) 527; *Lefferts v. DeMott*, 21 Wend. (N. Y.) 136; *Wilson v. Smith*, 5 Yerg. (Tenn.) 408. See also *Chapman v. Andrews*, 3 Wend. (N. Y.) 240; *Long v. Story*, 13 Mo. 4.

A dormant partner, who was not a party to the action, might release his interest to his co-partners and be a witness for the firm. *Clarkson v. Carter*, 3 Cow. (N. Y.) 84.

Where his interest was equally balanced between the parties, he was competent. *Black v. Campbell*, 6 W. Va. 51.

One who had a share in the profits of a firm but was not liable for its debts was rendered competent for the firm by releasing all his interest in the suit. *Curcier v. Pennock*, 14 S. & R. (Pa.) 51.

In an action against the representative of a deceased partner, upon a partnership contract, it was held that the surviving partner was competent for the defense to prove the partnership, on the ground that the survivor only might be sued on such contract, and, though his testimony would defeat the action against the decedent's representative, the witness still remained liable himself. *Grant v. Shurter*, 1 Wend. (N. Y.) 148.

One partner was a competent witness for another if he had no interest in the event of the suit. *Thomas v. Brady*, 10 Pa. St. 164; *Sloan v. Bangs*, 11 Rich. (S. Car.) 97; *Mooreman v. De Graffenread*, 2 Mill (S. Car.) 195; *Grant v. Shurter*, 1 Wend. (N. Y.) 148. See also *Ward v. Coulter*, 4 N. J. L. 236.

1. *Hall v. Curzon*, 9 B. & C. 646; 17 E. C. L. 466; *Blackett v. Weir*, 5 B. & C. 385; 11 E. C. L. 257; *Lockart v. Graham*, 1 Stra. 35; *York v. Blott*, 5 M. & S. 71; *Washing v. Wright*, 8 Ired. (N. Car.) 1; *Cummins v. Coffin*, 7 Ired. (N. Car.) 196.

Upon a plea in abatement that the defendant's partner was not joined, the alleged partner was competent for the plaintiff, *Gossham v. Goldney*, 2 Stark.

liability of the defendant, because he was directly interested in increasing the number of persons who should share the burden for which he was liable by his own admission.¹ Where partners were joined as parties to an action, one of them could not, *pendente lite*, make such a disposition of his interest as would render him competent for his co-partners.²

414; 3 E. C. L. 469; *Hudson v. Robinson*, 4 M. & S. 475; but not for the defendant. *Evans v. Yeatherd*, 2 Bing. 133; 9 E. C. L. 345.

A member of a firm was competent to prove the joint ownership of property by himself and his co-partner when his own interest was not in litigation, for example, where it was sought to appropriate his partner's interest to the payment of his individual debts. *Page v. Weeks*, 13 Mass. 199.

1. *Dixon v. Hood*, 7 Mo. 414; 38 Am. Dec. 461; *McIlvaine v. Franklin*, 2 La. Ann. 622; *Ellis v. Lauve*, 4 La. Ann. 245; *Lewis v. Post*, 1 Ala. 65; *Barney v. Earle*, 20 Ala. 405; *Garner v. Myrick*, 30 Miss. 448; *Phillips v. Henry*, 2 Head (Tenn.) 133; *Wright v. Boynton*, 37 N. H. 9; *Latham v. Kenniston*, 13 N. H. 203; *Porter v. Wilson*, 13 Pa. St. 641; *Rich v. Husson*, 4 Sandf. (N. Y.) 115; *Pierce v. Kearney*, 5 Hill (N. Y.) 82; *Hale v. Wetmore*, 4 Ohio St. 600; *Foster v. Hall*, 4 Humph. (Tenn.) 346; *Hurd v. Brown*, 25 Ill. 616; *Brown v. Hurd*, 41 Ill. 121; *Merritt v. Pollys*, 16 B. Mon. (Ky.) 355.

The case of *Crook v. Taylor*, 12 Ill. 355, supported a contrary rule, but it was overruled in *Hurd v. Brown*, 25 Ill. 616, and *Brown v. Hurd*, 41 Ill. 121.

In *Columbian Mfg. Co. v. Dutch*, 13 Pick. (Mass.) 128, *Shaw, C. J.*, said: "By testifying against the plaintiffs in favor of the defendant, he would defeat the action against himself and so would seem to have an interest against the plaintiffs. But it must be considered that by defeating this action he lays the foundation for another action against himself, in which he must be solely charged with the whole debt; whereas, if he testifies against the defendant and in favor of the plaintiffs, he fixes the other defendant as equally liable with himself for the debt; equally liable for the whole in the first instance, and ultimately liable *prima facie* to contribution. This principle was recognized and formed the point of the decision in *Brown v. Brown*, 4 Taunt. 752, which was recognized and confirmed by *Mant v. Main-*

waring, 8 Taunt. 139; 2 J. B. Moore 9. There appearing to be a plain interest in the witness, to charge the other defendant with a proportion of the debt, and no apparent interest to counterbalance it, it appears to us that he had a preponderance of interest to testify in favor of the party calling him, and was, of course, incompetent."

A partner who had sold out to his co-partners, and had been released by them, was held competent for the plaintiff in an action against the firm for a debt incurred while he was a member. *Hosack v. Rogers*, 25 Wend. (N. Y.) 313.

But he was not competent for them if the effect of a judgment in their favor would be to discharge a claim for which he remained jointly liable. *Kapp v. Barthan*, 1 E. D. Smith (N. Y.) 622.

A partner, who had assumed all the debts and liabilities of the firm, was competent for the plaintiff in an action against his former co-partners, because he was ultimately liable for the whole debt in any event. *Bell v. Thompson*, 34 Ill. 529; *Brown v. Hurd*, 41 Ill. 121.

In *Ripley v. Thompson*, 12 Moore 55; 22 E. C. L. 433, which was an action of assumpsit for goods sold and delivered, a partner of the defendant was offered as a witness for the plaintiff and rejected, on the ground that he was interested in procuring a verdict against the defendant which would relieve him from paying a part of the claim. It is difficult to reconcile this decision with the English cases cited in the last preceding note.

In *Pennsylvania* it was held that a partner of the defendant could not be compelled to testify in behalf of the plaintiff. *Taylor v. Henderson*, 17 S. & R. (Pa.) 453.

But it was held that in actions against personal representatives of deceased partners, surviving partners, who were willing to testify, were competent for the plaintiff. *Collier v. Leech*, 29 Pa. St. 404; *Brewster v. Sterrett*, 32 Pa. St. 115; *Wright v. Funck*, 94 Pa. St. 26.

2. *Dougherty v. Smith*, 4 Metc.

One part owner of personal property was not a competent witness for another who was engaged in a contest with a third person involving the title to such property.¹ In an action to enforce a liability arising from the partial ownership of property, or a joint contract, a part owner, or joint contractor, not sued, was not competent for the defense, because he was liable to contribute if the plaintiff succeeded;² neither was he competent for the plaintiff, since it was to his interest to compel the defendant to share the liability.³ A part owner of goods, who authorized his

(Ky.) 279; *Church v. Hampton*, 6 W. & S. (Pa.) 514; *Cravens v. Dewey*, 13 Cal. 40; *Loomis v. Loomis*, 26 Vt. 108.

In *Collins v. Flowers*, 1 How. (Miss.) 26, the court said: "We understand it to be a well established rule of evidence that a member of a partnership can never be so far divested of his interest in the firm, by any act of himself and co-partners, as to be made a competent witness, in a matter relating to the partnership whilst he was a member."

In an action against partners upon a note signed with the firm name, the one who signed, being willing to testify and having been first released by the plaintiff from any other action on the note, was held to be a competent witness for the plaintiff, on the ground that he was called to testify against interest to make himself liable with others. *Whitehead v. Pittsburgh Bank*, 2 W. & S. (Pa.) 172.

1. *Caldwell v. Cole*, 13 Me. 120.

But a partner who sold partnership property might be a witness for the vendee, where the title to the property was in question, upon receiving a release from the vendee to himself. *Churchill v. Bailey*, 13 Me. 64.

2. Thus, in a proceeding against a steamboat to recover damages done to the plaintiff's property, a part owner of the boat, though not a party of record, was not competent for the defense. *Steamboat Farmer v. McCraw*, 31 Ala. 659. See also *West v. Steamboat Berlin*, 3 Iowa 532.

Neither was a part owner of a vessel competent for the master in an action against the latter for the wages of seamen. *Lufkin v. Patterson*, 38 Me. 282. Nor was the master competent for the owners of the vessel in a similar action. *Malone v. Bell*, 1 Pet. Adm. 139; *Jones v. The Phoenix*, 1 Pet. Adm. 201. See also *Galloway v. Morris*, 3 Yeates (Pa.) 445; *Atkins v. Burrows*, 1 Pet. Adm. 244.

The mortgagee of the share of one

of the owners of a vessel was competent for the owners, in an action against them for the price of supplies. *Macy v. DeWolf*, 3 Woodb. & M. (U. S.) 193.

A joint contractor, being liable to contribute in case the plaintiff recovered, was not competent for his fellow contractor. *Ransom v. Keyes*, 9 Cow. (N. Y.) 128.

Thus, in assumpsit for services as a schoolmistress, a co-contractor, though not sued, was held incompetent for the defense. *Hall v. Rex*, 6 Bing. 181; 19 E. C. L. 47; 3 M. & P. 273.

An agreement, by one member of a firm, to indemnify an officer in selling property which had been levied on for a partnership debt, did not, *per se*, render another partner incompetent as a witness for the officer in a suit against him by one who claimed the property sold, such contract being outside of the legitimate business of the firm, and not binding on the other partner without his consent. *Thompson v. Franks*, 37 Pa. St. 327. Compare *Ward v. Chase*, 35 Me. 515.

Where two persons had separate causes of action for a failure to perform a covenant, the one who did not sue was a competent witness for the other. *Ford v. Bronaugh*, 11 B. Mon. (Ky.) 14.

3. In an action for repairs done to a vessel against one part owner, who neglected to plead the non-joinder of the others in abatement, another part owner was not a competent witness for the plaintiff to prove the ownership of the defendant. *Marquand v. Webb*, 16 Johns. (N. Y.) 89.

But one joint owner was competent to prove the tortious acts of another for which the witness was not liable. Thus, where the plaintiff, who had bought the bar of a steamboat, was wrongfully ejected therefrom by a number of the owners of the boat, a part owner who was not a joint tort-feasor with the defendants, was held to be a competent witness for the plaintiff to prove the

co-owner to sell the same as his own, looking to the vendor for payment, was competent to prove the contract of sale as he had no interest in the event of the suit.¹ In an action against the owner of part of a milldam to recover damages for flowing lands, the owner in severalty of another part of the dam was competent for the defendant.² Where a lessee covenanted that he would pay to each of the lessors severally a specified part of the rent reserved, one of the lessors was competent for another in an action by the latter to recover his share of the rent.³

(4) *In Actions Concerning Real Estate*.—In ejectment by a tenant in tail to try the validity of a common recovery, the remainderman was not a competent witness for the plaintiff, because he had a direct interest in the plaintiff's recovery upon which his remainder would immediately revest.⁴ In an action of ejectment, the tenant in possession was not competent for the defendant, because a judgment for the plaintiff would have the effect of turning him out of possession.⁵ Neither was a lessor competent to prove a right of possession in his lessee.⁶

A lessor was a competent witness for his lessee generally, unless the matter in controversy involved his own interest directly

tortious acts of the defendants. *Lee v. Murray*, 12 Mo. 280.

In an action on a policy of insurance on goods, a part owner of the vessel, not interested in the insurance, was competent to prove the loss and other facts. *Ruan v. Gardner*, 1 Wash. (U. S.) 145.

1. *Outwater v. Dodge*, 6 Wend. (N. Y.) 403.

2. *Clement v. Durgin*, 5 Me. 9. The court reasoned that the record of the case could not be used as evidence for or against the witness in an action against him, and neither was he liable to contribute in case of a recovery by the plaintiff.

3. *Gray v. Johnson*, 14 N. H. 414.

4. And it was immaterial that the witness was ninety years of age and the tenant in tail had sons and grandsons. *Doe v. Tyler*, 6 Bing. 390; 19 E. C. L. 111. See also *Smith v. Blackham*, 1 Salk. 283.

"The person to whom the remainder of an estate is, after the determination of the particular estate, limited by will, cannot be admitted to prove the will, because he has, although it be remote, a vested interest in the matter in question." *Lee, C. J.*, in *Commins v. Oakhampton*, Sayer 45. Quoted with approval by *Tindal, C. J.*, in *Doe v. Tyler*, 6 Bing. 390; 19 E. C. L. 111.

5. *Doe v. Wilde*, 5 Taunt. 183; *Doe*

v. Bingham, 4 B. & Ald. 672; *Doe v. Birchmore*, 9 Ad. & El. 662; 36 E. C. L. 235; *Doe v. Reynolds*, 27 Ala. 374; *Brant v. Dyckman*, 1 Johns. Cas. (N. Y.) 275; *Jackson v. Trusdell*, 12 Johns. (N. Y.) 246; *Jackson v. Hills*, 8 Cow. (N. Y.) 290; *Doe v. Attica*, 7 Ind. 641; *Doe v. Trice*, 8 Jones (N. Car.) 490; *Boyer v. Smith*, 5 Watts (Pa.) 55.

In ejectment by one who claimed as heir at law to his father, the claimant's mother was held to be a competent witness for him because, if her husband died seised of the premises in question, she was entitled to dower whether the premises were held by the plaintiff or the defendant. *Doe v. Maisey*, 1 B. & Ad. 439; 20 E. C. L. 420.

In *quare impedit*, respecting the right of presentation to an advowson claimed by the defendant through his mother, who was seised of an estate of inheritance, it was held that the father of the defendant, who was tenant by the curtesy, was not a competent witness for the defense. *Gully v. Bishop of Exeter*, 5 Bing. 171; 15 E. C. L. 408; 2 M. & P. 266.

6. *Smith v. Chambers*, 4 Esp. 164; *Doe v. Clarke*, 3 Bing. N. Cas. 429; 32 E. C. L. 191 (*dictum* by *Tindal, C. J.*); *Jackson v. Ogden*, 4 Johns. (N. Y.) 140; *House v. Camp*, 32 Ala. 549. See also *Jackson v. Stackhouse*, 1 Cow. (N. Y.)

or some right in which he was bound to protect the lessee.¹ So, also, a lessee might be a witness for his lessor when he had no interest in the event of the suit,² but was incompetent for him on the trial of an issue which might affect his own enjoyment of the estate demised.³ A tenant in common was a competent witness for his co-tenant in an action of ejectment brought by the latter against a disseisor.⁴

122; 13 Am. Dec. 514; *Wilson v. Douglas*, 2 Strobb. (S. Car.) 97.

In *Strawbridge v. Cartledge*, 7 W. & S. (Pa.) 398, it was held that the lessor of the defendant in ejectment was not competent for his lessee, notwithstanding he had conveyed his reversionary interest before the trial, because, if the plaintiff recovered, the witness would be answerable to him for the *mesne* profits so long as he had held the land by his tenant during the ownership of the plaintiff.

1. Thus, where the lease did not bind the lessor to protect the lessee against trespassers, he was competent for the lessee in an action for trespass to the leased premises. *McCormick v. Bailey*, 10 Cal. 230. So, also, a landlord who had leased his land to a tenant for a year for a specified part of the crop, was competent to prove a trespass upon the land and damages by the destruction of the crop. His interest was in the question only, and not in the event of the suit, since he was not entitled to any part of the damages which the plaintiff might recover, but must bring a separate action against the trespasser to recover his own damages for the loss of rent. *Sanderlin v. Shaw*, 6 Jones (N. Car.) 225.

In an action by a lessee to recover damages for obstructing him in the use of a right of way to repair a dam which was a part of the demised premises, the plaintiff's lessor was held to be incompetent to prove the right of way, on the double ground that he was directly interested in the matter in controversy and was also bound to protect his tenant in the quiet enjoyment of the premises. *Dickson v. Boland*, 4 Pa. St. 112.

2. *Grant v. Beall*, 4 Har. & M. (Md.) 419; *Baker v. Pearce*, 4 Har. & M. (Md.) 502; *Detweiler v. Groff*, 10 Pa. St. 376.

In an action for injury to the reversion in taking out coal, the lessee of the surface was a competent witness for the plaintiff. *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. St. 9.

A lessee who had covenanted not to remove from the demised premises any building which he might put thereon until the rents were paid, was a competent witness for the lessor in an action for damages against a third person who had purchased such a building from the lessee and removed it by his consent, the rents not being paid; he was liable to one of the parties in any event, and his interest was equally balanced. *Forbes v. Williams*, 1 Jones (N. Car.) 393.

In a contest between the landlord and an execution creditor of the tenant, as to the distribution of the proceeds of the tenant's goods found on the demised premises, the tenant was competent to prove the terms of the demise. *Collins' Appeal*, 35 Pa. St. 83. See also *Alexander v. Mahon*, 11 Johns. (N. Y.) 185.

And where the landlord had distrained property claimed by a third person as his own, the tenant was a competent witness for the claimant. *McConahy v. Kessler*, 3 P. & W. (Pa.) 467.

In an action by a landlord against the sheriff for removing the goods of the tenant from the premises under an execution, without securing the payment of the rent, the tenant was not competent for the plaintiff, for he came to compel the sheriff to pay his rent. *Thurgood v. Richardson*, 4 C. & P. 481; 19 E. C. L. 484.

3. *Kuester v. Keck*, 8 W. & S. (Pa.) 16. In an action against the owner and lessor of a ferry for damages done to the plaintiff's property, the lessee, who had charge of the ferry and was receiving tolls at the time of the loss, was not a competent witness for the defendant, because he was liable over to him for any damages which had resulted from his own negligence. *Harris v. Plant*, 31 Ala. 639.

4. *Cook v. Brown*, 34 N. H. 460; *Bennett v. Hethington*, 16 S. & R. (Pa.) 193. In such cases, the witness was interested in the question only as he could not be put in either a better or a worse position by the judgment. Thus,

In a contest between a mortgagee and a subsequent purchaser of the premises, respecting the validity of the mortgage, the mortgagor was not a competent witness for the mortgagee, because he was interested in having the proceeds of the land applied in discharge of a debt for which he was personally liable.¹ But where the contest was between two mortgagees as to the priority of their respective liens, the mortgagor stood indifferent and was competent for either of them.² Where the mortgaged premises had been sold at sheriff's sale the mortgagor was competent for the purchaser to prove usury in the mortgage.³ And upon the trial of an issue between a mortgagee and a third person the mortgagor was a competent witness if he would neither gain nor lose by the event of the suit.⁴

in *Bennett v. Hethington*, 16 S. & R. (Pa.) 196; *Gibson, C. J.*, said: "Here the plaintiff has elected to sue alone, and what would the witness gain by his recovery? The possession of his own freehold would not be restored; but for that he would be driven to a separate action, in which the verdict in this would not be competent evidence. Neither would the possession of his co-tenant, when recovered, avail him to save the bar of the Statute of Limitation, for he who recovers an undivided interest in a several action, holds in common with him from whom it is recovered; the latter continuing to hold the estates of those who remain ousted." See also *Cheswell v. Eastham*, 16 N. H. 296.

But in an early *Connecticut* case, it was held that, in such an action, one tenant in common was not competent for another, because, in that state, the possession of one was the possession of all, even when recovered from a disseisor. *Barrett v. French*, 1 Conn. 354; 6 Am. Dec. 241.

1. *Howard v. Chadbourne*, 3 Me. 461; *Hartz v. Woods*, 8 Pa. St. 471.

But he might be rendered competent for the mortgagee if the latter released him from so much of the debt as should not be satisfied by the land mortgaged and covenanted to resort to the lands as the sole fund for the payment of the debt. *Howard v. Chadbourne*, 5 Me. 15.

2. *Willard v. Ramsburg*, 22 Md. 206; *Wilcox v. Hill*, 11 Mich. 256; *Gilman v. Moody*, 43 N. H. 244. *Contra*, *Sitlington v. Brown*, 7 Leigh (Va.) 271.

And upon an issue of priority of liens between a mortgagee and an attaching creditor of the mortgagor, the mortgagor was admissible as a witness for the mortgagee. *Carter v. Champion*, 8 Conn. 549; 21 Am. Dec. 695.

In a contest between two mortgagees it was held that the mortgagor was not competent to defeat the lien of the prior mortgage by proving it usurious. *Beverley v. Brooke*, 2 Leigh (Va.) 425.

3. *Cummins v. Wire*, 6 N. J. Eq. 73; *Brolasky v. Miller*, 9 N. J. Eq. 807; *Nichols v. Holgate*, 2 Aik. (Vt.) 138.

And the mortgagor was a competent witness for a subsequent judgment creditor who attacked the lien of the mortgage on the ground of usury. *Post v. Dart*, 8 Paige (N. Y.) 639. Or on the ground of a want of consideration for the mortgage. *Lamar v. Simpson*, 1 Rich. Eq. (S. Car.) 71; 42 Am. Dec. 345. And he was also competent for a grantee of the mortgaged premises to prove payment of the mortgage. *Beach v. Cooke*, 28 N. Y. 508; 86 Am. Dec. 260. See also *Gage v. Whittier*, 17 N. H. 312. But the grantee was not competent to prove payment by the mortgagor. *Indianapolis, etc., R. Co. v. Waggoner*, 16 Ind. 367.

In an action by a mortgagee to recover possession of the mortgaged property from a subsequent purchaser, the mortgagor was held competent to prove the consideration of the mortgage and that it remained unpaid. *Miller v. Dillon*, 2 T. B. Mon. (Ky.) 73. See also *King v. Bailey*, 8 Mo. 332.

But in ejectment by a mortgagee, against one claiming from the mortgagor under a quitclaim deed, the mortgagor was not competent for the plaintiff; because he was liable on his mortgage bond for the whole debt, if the defendant succeeded, but, having conveyed by quitclaim only, he was bound by no covenants to his grantee in any event. *Jackson v. M'Chesney*, 7 Cow. (N. Y.) 360; 17 Am. Dec. 521.

4. Thus where a surety, protected by

A junior mortgagee was not competent for the mortgagor to prove the prior mortgage invalid.¹ In proceedings to set aside a mortgage on the ground of fraud, the mortgagee was not competent to prove that his assignee took without notice of the alleged fraud,² but if a mortgagee had no legal interest in the event of the suit he was a competent witness either for or against the mortgagor.³

One who had conveyed land by deed of quitclaim, was a competent witness for his grantee because, being bound to him by no covenants, he would incur no liability to him in any event.⁴ But

a mortgage of the principal debtor's land, paid the debt and foreclosed the mortgage, the mortgagor was a competent witness for him in an action against the mortgagor's immediate vendor to recover damages for a breach of the covenants of warranty running with the land. *Gunter v. Williams*, 40 Ala. 561.

In ejectment by an assignee of a mortgagee against a stranger, the mortgagor was competent for the defendant to prove notice to the mortgagee that part of the land did not belong to the mortgagor, and was by mistake included in the mortgage. *Mott v. Clark*, 9 Pa. St. 399; 49 Am. Dec. 566.

1. *Doe v. Bamford*, 11 Ad. & El. 786; 39 E. C. L. 228.

In an action upon a bond accompanied by a mortgage, it was held that a subsequent mortgagee was competent for the defendant, but the court said it would have been otherwise had the action been on the mortgage instead of the bond. *Enters v. Peres*, 2 Rawle (Pa.) 279.

Prior Attachment.—Neither was a mortgagee competent to defeat the lien of an attachment levied on the mortgaged premises prior to the execution of his mortgage. *Rideout v. Newton*, 17 N. H. 71.

2. *Perrin v. Johnson*, 16 Ind. 72.

But in *Shrom v. Williams*, 43 Pa. St. 520, it was held that the original mortgagee was competent to prove that the mortgagor had received only a part of the amount for which the mortgage was given, and that the assignee of the mortgage took with knowledge of that fact.

3. Thus, where the mortgagee had entered, for condition broken, and rented the premises to another, he was competent to prove these facts in an action for use and occupation brought by the mortgagor against the ten-

ant. *Plympton v. Moore*, 13 Pick. (Mass.) 191.

The mortgagee was competent for the mortgagor in a writ of entry brought by the latter against an alleged disseisor, as the record could not be used as evidence either to support or defeat his mortgage. *Woodman v. Skeetup*, 35 Me. 464.

4. *Taylor v. Luther*, 2 Sumn. (U. S.) 228; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *Lay v. Hayden*, 2 Root (Conn.) 317; *Kline v. Beebe*, 6 Conn. 494; *Doe v. Herbert*, 1 Ill. 354; *Jackson v. Hubble*, 1 Cow. (N. Y.) 613; *Gratz v. Ewalt*, 2 Binn. (Pa.) 95; *Cain v. Henderson*, 2 Binn. (Pa.) 108; *Johnston v. Eckart*, 3 Yeates (Pa.) 427; *Major v. Deer*, 4 J. J. Marsh. (Ky.) 585; *Finlay v. Humble*, 2 A. K. Marsh. (Ky.) 569; *Hodges v. Johnson*, 15 Tex. 570. See also *Swift v. Fitzhugh*, 9 Port. (Ala.) 39; *Bullen v. Arnold*, 31 Me. 583; *Hyman v. Bailey*, 15 La. Ann. 560; *Cleavinger v. Reimar*, 3 W. & S. (Pa.) 486; *Balliot v. Bowman*, 2 Binn. (Pa.) 162, note; *Manifee v. Conn*, 2 Bibb (Ky.) 623; *Johnson v. Parks*, 10 Cal. 446.

The grantor was competent to prove the execution of the deed so far as he was concerned. *Smith v. Morrow*, 7 J. J. Marsh. (Ky.) 442; *Jackson v. Britton*, 4 Wend. (N. Y.) 507. *Contra*, *Barry v. Wilbourne*, 2 Bailey (S. Car.) 91.

One who had twice granted the same land, once by deed of warranty, and again by deed of quitclaim, was competent for the grantee by quitclaim, because it was to his interest to support the deed of warranty. *Wise v. Tripp*, 13 Me. 9. But one who had acquired land by fraud, and fraudulently conveyed it by quitclaim, was not competent for his grantee, because he was liable to him for the fraud. *Roberts v. Anderson*, 3 Johns. Ch. (N. Y.) 371.

A co-parcener who had executed a

one who conveyed with general warranty was not competent to support the title, because in the event of its defeat he was liable on his covenants;¹ his competency might, however, be restored by a valid release from all liability on his covenants.² And if he conveyed with special warranty against all persons claiming under him, he was competent for his grantee without a release when the opposing party did not claim under him.³ A grantor was competent to impeach his deed when he was without interest in the event of the suit, or was called to testify against interest.⁴ The

deed of release to another co-parcener, was competent for the latter in a contest for possession of the land. *Rogers v. Turley*, 4 Bibb (Ky.) 355.

1. *Elliott v. Boren*, 2 Sneed (Tenn.) 662; *Swift v. Dean*, 6 Johns. (N. Y.) 523; *Jackson v. Hallenback*, 2 Johns. (N. Y.) 394; *Shields v. Buchanan*, 2 Yeates (Pa.) 219; *Erb v. Underwood*, 3 Yeates (Pa.) 172; *Goodman v. Losey*, 3 W. & S. (Pa.) 526; *Lester v. White*, 44 Ill. 464; *Hamilton v. Doolittle*, 37 Ill. 473; *Beach v. Packard*, 10 Vt. 96; 33 Am. Dec. 185; *Schillinger v. McCann*, 6 Me. 364; *Swisher v. Williams*, *Wright* (Ohio) 754.

The rule applied where the grantor was a trustee of the property conveyed, *Farley v. Woodburn*, 10 N. J. Eq. 96; unless he conveyed without covenants or responsibility. *Norwood v. Marrow*, 4 Dev. & B. (N. Car.) 442.

One who had conveyed adjoining parcels of land to different persons by deeds of warranty, was not competent to prove that the first deed did not include the premises conveyed by the latter, as he was interested in supporting the latter deed. *Jackson v. Hallenback*, 2 Johns. (N. Y.) 394.

Where the boundary and not the title was in controversy, he was competent for the grantee. *Robertson v. Mosson*, 26 Tex. 248. And he was competent where the title set up by the other party was not in conflict with that which he had conveyed and was called to sustain. *Prescott v. Hawkins*, 22 N. H. 191; *Harris v. Fletcher*, 10 N. H. 20.

A grantor with warranty was a competent witness in an action between his grantee and his creditor taking the land on execution, as his interest was balanced between the parties. *Giddings v. Canfield*, 4 Conn. 482; *Blaisdell v. Cowell*, 14 Me. 370. See also *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253; 13 Am. Dec. 153; *McKay v. Treadwell*, 8 Tex. 176; *Edgell v. Lowell*, 4 Vt. 405;

Warner v. Percy, 22 Vt. 155. But, it was held that he was incompetent in such case, to prove that the conveyance was fraudulent. *Seymour v. Beach*, 4 Vt. 493; *Fowler v. Norton*, 2 Root (Conn.) 231; *Jackson v. Eaton*, 20 Johns. (N. Y.) 478.

A grantor to whom both parties traced their title, through subsequent conveyances, was a competent witness, since the parties were equally interested in the covenants. *Roberts v. Whiting*, 16 Mass. 186.

A parol promise to make good the boundaries as described in the conveyance, amounts only to a moral obligation, and was not sufficient to render the grantor incompetent. *Jones v. Love*, 9 Cal. 68.

An attorney in fact, who had conveyed the same land to both parties to the suit, was competent to prove that the first grantee paid a valuable consideration for it. *Alston v. Jones*, 1 Murph. (N. Car.) 45.

2. *Smith v. Smith*, 15 N. H. 55; *Marston v. Brackett*, 9 N. H. 336; *Gilbert v. Curtis*, 37 Me. 45; *Wall v. Nelson*, 3 Litt. (Ky.) 395; *Field v. Snell*, 4 Cush. (Mass.) 504; *Cooper v. Granberry*, 33 Miss. 117; *Jackson v. Frost*, 6 Johns. (N. Y.) 135; *Jackson v. Root*, 18 Johns. (N. Y.) 60; *Dayton v. Newman*, 19 Pa. St. 194; *Summers v. Wallace*, 9 Watts (Pa.) 161; *Myers v. Brownell*, 1 D. Chip. (Vt.) 448.

3. *Twambly v. Henley*, 4 Mass. 441; *Sweitzer v. Meese*, 6 Blinn. (Pa.) 500; *Beach v. Sutton*, 5 Vt. 209; *M'Clain v. Gregg*, 2 A. K. Marsh. (Ky.) 454; *Busby v. Greenslate*, 1 Stra. 445; *Doe v. Howells*, 1 C. & M. 648; 41 E. C. L. 351.

4. *Sims v. Killen*, 12 Ala. 498; *Norton v. Linton*, 18 Ala. 690; *Hadduck v. Wilmarth*, 5 N. H. 181; 20 Am. Dec. 570; *Marston v. Brackett*, 9 N. H. 336; *Stevenson v. Chapman*, 12 N. H. 524; *Gage v. Gage*, 29 N. H. 533; *Simmons v. Parsons*, 1 Bailey (S. Car.) 62; *Worcester v. Eaton*, 11 Mass. 368; *Loker v.*

grantor in a deed of trust was not competent for the trustee if he retained any interest under the deed.¹ A grantor was competent for his grantee where the title which he had conveyed was not in issue or where he could incur no liability on his covenants in any event.²

A grantee of land, which had been previously attached, was not a competent witness against the attaching creditor of his grantor in the suit in which the attachment was made.³ Neither was he competent for his grantor to charge the land with a vendor's lien after the title had passed from him to a third person.⁴ One who had purchased a part of the real estate of a deceased person was not competent to fasten upon another part previously sold a secret trust for the payment of the decedent's debts, since by creating such fund he would prevent the pursuit of his own land;⁵ but in a contest between his vendor and a third person, in which he had no legal interest, he was a competent witness.⁶

Haynes, 11 Mass. 498; *Hudson v. Hulbert*, 15 Pick. (Mass.) 423; *Hall v. Gittings*, 2 Har. & J. (Md.) 380; *Doe v. Jackson*, 1 Smed. & M. (Miss.) 494; *Lloyd v. Higbee*, 25 Ill. 603; *Title v. Grevett*, 2 Ld. Raym. 1008; *McFerran v. Powers*, 1 S. & R. (Pa.) 102; *Seymour v. Beach*, 4 Vt. 493; *Stemmons v. Duncan*, 9 B. Mon. (Ky.) 352.

A grantor with covenants of general warranty was competent in an action against his grantee, to show that he conveyed by mistake a greater interest in the land than he possessed; in such case he was called to testify against his interest, as his testimony tended to render him liable on his covenant to his grantee. *Stewart v. Chadwick*, 8 Iowa 463.

For the same reason he might be a witness to prove that he had no title. *Wright v. Nichols*, 1 Bibb (Ky.) 298; *Brown v. Downing*, 4 S. & R. (Pa.) 494.

An alleged grantor was competent to prove the deed a forgery. *Jackson v. Leek*, 19 Wend. (N. Y.) 339.

A warrantor of a right of servitude was a competent witness against his grantee, because it was to his interest to defend the right. *Macheca v. Avegno*, 20 La. Ann. 339.

But the maker of a deed of trust was not competent to prove that he had falsely stated the amount due the beneficiaries, in order to deter his other creditors from proceeding against his property. *Byrne v. Becker*, 42 Mo. 264.

1. *Stewart v. Fowler*, 3 Ala. 629; *Hodge v. Thompson*, 9 Ala. 131; *Dameron v. Williams*, 7 Mo. 138; *Keiser v.*

Moore, 14 Mo. 28; *Smith v. Vertrees*, 2 Bush (Ky.) 63.

He might be made competent to sustain the deed by exhibiting his certificate of discharge in bankruptcy and releasing all his interest in the trust fund to his assignee. *Kirksey v. Dubose*, 19 Ala. 43.

2. *Rowe v. Bradley*, 12 Cal. 226; *Grady v. Early*, 18 Cal. 109; *Jackson v. Rice*, 3 Wend. (N. Y.) 180; *Greenwalt v. Horner*, 6 S. & R. (Pa.) 79; *Prescott v. Hawkins*, 22 N. H. 191; *Harris v. Fletcher*, 10 N. H. 20; *Robertson v. Mosson*, 26 Tex. 248.

3. *Beach v. Packard*, 10 Vt. 96; 33 Am. Dec. 185; *Schillinger v. McCann*, 6 Me. 364.

4. *Messenger v. Armstrong*, 19 Ohio 41; *Jones v. Patterson*, 1 W. & S. (Pa.) 321.

But in *Ringgold v. Bryan*, 3 Md. Ch. 488, it appeared that the vendee had mortgaged the premises and that the mortgage had been foreclosed and the premises purchased by the mortgagee. Under this state of facts, the court admitted the witness to prove notice to the mortgagee of the vendor's lien, because in case of its enforcement he would be personally liable for the mortgage debt. And in *Hill v. McLean*, 10 Lea (Tenn.) 107, the vendee was admitted to prove notice of the vendor's lien to a subsequent purchaser, having been rendered competent to give such evidence by the statutes of the state.

5. *Clagett v. Hall*, 9 Gill & J. (Md.) 96.

6. Thus where grantees were entitled to bring separate actions on the

(5) *Vendors and Purchasers of Personal Property*.—The vendor of personal property in possession, who sells it as his own, is bound by an implied warranty of title, and for this reason he was not, at common law, a competent witness for his vendee in an action in which the title to such property was in question,¹ but he might be a witness for the vendee when released from liability on his warranty;² and he was competent for one contesting the title of his vendee, as he was then called to testify against interest.³ Where, however, the sale was attacked by the creditors of the vendor he was not, according to the weight of authority, competent to prove it fraudulent, or to prove the title to the property in himself at the time of its seizure, because he then came in a financially irresponsible condition to pay his own debts with property which presumptively belonged to another.⁴ But there are cases in which it was held that where there was other

covenants in a deed, one was competent for the other. *Cheswell v. Eastham*, 16 N. H. 296; *Ford v. Bronaugh*, 11 B. Mon. (Ky.) 14.

A witness who had purchased an interest in real estate, to which it appeared his vendor had no title, was competent to prove the amount of rent received and improvements made by the vendor. *Hogan v. Stone*, 1 Ala. 496; 35 Am. Dec. 39.

The assignee of a preemption warrant was a competent witness if the facts intended to be proved by him did not tend to support the title of the party calling him. *Wilson v. Speed*, 3 Cranch (U. S.) 283.

In a suit against one who was alleged to have conveyed all his property in fraud of his creditors, the grantee was competent for the defendant, unless it were shown that he had knowledge of the grantor's purpose, or that the property, or the money received on the sale thereof, was still in his hands and subject to seizure for the grantor's debts. *Johnson v. Johnson*, 3 Met. (Mass.) 63.

The grantee in a trust deed was competent to prove that the deed was never delivered to him, although he had consented to accept the trust. *Jackson v. Sheldon*, 22 Me. 572.

1. *Lindsay v. Lamb*, 24 Ark. 222; *Dunnahoe v. Williams*, 24 Ark. 264; *Arnold v. McNeill*, 17 Ark. 179; *Bennett v. Quirk*, 13 La. Ann. 547; *O'Blennis v. Corri*, 5 La. Ann. 101; *Wetmore v. Click*, 5 Jones (N. Car.) 155; *Freeman v. Lewis*, 5 Ired. (N. Car.) 91; *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Whitney v. Heywood*, 6 Cush.

(Mass.) 82; *Hale v. Smith*, 6 Me. 416; *Thompson v. Towle*, 32 Me. 87; *Heskett v. Borden Min. Co.*, 10 Md. 179; *Parker v. Hammond*, 13 Vt. 242; *Moore v. McKie*, 5 Smed. & M. (Miss.) 238; *Edwards v. Ballard*, 14 B. Mon. (Ky.) 233; *Saunders v. Addis*, 1 Bailey (S. Car.) 49.

Neither was he competent for his vendee upon the trial of an issue, the determination of which might render him liable on an express warranty. *Burke v. Clarke*, 2 Swan (Tenn.) 310; *Biss v. Mountain*, 1 M. & Rob. 302.

But the donor of personal property, being bound by no warranty, was competent for the donee. *Humphries v. Dawson*, 38 Ala. 199; *Jones v. Hoskins*, 18 Ala. 489; *Easley v. Dye*, 14 Ala. 158.

And the same was true where the donor had made a voluntary warranty, for warranty to be binding must have a valuable consideration to support it. *Gunn v. Mason*, 2 Sneed (Tenn.) 646.

2. *Freeman v. Lewis*, 5 Ired. (N. Car.) 91; *Cadbury v. Nolen*, 5 Pa. St. 320; *O'Blennis v. Corri*, 5 La. Ann. 101; *Goodrich v. Hanson*, 33 Ill. 508.

3. *Dickinson v. Johnson*, 24 Ark. 251; *Clinton v. Estes*, 20 Ark. 216; *Martin v. Kelly*, 1 Stew. (Ala.) 198; *Dickinson v. Dickinson*, 9 Met. (Mass.) 471; *Shropshire v. Shropshire*, 7 Yerg. (Tenn.) 165; *Coghill v. Boring*, 15 Cal. 213; *Hendricks v. Mount*, 5 N. J. L. 856.

4. *Waugenheim v. Childs*, 23 Cal. 444; *Bailey v. Foster*, 9 Pick. (Mass.) 139; *Pratt v. Stephenson*, 16 Pick. (Mass.) 325; *Rea v. Smith*, 19 Wend. (N. Y.) 293; *Gardenier v. Tubbs*, 21 Wend. (N. Y.) 169; *Smead v. Williamson*, 16 B.

evidence of a fraudulent conspiracy between the vendor and the vendee, the declarations of the former might be received in evidence against the latter when the property was pursued by creditors of the vendor.¹ In such contest, the vendor was competent for the vendee to prove that the property seized belonged to the latter.² And in trover for the conversion of the goods, the plaintiff's vendor was a competent witness for him, unless the defendant claimed ownership under an adverse title.³

One who sold goods without warranty of title, either express or implied, was a competent witness for the vendee.⁴ And where the vendor's interest was balanced between the parties, as when

Mon. (Ky.) 492; *Paul v. Rogers*, 5 T. B. Mon. (Ky.) 167; *Bland v. Ansley*, 2 B. & P. N. R. 331, per Mansfield, C. J.

But, in *Maine*, it was held that he was competent for his creditors as well as his vendee, on the ground that his interest was balanced, *Nichols v. Patten*, 18 Me. 231; 36 Am. Dec. 713; *Ward v. Chase*, 35 Me. 515; and the rule was the same in the State of *Iowa*. *Adams v. Foley*, 4 Iowa 44; *Wisner v. Brady*, 11 Iowa 248; *Kingsbury v. Buchanan*, 11 Iowa 390.

1. *Borland v. Mayo*, 8 Ala. 112; *Clayton v. Anthony*, 6 Rand. (Va.) 285; *Reitenbach v. Reitenbach*, 1 Rawle (Pa.) 362; 18 Am. Dec. 638; *Wilbur v. Strickland*, 1 Rawle (Pa.) 458; *Willis v. Farley*, 3 C. & P. 395; 14 E. C. L. 366. See also *Brown v. Marsh*, 8 Vt. 310.

This modification of the general rule was recognized and applied in *Howe v. Scannell*, 8 Cal. 325. But in the later case of *Waugenheim v. Childs*, 23 Cal. 444, the court repudiated the doctrine, and held that the vendor was incompetent in all such cases to prove the sale fraudulent.

2. *Prince v. Shepard*, 9 Pick. (Mass.) 176; *Chark v. Gordon*, 13 Met. (Mass.) 434; *Rice v. Austin*, 17 Mass. 197; *Sawyer v. Ware*, 36 Ala. 675; *Garner v. Bridges*, 38 Ala. 276; *Zackowski v. Jones*, 20 Ala. 189; *Holman v. Arnett*, 4 Port. (Ala.) 63; *Sherron v. Humphreys*, 14 N. J. L. 217; *Clifton v. Bogardus*, 2 Ill. 32; *Warner v. Carlton*, 22 Ill. 422; *Mizell v. Herbert*, 12 Smed. & M. (Miss.) 547; *Ewing v. Cargill*, 13 Smed. & M. (Miss.) 79; *Hankins v. Ingols*, 4 Blackf. (Ind.) 35; *Bradbury v. Dougherty*, 7 Blackf. (Ind.) 467; *Ragland v. Wickware*, 4 J. J. Marsh. (Ky.) 530; *Lampton v. Lampton*, 6 T. B. Mon. (Ky.) 618; *Forsyth v. Palmer*, 14 Pa. St. 96; 53 Am. Dec. 522; *Graham v. McCreary*, 40 Pa. St. 515; 80 Am. Dec.

591; *Caston v. Ballard*, 1 Hill (S. Car.) 406.

But a fraudulent purchaser was not competent for his vendee to prove the validity of his title. In such case, his interest was not balanced, as he was liable to his vendee for the necessary expenses of the action, in addition to the value of the goods, if the title failed. *Kingsbury v. Smith*, 13 N. H. 109.

3. *Wetmore v. Click*, 5 Jones (N. Car.) 155; *Crosby v. Nichols*, 3 Bosw. (N. Y.) 450; *Waller v. Parker*, 5 Coldw. (Tenn.) 481. See also *Nix v. Cutting*, 4 Taunt. 18; *Ward v. Wilkinson*, 4 B. & Ald. 410; 6 E. C. L. 539.

But in *Howerton v. Holt*, 23 Tex. 51, it appeared that the witness had made an assignment of certain personal property for the benefit of his creditors and that the property was afterwards seized by the sheriff upon execution against the assignor, was sold and the proceeds applied in discharge of the claim of the execution creditor. In an action by the assignee against the sheriff for damages, it was held that the assignor was not competent for the plaintiff, as the effect of his testimony would be to have the value of the property again applied to the payment of his debts.

4. *Mahone v. Yancey*, 14 Ala. 395; *Connelly v. Chiles*, 2 A. K. Marsh. (Ky.) 242; *McInroy v. Dyer*, 47 Pa. St. 118; *Cannon v. White*, 16 La. Ann. 85.

Upon an execution sale, there is no implied warranty of title, and, therefore, a judgment debtor whose goods were sold was not disqualified as a witness in a contest, respecting the title to the property so sold, between the purchaser and another. *Lothrop v. Muzzy*, 5 Me. 450.

One who sold personal property not in his possession, was a competent

both parties claimed under him, he was competent for either.¹ So, also, in a contest between a vendor and a third person, the vendee of the property in question was a competent witness if he had no interest in the event of the suit, or if his interest was balanced between the parties.²

(6) *Agents, Servants, etc.*—(a) *In General.*—Where an agent was engaged in a contest concerning the business of his principal, the latter, being the real party in interest, was not a competent witness for the former.³ But an agent was competent *ex necessitate rei* to prove his authority as such, unless it was in writing, and was, as a rule, competent to prove also his acts and declarations in the exercise of such authority, even when he was interested in the matter in controversy.⁴ This rule, however, applied

witness for his vendee in jurisdictions where there was no implied warranty in case of such sale. Lackey v. Strouder, 2 Ind. 376.

1. Jones v. Park, 1 Stew. (Ala.) 419; Holman v. Arnett, 4 Port. (Ala.) 63; Butler v. Tufts, 13 Me. 302; Morrison v. Fowler, 18 Me. 402; Miller v. Fitch, 7 W. & S. (Pa.) 366; Frost v. Hill, 3 Wend. (N. Y.) 386.

Thus, one who had sold property for a valuable consideration and afterwards disposed of it in payment of a gambling debt, was held competent for the vendee for value in an action of replevin to recover the property. Fister v. Beall, 1 Har. & J. (Md.) 31.

But there are cases in which it was held that he was not competent for one party to prove that he did not sell the property to the other. M'Cabe v. Morehead, 1 W. & S. (Pa.) 513; Wright v. Bonta, 19 Tex. 385.

2. Loud v. Pierce, 25 Me. 233; Chamberlain v. Smith, 44 Pa. St. 431.

Thus a vendee was a good witness for his vendor after the rescission of the contract of sale. Stafford v. Ames, 9 Pa. St. 343; Babcock v. Huntington, 9 Ala. 869.

In a suit to enjoin an execution sale of property claimed to be exempt, one who purchased the property after a preliminary injunction was a competent witness for the vendor, as the property was, at the time of the sale, relieved from the lien of the levy and the security of the injunction bond was substituted therefor. Turley v. Brewster, 33 Tex. 188.

In replevin against an officer to recover property claimed to be exempt from execution, the vendee of the property was competent to prove that the

plaintiff had a right to the possession of the property at the time when the action was brought. Mumma v. McKee, 10 Iowa 107.

Where a person had bought goods as an agent, and they were afterwards seized on execution against him, the alleged principal was competent for the vendor, who replevied the goods as having been obtained through fraud. Cutter v. Rathbun, 3 Hill (N. Y.) 577.

In a suit by the vendor against a guarantor of payment of the purchase price, the vendee was a competent witness, as he was liable to one of the parties in any event. Smith v. Bainbridge, 6 Blackf. (Ind.) 12.

The vendee of property which he had in turn conveyed by deed of trust, for the benefit of his creditors, was competent against his vendor in replevin for the possession of the goods after mutual releases executed by him and his trustees. Ratcliffe v. Sangston, 18 Md. 383.

3. Sherman v. Bruce, 37 Ill. 39; Russell v. McKenzie, 13 Md. 560; Wallace v. Peck, 12 Ala. 768; Hayes v. Grier, 4 Binn. (Pa.) 80.

But he was competent for his agent where he had no interest in the event of the suit. Case v. Reeve, 14 Johns. (N. Y.) 79.

As where the money sought to be recovered from the agent had already been paid over to the principal. Seidel v. Peckworth, 10 S. & R. (Pa.) 442; Stroecker v. Hoffman, 19 Pa. St. 226.

He might, also, testify for his agent where his interest had been released. Kirksey v. Bates, 1 Ala. 303.

4. Martineau v. Woodland, 2 C. & P. 65; 12 E. C. L. 32; Ilderton v. Atkinson, 7 T. R. 476; Birt v. Kershaw,

only to agents employed in the ordinary transactions of commerce.¹

2 East 458; *Matthews v. Haydon*, 2 Esp. 509; *Adams v. Davis*, 3 Esp. 48; *Dixon v. Cooper*, 3 Wils. 40; *Martin v. Horrell*, 1 Stra. 647; *Barker v. Macrae*, 3 Campb. 144; *De Symonds v. De la Cour*, 2 B. & P. N. R. 374; *Pendall v. Rench*, 4 McLean (U. S.) 259; *Chapin v. Siger*, 4 McLean (U. S.) 378; *Lowber v. Shaw*, 5 Mason (U. S.) 241; *Stringfellow v. Mariott*, 1 Ala. 573; *Harrison v. Tulane*, 3 Ala. 534; *Gayle v. Bishop*, 14 Ala. 552; *Bean v. Pearsall*, 12 Ala. 592; *Napier v. Barry*, 24 Ala. 511; *Governor v. Gee*, 19 Ala. 199; *Falls v. Gaither*, 9 Port. (Ala.) 605; *Manaway v. State*, 44 Ala. 375; *Scott v. Jester*, 13 Ark. 437; *Collins v. Lester*, 16 Ga. 415; *Shepard v. Palmer*, 6 Conn. 95; *Doe v. Himelick*, 4 Blackf. (Ind.) 494; *State v. Holloway*, 8 Blackf. (Ind.) 45; *U. S. Bank v. Stearns*, 15 Wend. (N. Y.) 314; *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103; *Milward v. Hallett*, 2 Cal. (N. Y.) 77; *Fisher v. Willard*, 13 Mass. 379; *Rice v. Gove*, 22 Pick. (Mass.) 158; 33 Am. Dec. 724; *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338; 57 Am. Dec. 50; *Franklin Bank v. Freeman*, 16 Pick. (Mass.) 535; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Ward v. Griffin*, 3 Ired. Eq. (N. Car.) 150; *Decadillas v. Harris*, 8 Me. 298; *Crooker v. Appleton*, 25 Me. 131; *Perkins v. Jordan*, 35 Me. 23; *Stafford Bank v. Cornell*, 1 N. H. 192; *Phelps v. Sinclair*, 2 N. H. 554; *Kent v. Tyson*, 20 N. H. 121; *Downer v. Button*, 26 N. H. 338; *Caldwell v. Wentworth*, 16 N. H. 318; *Depeau v. Hyams*, 2 McCord (S. Car.) 146; *Salas v. Cay*, 12 Rich. (S. Car.) 558; *Covington v. Bussey*, 4 McCord (S. Car.) 412; *Black v. Goodman*, 1 Bailey (S. Car.) 201; *Johnson v. Harth*, 2 Bailey (S. Car.) 183; *Tomlinson v. Spencer*, 5 Cal. 291; *Mills v. Beard*, 19 Cal. 159; *Croom v. Noll*, 6 Fla. 52; *Dean v. Young*, 13 Smed. & M. (Miss.) 118; *Miller v. Hayman*, 1 Yeates (Pa.) 23; *Steward v. Richardson*, 2 Yeates (Pa.) 89; *McGunnagle v. Thornton*, 10 S. & R. (Pa.) 251; *Scott v. Wells*, 6 W. & S. (Pa.) 357; 40 Am. Dec. 568; *Gilpin v. Howell*, 5 Pa. St. 41; 45 Am. Dec. 720; *Cadwell v. Meek*, 17 Ill. 220; *Collins v. Smith*, 18 Ill. 160; *Nichols v. Guibor*, 20 Ill. 285; *Piercy v. Hedrick*, 2 W. Va. 458; 98 Am. Dec. 774; *Eastman v. Hodges*, 1

D. Chip. (Vt.) 101; *Wainwright v. Straw*, 15 Vt. 215; 40 Am. Dec. 675; *Lytle v. Bond*, 40 Vt. 618; *Weaver v. Bracken County Ct.*, 18 B. Mon. (Ky.) 728; *Bonham v. Laird*, 4 B. Mon. (Ky.) 403; *Kelly v. Lank*, 7 B. Mon. (Ky.) 220; *Connelly v. Chiles*, 2 A. K. Marsh. (Ky.) 242; *Barriere v. Peychaud*, 14 La. Ann. 371; *Phelps v. Hodge*, 6 La. Ann. 525; *Harvey v. Sweasy*, 4 Humph. (Tenn.) 449; *Stot-hard v. Aull*, 7 Mo. 318.

He might testify as to his understanding of the terms of a contract negotiated by him for his principal. *Linsley v. Lovely*, 26 Vt. 123.

A broker who had effected a policy was a competent witness to prove all matters connected with it, notwithstanding he had a lien on it for his premiums. *Hunter v. Leathley*, 10 B. & C. 858; 21 E. C. L. 184.

An agent who sold goods, receiving as commissions all he could get above a certain price, was competent to prove the contract of sale. *Benjamin v. Porteus*, 2 H. Bl. 590; *Caune v. Sagory*, 4 Martin (La.) 81.

An attorney was competent to prove the delivery of an execution and instructions to an officer in due time and manner to bind him. *Phillips v. Bridge*, 11 Mass. 242.

So, also, an agent was competent to prove the existence, loss, and contents of a written power to himself. *Grayson v. Bannon*, 8 Watts (Pa.) 524; *Kirkpatrick v. Cisna*, 3 Bibb (Ky.) 244; *Connelly v. Chiles*, 2 A. K. Marsh. (Ky.) 242.

The early case of *Nicholson v. Mifflin*, 2 Dall. (Pa.) 246, in which the supreme court of *Pennsylvania* held that the contents of the writing must be proved by other witnesses, was not followed by that court in subsequent decisions. See *Grayson v. Bannon*, 8 Watts (Pa.) 524.

But he could not testify to the contents of a written appointment, unless it was lost or destroyed. *Kennebec Purchase v. Call*, 1 Mass. 483. See also *Caldwell v. Wentworth*, 16 N. H. 318.

One who had sold goods on a *del credere* commission was not competent for his principal in an action for the purchase price. *New York Slate Co. v. Osgood*, 11 Mass. 60.

1. *Edmonds v. Lowe*, 8 B. & C. 407;

Upon the same ground of necessity a servant was a competent witness for or against his master, unless the cause of action resulted from his own negligence or misconduct.¹ So, also, the master was a competent witness for his servant, notwithstanding his interest in the services of the latter; such interest going only to the credibility of the witness and not to his competency.²

(b) *When Liable to One of the Parties.*—In an action against a master or principal to recover damages resulting from the alleged misconduct of the servant or agent of the defendant, such servant or agent was not, at common law, competent for the defendant, because if the plaintiff recovered the defendant might bring an action against the witness to recover the damages and costs which he was obliged to pay to the party injured, and in such action the record in the former suit would be admissible in evidence for the purpose of showing the *quantum* of damages sustained by the master or principal, after the fact of the misconduct had been

15 E. C. L. 250, per Lord Tenterden; *Runyon v. Farmers, etc.*, Bank, 4 N. J. Eq. 482. See also *Kerr v. Cotton*, 23 Tex. 411; *Montgomery v. Evans*, 8 Ga. 178.

1. *Moses v. Boston, etc., R. Co.*, 24 N. H. 72; 55 Am. Dec. 222; *Alexander v. Emerson*, 2 Litt. (Ky.) 25; *Kentucky Bank v. M'Williams*, 2 J. J. Marsh. (Ky.) 261; *Bentley v. Bustard*, 16 B. Mon. (Ky.) 643; 63 Am. Dec. 561; *Burd v. Ross*, 15 Mo. 254; *Noble v. Paddock*, 19 Wend. (N. Y.) 456; *Barnes v. Cole*, 21 Wend. (N. Y.) 188; *Dudley v. Bolles*, 24 Wend. (N. Y.) 465; *Carter v. Pinchbeck*, 7 Rich. (S. Car.) 356; *Wilmarth v. Mountford*, 8 S. & R. (Pa.) 124; *Moore v. Shenk*, 3 Pa. St. 13; 45 Am. Dec. 618; *Jones v. Lowell*, 35 Me. 538; *Johnson v. Lightsey*, 34 Ala. 169; 73 Am. Dec. 450.

The fact that a clerk received as wages a certain percentage of the profits of sales made by him, did not disqualify him as a witness for his employer. *Wright v. Rogers*, 18 La. Ann. 671; *Diggs v. Kirkland*, 8 La. Ann. 310; *Campbell v. Thompson*, 16 Me. 117; *Roberts v. Totten*, 13 Ark. 609.

2. In *State v. Aaron*, 4 N. J. L. 263; 7 Am. Dec. 592, which was a trial for murder, it appeared that the defendant was a black boy and that, according to an act for the gradual abolition of slavery, he was to remain the servant of the owner of his mother, she being a slave, and the executors, administrators, and assigns of such owner, in the same manner as if he had been bound to service by the trustees or overseers

of the poor, until he reached the age of twenty-five years. At the trial he offered his master as a witness, and the trial judge rejected him on the ground that he was disqualified by reason of interest. For this error the judgment of conviction was reversed. *Kirkpatrick, C. J.*, said: "As to the competency of Levi Solomon as a witness, little need be said. It is merely the case of master and servant, and is no way varied by the circumstance of the boy's being black and the master white. He is, by the words of the act, put in the situation of an indentured servant, and although this relation has existed from the earliest ages, no case has been produced, and, I am bold to affirm, no case can be produced, where that relation alone has been adjudged to create such an interest as to exclude the master from being a witness for the servant. If such a principle were once admitted, it would extend itself to all the relations in life; it would exclude the father from being a witness for his son, for he is entitled to his services, and the son from being a witness for the father, for he is entitled to receive from him his maintenance. It would even exclude the creditor in the case of his debtor, and the debtor in the case of his creditor, for it is easy to see that they may be mutually dependent upon the personal exertions of one another for their rights and for their support. But these interests, however they may weigh upon the human mind, have never been considered as direct and positive, going to the

proved by other evidence.¹ So, also, in an action to recover damages done to property of the plaintiff when it was in the possession of his servant or agent, such servant or agent was not, unless released from liability, competent for the plaintiff, because if he obtained a verdict the witness was placed in a state of security from liability.²

competency of witnesses, but rather as collateral and remote, going to the credibility only."

1. *Green v. New River Co.*, 4 T. R. 589; *Flanagan v. Drake*, 2 Fox & Smith 200; *Hawkins v. Finlayson*, 3 C. & P. 305; 14 E. C. L. 319; *Whitamore v. Waterhouse*, 4 C. & P. 383; 19 E. C. L. 432; *Gevers v. Mainwaring*, Holt 139; *Field v. Mitchell*, 6 Esp. 71; *Powell v. Hord*, 2 Ld. Raym. 1411; 1 Stra. 650; *Whitehouse v. Atkinson*, 3 C. & P. 344; 14 E. C. L. 339; *Harrington v. Caswell*, 6 C. & P. 352; 25 E. C. L. 434; *The Hope*, 2 Gall. (U. S.) 48; *Harris v. Paynes*, 5 Litt. (Ky.) 105; *Lexington, etc., R. Co. v. Kidd*, 7 Dana (Ky.) 245; *Finn v. Vallejo Street Wharf Co.*, 7 Cal. 253; *Charleston Gas Light Co. v. City Council*, 9 Rich. (S. Car.) 342.

The engineer in charge of a train when the wrong complained of was done, was not a competent witness for the railroad company, unless released from liability. *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186; *Chicago, etc., R. Co. v. Hutchins*, 34 Ill. 108; *Horne v. Memphis, etc., R. Co.*, 1 Coldw. (Tenn.) 72; *Memphis, etc., R. Co. v. Tugwell*, 1 Coldw. (Tenn.) 91. And the same is true of the master of a boat. *Schuylkill Nav. Co. v. Harris*, 5 W. & S. (Pa.) 28; *Humphreys v. Reed*, 6 Whart. (Pa.) 444; *Arnold v. Anderson*, 2 Yeates (Pa.) 93; *Galloway v. Morris*, 3 Yeates (Pa.) 445; *Newbold v. Wilkins*, 1 Harr. (Del.) 43; *The William Harris, Ware* (U. S.) 367. And, also, of a pilot in charge of a boat when the injury occurred. *Hawkins v. Finlayson*, 3 C. & P. 305; 14 E. C. L. 319; *Plumer v. Alexander*, 12 Pa. St. 81.

But the pilot was competent, unless his was the act of negligence complained of. *Johnson v. Lightsey*, 34 Ala. 169; 73 Am. Dec. 450; *Bentley v. Bustard*, 16 B. Mon. (Ky.) 697; 63 Am. Dec. 561.

In an action against a railroad company for damages resulting from the washing out of a culvert, the engi-

neer who planned it and superintended the erection of it, was not competent for the company until released. *Galena, etc., R. Co. v. Welch*, 24 Ill. 31.

A deputy was not competent for the sheriff where the alleged cause of action was the negligence of the deputy. *Dorrance v. Com.*, 13 Pa. St. 160.

In order to exclude a witness, the record must have been evidence for or against him directly. Thus, in an action against a sheriff for the misconduct of an assistant of his deputy, it was objected that the assistant was incompetent on the ground that the record would be evidence against the deputy, and that the record in an action against the deputy would be evidence against the assistant. But Lord Tenterden held that the interest was too remote to render the witness incompetent. *Clark v. Lucas, Ry. & M. N. P. C.* 32.

An agent who had lost his principal's money at gaming was not competent for the principal in an action against the winners to recover it back. *Allen v. Lacy, Dudley* (Ga.) 81; *Jones v. McRay*, 6 Jones (N. Car.) 192.

A release from liability to the master or principal, of course restored the competency of the witness. *Downes v. Davis*, 19 Pick. (Mass.) 72.

The rule did not apply if the servant was in the presence of his master and was acting in obedience to his orders in doing the act complained of. *Barnes v. Cole*, 21 Wend. (N. Y.) 188; *Noble v. Paddock*, 19 Wend. (N. Y.) 456.

In order to exclude the witness on this ground, it should be made to appear affirmatively that he had rendered himself liable to the party calling him. *Juniata Bank v. Beale*, 1 W. & S. (Pa.) 227; *Ashe v. Murchison*, 8 Ired. (N. Car.) 215.

2. *Kerrison v. Coatsworth*, 1 C. & P. 511; *Miller v. Falconer*, 1 Campb. 251; *Morish v. Foote*, 8 Taunt. 434; 2 Moore 508; *Rotheroe v. Elton*, Peake 84; *Wake v. Lock*, 5 C. & P. 454; 24 E. C. L. 402; *Sherman v. Barnes*, 1 M. & Rob. N. P. C. 69; *Boorman v. Brown*, 9 Ad. & El. 487; 36 E. C. L. 173; *Otis*

(7) *Bail and Surety*.—One who was bail for a defendant was not, at common law, a competent witness for him, for his liability on the bail bond depended directly upon the event of the suit;¹ and a surety was not competent for his principal where his testimony would tend to diminish or extinguish his liability on the contract of suretyship.² The rule applied to sureties in replevin

v. Thom, 23 Ala. 469; 58 Am. Dec. 303; *Littlefield v. Portland*, 26 Me. 39; *Middlekauff v. Smith*, 1 Md. 341; *McClure v. Whitesides*, 2 Ind. 573; *Christy v. Smith*, 23 Vt. 663.

But in *New York*, the court refused to follow this rule and admitted the plaintiff's servant on the ground that a recovery against the defendant would be no bar to an action against the servant. *Dudley v. Bolles*, 24 Wend. (N. Y.) 467.

The servant of the defendant was competent for the plaintiff to prove that he did the act complained of by the direction of the defendant; the witness and the defendant being joint trespassers, a recovery against the defendant was no bar to a suit against the witness. *Jones v. Lowell*, 35 Me. 538; *The General Worth v. Hopkins*, 30 Miss. 703.

1. *Lacon v. Higgins*, 3 Stark. 178; *Carter v. Pearce*, 1 T. R. 164, per Bul-ler, J.; *Hawkins v. Inwood*, 4 C. & P. 148; 19 E. C. L. 315; *Piesly v. Von Esch*, 2 Esp. 605; *Niles v. Brackett*, 15 Mass. 378; *Chapel v. White*, 3 Cush. (Mass.) 537; *Gray v. Young, Harp.* (S. Car.) 38; *Cates v. Noble*, 33 Me. 258; *Browning v. Cooper*, 18 N. J. L. 196.

Neither was the wife of the bail competent for the party for whom her husband had given bond. *Cornish v. Pugh*, 8 D. & R. 65; 16 E. C. L. 335; *Leggett v. Boyd*, 3 Wend. (N. Y.) 376.

Where a witness to an assignment had become incompetent to give evidence in consequence of his becoming special bail for the defendant in the action, the court permitted his handwriting to be proved. *Bell v. Cowgell*, 1 Ashm. (Pa.) 7.

But where the condition of the bond was simply for the appearance of the defendant and not to perform or endure the sentence of the court, the sureties were not disqualified as witnesses. *Andrews v. State*, 4 Wis. 385.

One who had given a bond of indemnity against costs was not a competent witness for the party protected by the bond. *Butler v. Warren*, 11 Johns. (N. Y.) 57.

2. *State Bank v. Littlejohn*, 2 Dev. (N. Car.) 381; *Reigert v. Hix*, 14 S. & R. (Pa.) 134; *Shelby v. Smith*, 2 A. K. Marsh. (Ky.) 504; *Paine v. Hussey*, 17 Me. 274. Compare *Fairfax v. Fairfax*, 2 Cranch (C. C.) 25; *Thompson v. Carbery*, 2 Cranch (C. C.) 35; *Craig v. Reintzel*, 2 Cranch (C. C.) 128.

A party who had given security for costs could not, by taking the pauper's oath, have his security discharged for the purpose of examining him as a witness. *Black v. Crain*, 10 Yerg. (Tenn.) 516.

The security was competent when called to testify against interest. *Molyneux v. Collier*, 13 Ga. 406.

Guarantor.—The guarantor was competent for the obligors in a bond, because if the plaintiff were defeated the guarantor would not be relieved of his obligation. *Caldwell v. McCortney*, 2 Gratt. (Va.) 187; *Mayo v. Avery*, 18 Cal. 309. Compare *Gilliam v. Henneberry*, 6 Jones (N. Car.) 224.

But a guarantor of the solvency of the maker of a note was not competent to prove a want of consideration therefor. *Hanna v. Spencer*, 3 Ind. 351.

Neither was he competent to prove a partial failure of consideration, or a want of consideration, as he was interested in diminishing the amount due. *Paine v. Hussey*, 17 Me. 274; *Hanna v. Spencer*, 3 Ind. 351.

A surety was competent for his principal where the issue on trial did not involve his own liability. *Covington, etc., R. Co. v. Ingles*, 15 B. Mon. (Ky.) 637; *Townshend v. Townshend*, 6 Md. 295; *Hill v. Hill*, 32 Pa. St. 511; *Atwood v. Wright*, 29 Ala. 346.

Usury.—And in an action upon a promissory note between the original parties thereto, a surety has been held competent to prove usury in the contract. *Webb v. Wilshire*, 19 Me. 406; *Nichols v. Bellows*, 22 Vt. 581; 54 Am. Dec. 85; *Phillips v. Caldwell*, 2 Rich. (S. Car.) 1.

Sureties in a forthcoming bond, who were without further interest than an obligation to deliver the property, were competent to testify as to other matters

bonds,¹ attachment bonds,² administration bonds,³ and injunction bonds.⁴ Neither was the surety a competent witness for his co-surety without a release from liability to contribute,⁵ but a party might avail himself of the testimony of his bail or surety on a bond by substituting and qualifying another in his place and

in the case. *Greene v. Tims*, 16 Ala. 541; *Bates v. Steamboat Madison*, 18 Mo. 99; *Steamboat Madison v. Wells*, 14 Mo. 360. See also *Planters', etc., Bank v. Willis*, 5 Ala. 770.

1. *Bailey v. Bailey*, 1 Bing. 92; 8 E. C. L. 418; 7 Moo. 439; *Sanderson v. Marks*, 1 Har. & G. (Md.) 252; *Morton v. Beall*, 2 Har. & G. (Md.) 136; *Wallace v. Twyman*, 3 J. J. Marsh. (Ky.) 457; *Dannels v. Fitch*, 8 Pa. St. 495.

In *Cook v. Lyon*, 10 Iowa 434, the common-law rule was recognized by the court, but the law had been changed by statute.

Where several actions of replevin were tried together before the same jury, a surety in one of the replevin bonds was competent to testify in the cases in which he was not interested in the same manner as if the actions had been tried separately. *Kimball v. Thompson*, 4 Cush. (Mass.) 441; 50 Am. Dec. 799.

After judgment against a surety in a replevin bond, he was a competent witness in an action against the sheriff for taking insufficient sureties. *Myers v. Clark*, 3 W. & S. (Pa.) 535.

It was not a valid objection to the competency of a witness that he was a surety on the bond of a third person, who had replevied from an officer property which he had taken in execution or attachment against the defendant. *Johnson v. Whidden*, 32 Me. 230. Compare *Poe v. Dorrah*, 20 Ala. 288; 56 Am. Dec. 196.

2. *Stowe v. Sewall*, 3 Stew. & P. (Ala.) 67; *Miller v. Henshaw*, 4 Dana (Ky.) 325.

And a surety in a bond to release an attachment was not competent for the defendant. *Rucker v. Pritchett*, 3 Bush (Ky.) 689.

A surety in an attachment bond was competent for his principal in a suit against him to enjoin the attachment proceedings, as the decree could not affect his liability on the bond one way or the other. *Atkins v. Guice*, 21 Ark. 164.

He was, also, competent on the trial

of an issue taken on the answer of the garnishee in the attachment proceedings. *Peters v. Moss*, 1 Smed. & M. (Miss.) 331.

3. *Owens v. Collinson*, 3 Gill & J. (Md.) 25; *Bean v. Jenkins*, 1 Har. & J. (Md.) 135; *Mitchell v. Mitchell*, 11 Gill & J. (Md.) 388; *McCreeliss v. Hinkle*, 17 Ala. 459; *Henderson v. Simmons*, 33 Ala. 291; 70 Am. Dec. 590.

It was otherwise where the cause of action was of such a nature as would not render his surety liable on the bond. *Ferguson v. Cappeau*, 6 Har. & J. (Md.) 394; *Mitchell v. Mitchell*, 1 Gill (Md.) 66; *Blood v. Hayman*, 13 Met. (Mass.) 231; *Kaywood v. Barnett*, 3 Dev. & B. (N. Car.) 91; *Reeme v. Parthemere*, 8 Pa. St. 460; *Anderson v. Smoot*, 2 Rich. Eq. (S. Car.) 285; *Carter v. Pearce*, 1 T. R. 163.

4. *Wickliffe v. Mosely*, 4 J. J. Marsh. (Ky.) 172.

5. *Low v. Smart*, 5 N. H. 353; *Keer v. Clark*, 11 Humph. (Tenn.) 77.

A surety who was released from liability to contribute was a competent witness for his co-surety. *Jones v. Letcher*, 13 B. Mon. (Ky.) 363.

But in *Benedict v. Hecox*, 18 Wend. (N. Y.) 496, it was held by a majority of the court that, where payment had been enforced from one of the sureties, a co-surety was competent for him in an action against the principal debtor to recover the amount so paid. See also *Governor of Virginia v. Evans*, 1 Cranch (C. C.) 581.

And a surety who was not a party to a suit was a competent witness against his co-surety. *Craig v. Callaway County Ct.*, 12 Mo. 94; *Leech v. Kennedy*, 3 Strobb. (S. Car.) 488. But he was not competent against his co-surety upon an issue of *non est factum*, as it was to his interest that the co-surety should share the liability with himself. *Rowe v. Ware*, 30 Ga. 278; *Whately v. Johnson*, 1 Stew. (Ala.) 498. See also *Hale v. Wetmore*, 4 Ohio St. 600.

In *Greely v. Dow*, 2 Met. (Mass.) 176, it was held that a surety was competent for his co-surety to prove a discharge by the plaintiff.

obtaining an order of court discharging the former from liability,¹ or by depositing in court a sufficient sum of money to meet the obligation of the undertaking.²

(8) *Principal Obligors*.—The principal obligor in a bond was not a competent witness for his surety in a separate action against the latter, for if the judgment went against the surety, the principal's liability would be increased to the extent of the costs of the suit.³ But he might testify for his surety after being released from his liability to pay costs, as his interest was then

1. *Whitley v. Fearnly*, 2 Chitty Rep. 103; *Bailey v. Bailey*, 1 Bing. 92; 8 E. C. L. 418; *Leggett v. Boyd*, 3 Wend. (N. Y.) 376; *Irwin v. Caryell*, 8 Johns. (N. Y.) 407; *Comstock v. Pale*, 3 Rob. (La.) 440; *Craighead v. State Bank*, Meigs (Tenn.) 199; *Ross v. Blair*, Meigs (Tenn.) 525; *Moore v. McKie*, 5 Smed. & M. (Miss.) 238; *Taylor v. Branch Bank*, 14 Ala. 633; *Rucker v. Pritchett*, 3 Bush (Ky.) 689.

But in *Gray v. Young*, Harp. (S. Car.) 38, the court thought it had no power to discharge the bail by the substitution of another in order to render him competent.

So, upon appeal from an inferior court, if the appellant wished to examine his surety on the appeal bond, another surety might be substituted. *Salmon v. Rance*, 3 S. & R. (Pa.) 311; *Tompkins v. Curtis*, 3 Cow. (N. Y.) 251; *M'Culloch v. Tyson*, 2 Hawks (N. Car.) 336.

An undertaking of a surety for costs might be stricken out and a new surety substituted, in order to render the first one competent. *Stimmel v. Underwood*, 3 Gill & J. (Md.) 282. And so of one who had indorsed the writ and thereby become liable for the costs, *Roberts v. Adams*, 9 Me. 9; and an attorney for a non-resident plaintiff, who was liable for costs through his client's failure to file a bond, might be released from his liability by the filing of a sufficient bond and thus become a competent witness. *Brandigee v. Hale*, 13 Johns. (N. Y.) 125.

2. *Pearcy v. Fleming*, 5 C. & P. 503; 24 E. C. L. 429; *Bailey v. Hole*, 3 C. & P. 560; 14 E. C. L. 449; *Mo. & Ma. N. P. C.* 289; *Hall v. Baylies*, 15 Pick. (Mass.) 51; *Cooper v. Bakeman*, 33 Me. 376. Compare *Allen v. Hawks*, 13 Pick. (Mass.) 79; *Beckley v. Freeman*, 15 Pick. (Mass.) 468.

3. *Riddle v. Moss*, 7 Cranch (U. S.) 206; *Hunter v. Gatewood*, 5 T. B. Mon.

(Ky.) 269; *Kelly v. Lank*, 7 B. Mon. (Ky.) 226; *Jones v. Raine*, 4 Rand. (Va.) 386; *Douglass v. Owens*, 5 Rich. (S. Car.) 149; *Cleveland v. Covington*, 3 Strobb. (S. Car.) 184; *Cantey v. Blair*, 1 Rich. Eq. (S. Car.) 41; 2 Rich. Eq. (S. Car.) 46; *Vandiver v. Glaspy*, 7 Rich. (S. Car.) 14; *Com. v. McKee*, 2 Grant's Case (Pa.) 27; *Marshall v. Franklin Bank*, 25 Pa. St. 384; *Morrison v. Hartman*, 14 Pa. St. 55; *Hurst v. Word*, 3 Head (Tenn.) 564; *Rackley v. Sanders*, 1 Ga. 258; *Richards v. Griffin*, 5 Ala. 195; *Garrett v. Holloway*, 24 Ala. 376; *Moffitt v. Gaines*, 1 Ired. (N. Car.) 158; *Jordan v. Trumbo*, 6 Gill & J. (Md.) 103; *Crowell v. Western Reserve Bank*, 3 Ohio St. 406.

Neither was the wife of the principal obligor competent for the surety. *Vandiver v. Glaspy*, 7 Rich. (S. Car.) 14.

A principal who had suffered a default, and against whom a separate judgment had been entered, was competent for his surety upon an issue joined between him and the plaintiff. *Preble County Bank v. Russell*, 1 Ohio St. 313; *Simpson v. Bovard*, 74 Pa. St. 351.

Where the contract upon which the sureties were sued had been rescinded by the principal, on account of fraud, he was competent for the defense, as he could not be made liable for the costs. *Hazard v. Irwin*, 18 Pick. (Mass.) 95.

And in an action by a surety, against a co-surety, for contribution, the principal debtor was competent, not being liable for costs. *Leavenworth v. Pope*, 6 Pick. (Mass.) 419; *Hunt v. Chambliss*, 7 Smed. & M. (Miss.) 532.

In an action against an officer, for a failure to return an execution issued on a replevin bond, an obligor in the bond was competent to prove that it had not been legally acknowledged. *Williams v. Hall*, 2 Dana (Ky.) 97.

balanced between the parties.¹ And where the surety filed a bill in equity to be relieved from his obligation on account of indulgences extended to the principal, the latter was competent because he was not liable for the costs of the suit in equity.² In a separate action against the surety the principal was competent for the plaintiff. In such case, his testimony tended to increase his liability to the extent of the costs of the action.³ In an action against an obligor, a co-obligor not sued was competent for the defense if he had no interest in the event of the suit;⁴ and he was also competent for the plaintiff,⁵ unless the defendant sought to escape liability by a defense which was not available to the witness.⁶

(9) *Parties to Negotiable Instruments*.—It was held by Lord Mansfield that a person who had signed a negotiable instrument, thereby giving it credit and circulation, should not be permitted to give testimony impeaching its validity after it had passed into the hands of an innocent holder.⁷ This rule was adopted in a number of jurisdictions in the *United States*,⁸ with the qualification that it applied only to parties to negotiable instruments,

1. *Moffitt v. Gaines*, 1 Ired. (N. Car.) 158; *Miller v. Stem*, 12 Pa. St. 383; *Pogue v. Joyner*, 7 Ark. 462; *Holland v. Chambers*, 22 Ga. 193; *Field v. Davidson*, 9 B. Mon. (Ky.) 77. *Compare* *U. S. v. Leffler*, 11 Pet. (U. S.) 86; *Ligon v. Dunn*, 6 Ired. (N. Car.) 133; *Cameron v. Paul*, 6 Pa. St. 322.

2. *Reid v. Watts*, 4 J. J. Marsh. (Ky.) 440; *Bartlow v. Boude*, 3 Dana (Ky.) 591; *Gass v. Stinson*, 2 Sumn. (U. S.) 453; *Kennedy v. Evans*, 31 Ill. 258; *Armistead v. Ward*, 2 Patt. & H. (Va.) 504.

But in *Cannon v. Jones*, 4 Hawks (N. Car.) 368, it appeared that the obligee had already obtained his judgment at law, and the surety then brought his bill to be relieved against the judgment. It was held that the principal was not competent for him, as, in that case, he was liable for the costs of the suit in equity.

3. *Buckingham v. Clary*, 4 Gill (Md.) 223; *Morse v. Green*, 13 N. H. 32; *Lockart v. Graham*, 1 Stra. 35. *Compare* *Gayle v. Bishop*, 14 Ala. 552.

4. *Long v. Ray*, 1 Dana (Ky.) 430; *Lovett v. Adams*, 3 Wend. (N. Y.) 380; *Ely v. Hager*, 3 Pa. St. 154. *Contra*, *Callaway County Ct. v. Craig*, 9 Mo. 846.

5. *Williams v. Cummins*, 6 T. B. Mon. (Ky.) 157; *Hopkinson v. Steel*, 12 Vt. 582.

But he was not competent to prove that the consideration was for the ex-

clusive benefit of the defendant, and a release from the plaintiff would not render him competent, as his liability to the defendant still remained. *Huff v. Freeman*, 15 La. Ann. 240.

6. *Whatley v. Johnson*, 1 Stew. (Ala.) 498; *Rowe v. Ware*, 30 Ga. 278.

7. *Walton v. Shelley*, 1 T. R. 300. *Compare* *Buckland v. Tankard*, 5 T. R. 578, wherein Lord Kenyon expressed his disapproval of the rule.

8. *U. S. Bank v. Dunn*, 6 Pet. (U. S.) 51; *Bank of the Metropolis v. Jones*, 8 Pet. (U. S.) 12; *Henderson v. Anderson*, 3 How. (U. S.) 73; *Smyth v. Strader*, 4 How. (U. S.) 404; *Saltmarsh v. Tuthill*, 13 How. (U. S.) 229; *Sweeney v. Easter*, 1 Wall. (U. S.) 173; *Nichols v. Wright*, 4 Cranch (C. C.) 700; *Warren v. Merry*, 3 Mass. 27; *Parker v. Lovejoy*, 3 Mass. 565; *Butler v. Damon*, 15 Mass. 225; *Churchill v. Suter*, 4 Mass. 156; *Widgery v. Munroe*, 6 Mass. 449; *Manning v. Wheatland*, 10 Mass. 502; *Knights v. Putnam*, 3 Pick. (Mass.) 184; *Clapp v. Hanson*, 15 Me. 345; *Goodwin v. Chadwick*, 35 Me. 194; *Lincoln v. Fitch*, 42 Me. 456; *Griffith v. Reford*, 1 Rawle (Pa.) 196; *Stroh v. Hess*, 1 W. & S. (Pa.) 147; *Montgomery Bank v. Walker*, 9 S. & R. (Pa.) 236; 11 Am. Dec. 709; *Harrisburg Bank v. Forster*, 8 Watts (Pa.) 304; *Harding v. Mott*, 20 Pa. St. 469; *Thompson v. Gettysburg Bank*, 3 Grant's Cas. (Pa.) 119; *Treon v. Brown*, 14 Ohio 482; *Walters v.*

which had actually been negotiated before maturity, in the ordinary course of trade, and had passed into the hands of *bona fide* holders,¹ and to matters only which tended to destroy the validity of an instrument at the time of its execution, thus not precluding the witness from testifying to subsequent matters which

Smith, 23 Ill. 342; *Walters v. Witherell*, 43 Ill. 388; *Dewey v. Warriner*, 71 Ill. 198; 22 Am. Rep. 91.

In a suit between the original parties to a negotiable instrument, the surety not sued was competent to prove usury. In such case, the instrument had not been given currency by indorsement, and the above rule did not apply. *Fox v. Whitney*, 16 Mass. 118.

So, also, in an action against an accommodation indorser, by one who had discounted the note, the maker, being released by the defendant, might prove usury, as the plaintiff had not taken the instrument as an indorsee in the ordinary course of business, but was a lender and a party to the usurious contract. *Van Schaack v. Stafford*, 12 Pick. (Mass.) 565; *Bubier v. Pulsifer*, 4 Gray (Mass.) 592; *Little v. Rogers*, 1 Met. (Mass.) 108. But in a similar case in *Maine*, the witness was held incompetent under the rule. *Chandler v. Morton*, 5 Me. 374.

In an action by an indorser against the promisor, one who signed as agent for the promisor was not competent to prove usury. *Packard v. Richardson*, 17 Mass. 126; 9 Am. Dec. 123. But it was otherwise if the witness acted as agent for the indorser. *Webster v. Vickers*, 3 Ill. 295.

1. U. S. *v. Leffler*, 11 Pet. (U. S.) 86; *Brown v. Babcock*, 3 Mass. 29; *Hill v. Payson*, 3 Mass. 559; *Worcester v. Eaton*, 11 Mass. 368; *Loker v. Haynes*, 11 Mass. 408; *Hudson v. Hulbert*, 15 Pick. (Mass.) 426; *Hartford Bank v. Barry*, 17 Mass. 94; *Hepburn v. Cassel*, 6 S. & R. (Pa.) 113; *Baird v. Cochran*, 4 S. & R. (Pa.) 397; *Pleasants v. Pemberton*, 2 Dall. (Pa.) 196; *McFerran v. Powers*, 1 S. & R. (Pa.) 102; *Baring v. Shippen*, 2 Binn. (Pa.) 154; *Parke v. Smith*, 4 W. & S. (Pa.) 287; *Topping v. Van Pelt*, Hoffm. Ch. (N. Y.) 545; *Rohrer v. Morningstar*, 18 Ohio 579. See also the opinion of Buller, J., in *Bent v. Baker*, 3 T. R. 35.

The rule did not apply where the note or bill was not sued on. Thus, in an action to recover from a prior indorser the amount advanced to take up

the bill, the drawer and acceptor might prove that the bill was indorsed for the accommodation of the party who made the advance. *Wright v. Truefitt*, 9 Pa. St. 507. But in *Deering v. Sawtel*, 4 Me. 191, it was held that the rule applied even where the validity of the instrument came collaterally in question.

The rule excluded only those whose names were on the instrument. Therefore, a former owner of a coupon payable to bearer was competent to impeach it in the hands of the holder. *Columbia Coal, etc., Co. v. Fox*, 33 Pa. St. 239.

A party to a non-negotiable instrument was competent to prove it void. *Williams v. Miller*, 10 Smed. & M. (Miss.) 139.

But in a few cases, it was held that the assignor of a bond was not competent to prove any fact which would render the security invalid at the time of its assignment. *Gillian v. Clay*, 3 Leigh (Va.) 590; *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Canty v. Sumter*, 2 Bay (S. Car.) 93.

In an action by an indorsee against the maker of a promissory note, which was indorsed after it was due and dishonored, the indorser was competent to prove that it was paid before indorsed. *Thayer v. Crossman*, 1 Met. (Mass.) 416; *American Bank v. Jenness*, 2 Met. (Mass.) 288; *Newell v. Holton*, 10 Gray (Mass.) 349; *Adams v. Carver*, 6 Me. 390. Thus, where a promissory note was indorsed on the last day of grace, it was held that it was dishonored and the maker was competent to impeach it. *Pine v. Smith*, 11 Gray (Mass.) 38.

The payee in a negotiable instrument was competent to impeach the consideration so long as the legal title to the same remained in him. *Watts v. Smith*, 24 Miss. 77.

A person to whom a bill of exchange had been indorsed as agent for the payee for collection, and who had indorsed it to another in trust for the payee, was competent for the drawer in an action against him to collect the bill. *Barker v. Prentiss*, 6 Mass. 430.

might defeat the holder, unless he was disqualified on account of interest.¹ This rule, however, was quickly repudiated by the English courts, and it was laid down as a general rule that payees and indorsers of negotiable instruments might be admitted to prove them voidable or void *ab initio*, unless the witnesses were disqualified for some other reason.² The weight of authority in the *United States* is in support of this latter rule.³

In a contest between the holder and the maker or drawer of a negotiable instrument, an indorser who stood indifferent between the parties was competent to prove any fact which did not show the instrument void in its inception.⁴ But where the genuineness of the instrument was in question, he was not a competent

1. *Frazer v. Carpenter*, 2 McLean (U. S.) 235; *Davis v. Brown*, 94 U. S. 425; *Appleton v. Donaldson*, 3 Pa. St. 385; *Wilt v. Snyder*, 17 Pa. St. 77; *Guliford v. Skinner*, 9 Pa. St. 334; *Maynard v. Nekervis*, 9 Pa. St. 81; *Pennypacker v. Umberger*, 22 Pa. St. 492; *Skilding v. Warren*, 15 Johns. (N. Y.) 270; *Buck v. Appleton*, 14 Me. 284; *Davis v. Sawtelle*, 30 Me. 389; *Wendell v. George*, R. M. Charlt. (Ga.) 51; *Barker v. Prentiss*, 6 Mass. 430; *Crayton v. Collins*, 2 McCord (S. Car.) 457.

2. *Jordaine v. Lashbrooke*, 7 T. R. 598, *overruling* *Walton v. Shelley*, 1 T. R. 296.

3. *Townsend v. Bush*, 1 Conn. 260; *Johnson v. Blackman*, 11 Conn. 342; *Tucker v. Wilamouicz*, 8 Ark. 157; *Slack v. Moss*, *Dudley* (Ga.) 161; *Winkler v. Scudder*, 1 Ga. 108; *Ringgold v. Tyson*, 3 Har. & J. (Md.) 176; *Hunt v. Edwards*, 4 Har. & J. (Md.) 283; *Freeman v. Brittin*, 17 N. J. L. 191; *Heath v. Everson*, 17 N. J. L. 245; *Rosevelt v. Gardner*, 3 N. J. L. 358; *Guy v. Hall*, 3 Murphy (N. Car.) 150; *Stump v. Napier*, 2 Yerg. (Tenn.) 35; *Taylor v. Beck*, 3 Rand. (Va.) 316; *State Bank v. Hull*, 7 Mo. 273; *Nichols v. Holgate*, 2 Aik. (Vt.) 138 (*criticised* in *Chandler v. Mason*, 2 Vt. 198); *Farrar v. Metts*, 12 Rich. (S. Car.) 667; *Knight v. Packard*, 3 McCord (S. Car.) 71 (where it is said that the case of *Canty v. Sumter*, 2 Bay (S. Car.) 93, was not correctly reported). See also *Gorham v. Carroll*, 3 Litt. (Ky.) 221.

In *Alabama*, the court apparently adopted the rule laid down by Lord Mansfield in the case of *Ross v. Wells*, 1 Stew. (Ala.) 139, but, in subsequent cases, the later English rule was followed. *Todd v. Stafford*, 1 Stew. (Ala.) 199; *Griffing v. Harris*, 9 Port.

(Ala.) 225; *Adams v. Moore*, 9 Port. (Ala.) 406.

And in *New Hampshire*, the court first followed the rule of *Walton v. Shelley*, 1 T. R. 300, in *Houghton v. Page*, 1 N. H. 60, and it was subsequently recognized as law in *Bryant v. Ritterbush*, 2 N. H. 212; *Carleton v. Whitcher*, 5 N. H. 196; *Odiorne v. Howard*, 10 N. H. 343. But in *Haines v. Dennett*, 11 N. H. 180, the court, after careful consideration of the question upon principle and authority, overruled these former decisions and adopted the rule of *Jordaine v. Lashbrooke*, 7 T. R. 597.

So, also, in *New York*, the rule of *Walton v. Shelley*, 1 T. R. 300, was adopted in some early cases. *Winton v. Saidler*, 3 Johns. Cas. (N. Y.) 185; *Coleman v. Wise*, 2 Johns. (N. Y.) 165; *Mann v. Swann*, 14 Johns. (N. Y.) 270. But these cases were overruled, and the rule of *Jordaine v. Lashbrooke*, 7 T. R. 597, was adopted as the law of that state. *Stafford v. Rice*, 5 Cow. (N. Y.) 23; *Utica Bank v. Hillard*, 5 Cow. (N. Y.) 153; *Williams v. Walbridge*, 3 Wend. (N. Y.) 415. Compare *Tuthill v. Davis*, 20 Johns. (N. Y.) 285; *Myers v. Palmer*, 18 Johns. (N. Y.) 167; *Truscott v. Davis*, 4 Barb. (N. Y.) 495; *Auburn Bank v. Walter*, 23 Barb. (N. Y.) 441.

An indorser might be a witness for the holder if he had no interest in the event of the suit. *Abbott v. Mitchell*, 18 Me. 354; *Berry v. Hall*, 33 Me. 493; *Miley v. Todd*, 17 Pa. St. 103. See also *Cockrill v. Hobson*, 16 Ala. 391.

4. *Birt v. Kershaw*, 2 East 458; *Isbell v. Brown*, 13 Ala. 383; *Tomlinson v. Spencer*, 5 Cal. 291; *Bryant v. Watriss*, 13 Cal. 85; *Smith v. Richmond*, 19 Cal. 476; *Priest v. Bounds*, 25 Cal. 188; *Curtis v. Marrs*, 29 Ill. 508; *Buck v.*

witness;¹ and where he was interested in securing or preventing a recovery, he was incompetent.² A maker of a note who was not sued was not competent for his co-maker, unless he was released from his liability to contribute.³ Neither was one joint maker competent against another to prove their joint liability, because it was to his interest to compel the defendant to share the liability.⁴

In an action by the holder against an indorser of a note, the maker was not competent for the defendant;⁵ but he might be a witness if he were released from liability,⁶ or if his liability were

Appleton, 14 Me. 284; *Berry v. Hall*, 33 Me. 493; *Adams v. Carver*, 6 Me. 390; *Goodwin v. Chadwick*, 35 Me. 193; *Whiteford v. Monroe*, 17 Md. 135; *Drake v. Henly*, Walk. (Miss.) 541; *Partee v. Silliman*, 44 Miss. 273; *Zeigler v. Gray*, 12 S. & R. (Pa.) 42; *Juniata Bank v. Brown*, 5 S. & R. (Pa.) 226; *Girard, F., etc., Ins. Co. v. Marr*, 46 Pa. St. 504; *Oliver v. Tennessee Bank*, 11 Humph. (Tenn.) 74; *Smithwick v. Anderson*, 2 Swan (Tenn.) 573; *Barker v. Prentiss*, 6 Mass. 430; *Richardson v. Lincoln*, 5 Met. (Mass.) 201; *Ellis v. Bervellier*, 15 Ohio 489; *White v. Kibling*, 11 Johns. (N. Y.) 128; *Smith v. Kentucky Northern Bank*, 1 Metc. (Ky.) 575.

1. *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Herrick v. Whitney*, 15 Johns. (N. Y.) 240; *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *Murray v. Marsh*, 2 Hayw. (N. Car.) 290; *Geoghegan v. Reid*, 2 Whart. (Pa.) 152. But a discharge in bankruptcy restored his competency. *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Murray v. Marsh*, 2 Hayw. (N. Car.) 290.

2. *Tilden v. Gardinier*, 25 Wend. (N. Y.) 663; *Baskins v. Wilson*, 6 Cow. (N. Y.) 471; *Williams v. Banks*, 11 Md. 198; *Soule v. Dawes*, 6 Cal. 473; *Mitchell v. Cooper*, 17 Pa. St. 343; *Craig v. Andrews*, 7 Iowa 17. But he might testify if he were released from liability. *Bay v. Gunn*, 1 Den. (N. Y.) 108.

Thus, in an action by the holder against an indorser, a subsequent indorser was not competent for the plaintiff, because, if the money were collected from the previous indorser, that would discharge the witness from liability. *Hayes v. Gorham*, 3 Ill. 429; *Kennon v. M'Rea*, 2 Port. (Ala.) 389; *Presbury v. Papin*, 31 Mo. 490; *Williams v. Brailsford*, 25 Md. 126. Neither was an indorser competent for a subsequent indorser in an action against

the maker. *Ward v. Tyler*, 52 Pa. St. 393.

3. *Kornegay v. Salle*, 12 Ala. 534 (overruling *Thompson v. Armstrong*, 5 Ala. 383); *Commercial, etc., Bank v. Lum*, 7 How. (Miss.) 414; *Jewett v. Davis*, 6 N. H. 518; *Concord Bank v. Rogers*, 16 N. H. 9; *Whipple v. Stevens*, 19 N. H. 150; *Miller v. M'Cagg*, 4 Hill (N. Y.) 35; *Kile v. Graham*, 1 McCord (S. Car.) 552; *Marine Bank v. Ferry*, 40 Ill. 255; *Pinney v. Bugbee*, 13 Vt. 623. And where both were joined but set up separate defenses, one was not competent for the other. *Groat v. Palmer*, 7 Wis. 338. If he were released from his liability on the note, he might testify for his co-maker. *Ames v. Withington*, 3 N. H. 115; *Carleton v. Whitcher*, 5 N. H. 106.

A default would not render one joint maker competent for another, where they were joined as defendants. *Turner v. Lazarus*, 6 Ala. 878. Neither would a certificate of bankruptcy, unless he released to the assignee all his claim to surplus and allowance. *Madison Ins. Co. v. Mitchell*, 1 Ind. 384. Compare *Wolf v. Fink*, 1 Pa. St. 435; 44 Am. Dec. 141.

4. *McCall v. Sinclair*, 14 Ala. 764; *Whately v. Johnson*, 1 Stew. (Ala.) 498; *Marshall v. Thrailkill*, 12 Ohio 275; *Armstrong v. Deshler*, 12 Ohio 475; *Harvey v. Sweasy*, 4 Humph. (Tenn.) 449.

But where the action was brought against one of the makers by a surety, a joint maker was competent to prove that the plaintiff was a surety and not a principal, as he then testified against interest. *Hopkinson v. Steel*, 12 Vt. 582.

5. *Peirce v. Butler*, 14 Mass. 303.

The maker of a note was not competent to prove an agreement between the indorsers that they would contribute equally to the payment of the note if it was not paid by the maker. *Saurman v. Bodey*, 42 Pa. St. 476.

6. *Frazer v. Carpenter*, 2 McLean

extinguished by operation of law,¹ or if judgment had been rendered against him, thus fixing his liability.² In an action against an attorney to recover money which he had collected on a note, the maker was not competent to prove payment thereof to the defendant,³ but the maker was competent to prove any fact, the establishment of which would not put him in a better position.⁴

At common law, the drawer of a bill of exchange was not competent for the holder in an action against the acceptor, because, if the plaintiff did not prevail, the witness was liable to him for damages, interest, and costs.⁵ But it seems that he was competent for the acceptor, as he was liable to the holder in case of a failure to recover from the acceptor.⁶ In an action by the indorsee against the drawer, the acceptor was competent to prove

(U. S.) 235; *Franklin Bank v. Pratt*, 31 Me. 501; *Wheaton v. Wilmarth*, 13 Met. (Mass.) 422; *Bank v. Fordyce*, 9 Pa. St. 275.

1. Thus, the maker was a competent witness if his liability were extinguished by the Statute of Limitations, *Breitenbach v. Houtz*, 35 Pa. St. 153; or by a discharge in bankruptcy. *Hayden v. McKnight*, 45 Ga. 147.

2. *Vance v. Collins*, 6 Cal. 435; *Mevey v. Matthews*, 9 Pa. St. 112; *Routh v. Helm*, 6 How. (Miss.) 127; *Kleimann v. Boernstein*, 32 Mo. 311. But a verdict against him was not sufficient. To restore his competency it was necessary that judgment be rendered. *Haig v. Newton*, 1 Mill (S. Car.) 423.

3. *Moore v. Henderson*, 18 Ala. 232; *Nisbet v. Lawson*, 1 Ga. 275.

So, in an action against the indorser, the maker was not competent to prove that he had paid the amount of the note to the defendant. *Palmer v. Tripp*, 6 Cal. 82. But, in an action upon a note of a third party given as collateral security, the maker of the note, for the payment of which the collateral was held, was competent to prove it paid. *Fry v. Coleman*, 1 Grant's Cas. (Pa.) 445.

4. In a contest between the indorser and indorsee of a note, the maker was competent to prove that the indorsement was for collection and not for value, *Gilman v. Pugh*, 1 Litt. (Ky.) 286; and he was competent to prove the execution of the note by himself and its indorsement by the defendant. *Crowley v. Barry*, 4 Gill (Md.) 194. He was competent for the plaintiff to prove that defendant owed the witness the amount of the note and had agreed to

pay it at maturity. *Schley v. Merritt*, 37 Md. 352; *Columbia Bank v. Magruder*, 6 Har. & J. (Md.) 172; 14 Am. Dec. 271.

The maker was competent also to prove that the note was made payable to the payee at the request of one to whom the maker was indebted. *Campbell v. Knapp*, 15 Pa. St. 27.

In an action of trover for a note, the maker was a competent witness, for his liability remained the same in any event. *Woodruff v. Smith*, 6 N. J. L. 214.

5. *Scott v. McLellan*, 2 Me. 199; *Hewitt v. Lovering*, 12 Me. 201; *Dennistoun v. Fleming*, 7 Pa. St. 528; *Smith v. Thorne*, 9 Watts (Pa.) 144; *Montgomery Bank v. Walker*, 9 S. & R. (Pa.) 237; 11 Am. Dec. 709; *Hubble v. Brown*, 16 Johns. (N. Y.) 70; *Huntington v. Champlin*, Kirby (Conn.) 166. But where the drawer and holder both resided in *New York*, and the holder sued the drawee in *Massachusetts*, where the latter resided, it was held that the drawer was competent for the plaintiff, his liability to damages under the laws of *New York* being too remote and contingent an interest to exclude him. *Barney v. Newcomb*, 9 Cush. (Mass.) 46.

It has been held that the drawer was competent to prove the handwriting of the acceptor. *Dickinson v. Prentice*, 4 Esp. 32; *Barber v. Gingell*, 3 Esp. 60.

In an action by the indorsee against the indorser, the drawer was competent to prove non-acceptance and notice. *Whiteford v. Buckmyer*, 1 Gill (Md.) 127; 39 Am. Dec. 640; *Eddy v. Peterson*, 22 Ill. 535.

6. *Pacific Bank v. Mitchell*, 9 Met. (Mass.) 297. Thus he was competent

that the drawer had no funds in his hands, thereby showing it to be an accommodation acceptance.¹

(10) *Parties to Assignments of Choses in Action*.—The assignor of a chose in action was not a competent witness for the assignee, where it appeared that he was in any degree interested, or that the assignment had been made for the purpose of removing his disability.² But in many cases the assignor was permitted to testify where the assignment had been made in good faith in the ordinary course of business, and it did not appear that he was disqualified on the ground of interest.³ The assignee of a chose

for the drawee, to prove the conditions upon which he had promised to accept. *Storer v. Logan*, 9 Mass. 55.

1. In *Kinsley v. Robinson*, 21 Pick. (Mass.) 327, Shaw, C. J., said: "If it is an acceptance for value, as it appears *prima facie*, the acceptor is liable at all events; in one case, to the indorsee, the plaintiff; in the other, to the drawer, the defendant. If it was an accommodation acceptance, he is not ultimately liable in any event, because, in one, he will be exempted from an action; in the other, though liable to an action in the first instance, he has a remedy over for the like amount, which the law deems precisely equivalent." To the same effect is *Parsons v. Phipps*, 4 Tex. 341.

The drawee in a bill was competent for the drawer to prove the acceptance of the bill. *Tarble v. Underwood*, 34 Ill. 67.

2. *Bell v. Smith*, 5 B. & C. 188; 11 E. C. L. 198; *Houston v. Prewitt*, 8 Ala. 846; *Clifton v. Sharpe*, 15 Ala. 618; *Muirhead v. Kirkpatrick*, 2 Pa. St. 425; *Patterson v. Reed*, 7 W. & S. (Pa.) 144; *Reading R. Co. v. Johnson*, 7 W. & S. (Pa.) 324; *Phinney v. Tracey*, 1 Pa. St. 173; 44 Am. Dec. 116; *McClelland v. Mahon*, 1 Pa. St. 364; *Post v. Avery*, 5 W. & S. (Pa.) 510; *Leiper v. Peirce*, 6 W. & S. (Pa.) 555; *Sypher v. Long*, 4 Watts (Pa.) 253; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498; 78 Am. Dec. 390; *Grayson's Appeal*, 5 Pa. St. 395; *Cox v. Davis*, 16 Ind. 378; *Swails v. Coverdill*, 17 Ind. 337; *Ketcham v. Hill*, 42 Ind. 64; *Bell v. Drew*, 4 E. D. Smith (N. Y.) 59; *Woodruff v. Cox*, 2 Bradf. (N. Y.) 223; *Adams v. Woods*, 8 Cal. 306; *Wilkins v. Stidger*, 22 Cal. 235; 83 Am. Dec. 64.

It has been held that the assignor for value was not competent to rebut a defense to the original cause of action,

unless he were released by the assignee from his implied warranty of the existence of the debt. *Ludwig v. Meyre*, 5 W. & S. (Pa.) 435; *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *Delee v. Sandel*, 12 La. Ann. 208.

Where the defense was that the claim had been paid before the assignment, the assignor was not competent for the assignee without a release. *Woolfolk v. McDowell*, 9 Dana (Ky.) 268.

3. *Platt v. Hedge*, 8 Iowa 386, 392; *Watson v. Smith*, 13 Wend. (N. Y.) 51; *Cobb v. Baldwin*, 1 Root (Conn.) 534; *Roshing v. Chandler*, 3 Pa. St. 375; *Fetterman v. Plummer*, 9 S. & R. (Pa.) 20; *M'Iroy v. M'Iroy*, 1 Rawle (Pa.) 433. Compare *Taylor v. Gitt*, 10 Pa. St. 428; *Caton v. Lenox*, 5 Rand. (Va.) 31; *McConnell v. McCracken*, 14 Wis. 83; *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 440.

Where the cause of action was assigned *pendente lite*, and the assignee was substituted as plaintiff, it was held the assignor was a competent witness for him. *Warner v. Turner*, 18 B. Mon. (Ky.) 758; *Freeman v. Jennings*, 7 Rich. (S. Car.) 381.

The assignor of a judgment was competent for the assignee in a suit to enforce it, *Doub v. Barnes*, 1 Md. Ch. 127; and the assignor of a judgment might testify against the assignee. *Himblewright v. Armstrong*, 25 Pa. St. 428.

In *Burrows v. Shultz*, 6 Pa. St. 325, and *Reading R. Co. v. Johnson*, 7 W. & S. (Pa.) 317, the assignors of judgments were rejected because their names still appeared on the record as parties to the actions.

Under a statute of *Missouri*, it was held that the assignor of a chose in action was not competent for the assignee to prove any facts occurring prior to the assignment, *Parish v. Frampton*, 32 Mo. 396; *Hendricks v.*

in action was not competent to sustain the claim, as he had become the real party in interest.¹

(11) *Attorneys*.—In the absence of a disqualifying interest in the event of the suit, an attorney was, at common law, a competent witness for his client.² While there is no rule of law to prevent his testifying, it is, nevertheless, regarded by both bench and bar as very objectionable practice, which should be adopted only in cases of absolute necessity, and then it is better for the attorney to retire from the case.³ But an attorney whose fee was to be a percentage of the amount recovered, was not competent for his client, because he was directly interested in the event of the suit;⁴ and the same was true if he was, for any reason,

Ebbitt, 37 Mo. 24; but he was competent to prove the consideration for the assignment. *Weil v. Tyler*, 38 Mo. 558; *Perry v. Siter*, 37 Mo. 279; *Bidwell v. St. Louis Floating Dock, etc.*, Co., 40 Mo. 42.

1. *Clover v. Painter*, 2 Pa. St. 46; *Grayson's Appeal*, 5 Pa. St. 395; *Harbin v. Roberts*, 33 Ga. 45; *Stewart v. Conner*, 13 Ala. 94; *Benoist v. Darby*, 12 Mo. 196. But in *Locke v. North American Ins. Co.*, 13 Mass. 61, it was held that a person who furnished money to buy a cargo, and took an assignment of the bill of lading as security, was a competent witness for the assignor in an action against the underwriters for the loss of the cargo.

In *Massachusetts* it was held, under Statute 1851, ch. 233, § 97, that the assignee of a chose in action was a competent witness for the nominal plaintiff in an action thereon. *Palmer v. White*, 10 Cush. (Mass.) 321. Under the same statute the donee *causa mortis* of a note was held competent for the nominal plaintiff in an action to collect the note. *Bates v. Kempton*, 7 Gray (Mass.) 382. But in the absence of an enabling statute such donee was not a competent witness. *Thorpe v. Amos*, 1 Sandf. Ch. (N. Y.) 26.

2. *McGehee v. Hansell*, 13 Ala. 17; *Morrow v. Parkman*, 14 Ala. 769; *Quarles v. Waldron*, 20 Ala. 217; *Mosser v. Mosser*, 32 Ala. 551; *Smith v. Huntington*, 1 Root (Conn.) 226; *Carrington v. Holabird*, 17 Conn. 530; *Grant's Succession*, 14 La. Ann. 807; *Beatty v. Davis*, 9 Gill (Md.) 211; *Potter v. Ware*, 1 Cush. (Mass.) 519; *Phillips v. Bridge*, 11 Mass. 242; *State v. Woodside*, 9 Ired. (N. Car.) 496; *Willis v. West*, 60 Ga. 613; *McBride v. Bryan*, 67 Ga. 584; *Beall v. Territory*, 1 N. Mex. 507; *Boulden v. Hebel*, 17 S. & R.

(Pa.) 312; *Bell v. Bell*, 12 Pa. St. 235; *Johns v. Bolton*, 12 Pa. St. 339; *Linton v. Com.*, 46 Pa. St. 294; *Braine v. Spalding*, 52 Pa. St. 247; *Follansbee v. Walker*, 72 Pa. St. 228; 13 Am. Rep. 671; *Rea v. Trotter*, 26 Gratt. (Va.) 585; *Walsh v. Murphy*, 2 Greene (Iowa) 227; *Cox v. Hill*, 3 Ohio 411; *Abbott v. Striblen*, 6 Iowa 191; *Gaul v. Groat*, 1 Cow. (N. Y.) 113; *Tullock v. Cunningham*, 1 Cow. (N. Y.) 256; *Pirley v. Butts*, 2 Cow. (N. Y.) 421; *Robinson v. Dauchy*, 3 Barb. (N. Y.) 20; *Little v. McKeon*, 1 Sandf. (N. Y.) 607; *Sherman v. Scott*, 27 Hun (N. Y.) 331; *Clark v. Kingsland*, 1 Smed. & M. (Miss.) 248; *Reid v. Colcock*, 1 Nott. & M. (S. Car.) 592; 9 Am. Dec. 729; *Simonton v. Yongue*, 3 Strobb. (S. Car.) 538; *Benton v. Henry*, 2 Coldw. (Tenn.) 83.

3. *Morgan v. Roberts*, 38 Ill. 65; *Ross v. Demoss*, 45 Ill. 447; *Harkins' Succession*, 2 La. Ann. 923; *Blanc v. Forgay*, 5 La. Ann. 695; *Madden v. Farmer*, 7 La. Ann. 580; *Boissy v. Lacou*, 10 La. Ann. 29; *Frear v. Drinker*, 8 Pa. St. 521; *Connolly v. Straw*, 53 Wis. 649.

In *England*, it was once considered a sufficient ground for a new trial that the attorney of the successful party testified in his behalf. *Stones v. Byron*, 1 B. C. Rep. 248; 11 Jur. 44; 16 L. J. Q. B. 32; *Dunn v. Packwood*, 1 B. C. Rep. 312; 11 Jur. 242; 4 D. & L. 395, note (b); *Rex v. Brice*, 2 B. & Ald. 606. But these cases were subsequently overruled in *Cobbett v. Hudson*, 1 El. & Bl. 11; 72 E. C. L. 11; 22 L. J. Q. B. 11. See also 2 Taylor on Evidence, § 1391.

4. *Com. v. Moore*, 5 J. J. Marsh. (Ky.) 655; *Hall v. Acklen*, 9 La. Ann. 219; *Dailey v. Monday*, 32 Tex. 141. But if such contract were rescinded before

liable for the costs of the action.¹ The attorney of one party may be called to testify for the other, except as to facts that came to his knowledge through confidential relations with his client.²

(12) *Bailor and Bailee*.—In an action by a bailee against a third person to recover the property committed to him, or damages for its loss or conversion, the bailor was not competent for the plaintiff to prove the general ownership of the property in himself, as he was directly interested in the event of the suit.³ But in a contest between the bailor and a third person, the bailee was competent to support the title of the bailor,⁴ even when he had converted the goods to his own use by a sale or exchange of them, as in that case he was liable to one of the parties in any event and his interest was balanced.⁵

(13) *Parent and Child*.—At common law there was nothing in the relation of parent and child to prevent their being witnesses for each other. The natural bias of feeling which accompanies the relationship went only to the credibility of the witnesses.

the trial, his competency was restored. *McLaughlin v. Shields*, 12 Pa. St. 283.

The fact that an attorney expected to receive a larger fee if his client recovered, did not disqualify him as a witness. *Miles v. O'Hara*, 1 S. & R. (Pa.) 32; *Slocum v. Newby*, 1 Murph. (N. Car.) 423.

An attorney might be a witness for his client, although his judgment fee depended upon his success in the cause. *Newman v. Bradley*, 1 Dall. (Pa.) 240.

If the act of an attorney were set up as a defense to his client's claim, his contingent liability to the client was not sufficient to render him incompetent as a witness. *Orphans' Court v. Woodburn*, 7 W. & S. (Pa.) 162; *Braine v. Spalding*, 52 Pa. St. 247.

1. Thus, an attorney for a non-resident plaintiff, who had given no bond for costs, was not competent for his client, because he was himself liable for the costs, *Jones v. Savage*, 6 Wend. (N. Y.) 658; but if he were fully indemnified and secured against costs, he was competent, although liable in the first instance. *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358; *Brandigee v. Hale*, 13 Johns. (N. Y.) 125. So, also, an attorney who had indorsed the original writ, and thereby made himself liable for costs, was not a competent witness for his client, *Chadwick v. Upton*, 3 Pick. (Mass.) 442; and the same was true where the indorser of the writ had become such at the attorney's request, because he was answerable over to the

indorser for the costs. *Meserve v. Hicks*, 24 N. H. 295.

2. *Buckmaster v. Kelley*, 15 Fla. 180; *McLaine v. Bachelor*, 8 Me. 324. Thus, he might be called for the other side and asked who employed him, in order to show the real party and so let in his declarations, *Levy v. Pope*, 1 M. & M. 410; 22 E. C. L. 343; and where notice to produce a written instrument had been served, the attorney for the opposite party might be asked if he had the instrument, in order to let in secondary evidence of its contents if not produced. *Bevan v. Waters*, 1 M. & M. 235; 22 E. C. L. 301.

The prosecution may call the defendant's attorney to prove what a witness since deceased testified on a former trial of the case. *State v. Cook*, 23 La. Ann. 347.

3. *Chesley v. St. Clair*, 1 N. H. 189; *Nelson v. Iverson*, 24 Ala. 9; 60 Am. Dec. 442; *Heitzman v. Divil*, 11 Pa. St. 264. But after releasing to the bailee his interest in the property, he was competent to prove its loss and value. *Moran v. Portland Steam Packet Co.*, 35 Me. 55. And he was competent without a release to prove facts in which he had no interest. *Maine Stage Co. v. Longley*, 14 Me. 444.

4. *Wright v. Ross*, 2 Greene (Iowa) 266; *Walmsley v. Hubbard*, 24 Tex. 612. Compare *Smith v. Seward*, 3 Pa. St. 342.

5. *Oliver v. McClellan*, 21 Ala. 675. The contrary was decided in *Pierce v. Hindsall*, 1 Tyler (Vt.) 153.

Accordingly, in the absence of a disqualified legal interest in the event of the suit, a parent was a competent witness for his child,¹ and a child was also competent for his parent.² The cases holding the heirs and distributees of the estate of a deceased person incompetent for the personal representative, have been examined in another place.³

(14) *Debtor and Creditor*.—One who was *prima facie* liable for a debt was not competent to sustain a suit in which it was sought to charge another person with the whole or any part of that debt.⁴ But in a contest among creditors as to the disposition to be made of the debtor's property, or the proceeds thereof, the debtor was a competent witness;⁵ and in a trial of the right of property taken upon execution, the judgment debtor was competent for the claimant,⁶ but was not competent to prove the title

1. *Cass v. State*, 2 Greene (Iowa) 359; *Moore v. McKie*, 5 Smed. & M. (Miss.) 238; *O'Neil v. Teague*, 8 Ala. 352; *Wiseman v. Cornish*, 8 Jones (N. Car.) 218; *Alderman v. Tirrell*, 8 Johns. (N. Y.) 418; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266. For the law in Louisiana, see *Hargis' Succession*, 3 La. Ann. 142.

2. *Murray v. Finster*, 2 Johns. Ch. (N. Y.) 155; *McClung v. Spotswood*, 19 Ala. 165; *Aiken v. Cato*, 23 Ga. 154; *Mester v. Zimmerman*, 7 Ill. App. 156; *Parker v. McNeill*, 12 Smed. & M. (Miss.) 355; *Mott v. Goddard*, 1 Root (Conn.) 472; *Highberger v. Stiffler*, 21 Md. 350; 83 Am. Dec. 593. *Compare State v. Thompson*, 10 La. Ann. 122.

A son was a competent witness for his father in an action to recover wages earned by the son. *Keen v. Sprague*, 3 Me. 80.

3. See *supra*, this title, *Persons Interested in the Estates of Decedents*.

4. *M'Brain v. Fortune*, 3 Campb. 317; *Ripley v. Thompson*, 12 Moore 55; 22 E. C. L. 433; *Brown v. Brown*, 4 Taunt. 752; *Collins v. Ellis*, 21 Wend. (N. Y.) 399; *Marquand v. Webb*, 16 Johns. (N. Y.) 89; *Jackson v. Peek*, 4 Wend. (N. Y.) 300; *Sheldon v. Ackley*, 4 Day (Conn.) 458; *Emerton v. Andrews*, 4 Mass. 653; *Griffin v. Brown*, 2 Pick. (Mass.) 304; *Hickling v. Fitch*, 1 Miles (Pa.) 208; *Purviance v. Dryden*, 3 S. & R. (Pa.) 402; *Miller v. M'Clenachan*, 1 Yeates (Pa.) 144; *Doebler v. Snavelly*, 5 Watts (Pa.) 225; *Whately v. Johnson*, 1 Stew. (Ala.) 408; *Miller v. Hale*, *Dudley* (Ga.) 119; *Edwards v. Musgrove*, *Dudley* (Ga.) 219; *Danforth v. Roberts*, 20 Me. 307.

It has been held, however, that in a suit against one of several debtors, the plaintiff might call either of the others as a witness for him. *Thornton v. Lane*, 11 Ga. 459; *Gay v. Cary*, 9 Cow. (N. Y.) 44.

It has been held that a witness who was liable for a debt was competent for the plaintiff, in an action to obtain a judgment against another for the same debt, even where the satisfaction of such judgment would discharge the witness from liability. These decisions proceeded on the ground that it was not certain that the witness would be benefited by the plaintiff's success, because he might not enforce his judgment, and, until he did so, he might proceed against the witness as before. *Eastman v. Winship*, 14 Pick. (Mass.) 46; *Philbrook v. Handley*, 27 Me. 55. This question was also before the Supreme Court of the *United States*, but the court, being divided in opinion respecting it, came to no conclusion. *Winship v. U. S. Bank*, 5 Pet. (U. S.) 529. And in *New York*, a witness so situated was rejected. *Collins v. Ellis*, 21 Wend. (N. Y.) 397.

5. *Ohio L. Ins., etc., Co. v. Ross*, 2 Md. Ch. 25; *Galway's Appeal*, 34 Pa. St. 242; *Stewart v. Stocker*, 1 Watts (Pa.) 135; *Smith v. Wagenseller*, 21 Pa. St. 494; *Updegraff v. Rowland*, 52 Pa. St. 317; *Ferree v. Thompson*, 52 Pa. St. 353; *Prince v. Shepard*, 9 Pick. (Mass.) 176.

6. *Holman v. Arnett*, 4 Port. (Ala.) 63; *Hankins v. Ingols*, 4 Blackf. (Ind.) 35; *Bradbury v. Dougherty*, 7 Blackf. (Ind.) 467; *Clifton v. Bogardus*, 2 Ill. 32; *Ewing v. Cargill*, 13 Smed. & M. (Miss.) 79; *Clark v. Watson*, 50 Pa. St.

in himself,¹ even in an action of trespass brought against the officer by the claimant after the property was sold and the proceeds applied in discharge of the judgment.² In proceedings against a garnishee the judgment debtor was competent for either party.³

In an action by or against an executor or administrator, one who had an unsatisfied claim against the estate was not a competent witness for the personal representative, where the estate was insolvent;⁴ but if it were not shown that the estate was insolvent, the creditors were admissible as witnesses.⁵ A general creditor of a party to an action was not disqualified as a witness, notwithstanding the party's ability to meet his obligations depended largely upon his success in the action in which the witness was called.⁶ But the witness was incompetent if payment

317; *Converse v. McKee*, 14 Tex. 20. But under the peculiar provisions of the statutes of *Georgia* it was held that the execution debtor was not competent for the claimant. *Williams v. Kelsey*, 6 Ga. 365; *Edwards v. Musgrove*, *Dudley* (Ga.) 219.

1. *Paul v. Rogers*, 5 T. B. Mon. (Ky.) 167.

In detinue against the sheriff, the judgment debtor was not competent for the sheriff to prove the property his. *Bland v. Ansley*, 2 B. & P. N. R. 331; *Leiper v. Gewin*, 8 Ala. 326; *Pratt v. Stephenson*, 16 Pick. (Mass.) 325; *Waller v. Mills*, 3 Dev. (N. Car.) 517.

2. *Burns v. Taylor*, 3 Port. (Ala.) 187; *Pruit v. Lowry*, 1 Port. (Ala.) 101. But in an action against an officer for a false return, the execution debtor was competent for the plaintiff. *Limpus v. State*, 7 Blackf. (Ind.) 43; *Taylor v. Com.*, 3 Bibb (Ky.) 356. And, in debt against an officer for permitting an escape, the execution debtor was competent for the officer. *Bond v. Brady*, 7 Blackf. (Ind.) 39; *Waters v. Burnet*, 14 Johns. (N. Y.) 362. Compare *Newell v. Hoadley*, 8 Conn. 381; *Pillsbury v. Small*, 19 Me. 435.

The execution debtor was competent for the sheriff in an action to recover the amount bid for the property at the sheriff's sale. *Yongue v. Aiken*, 3 Strobb. (S. Car.) 533.

3. *Scales v. Southern Hotel Co.*, 37 Mo. 520; *Jones v. Northern Liberties Bank*, 44 Pa. St. 253; *Enos v. Tuttle*, 3 Conn. 247.

4. *Craig v. Cundell*, 1 Campb. 381; *Owens v. Collinson*, 3 Gill & J. (Md.) 25; *Flinn v. Chase*, 4 Den. (N. Y.) 85; *Marre v. Ginocchio*, 2 Bradf. (N. Y.)

165. See also *Latimer v. Sayre*, 45 Ga. 468.

5. *Paull v. Brown*, 6 Esp. 34; *Nowell v. Davies*, 5 B. & Ad. 368; 27 E. C. L. 96; *Barns v. Hatch*, 3 N. H. 304; 14 Am. Dec. 369; *Youst v. Martin*, 3 S. & R. (Pa.) 423; *Boyer v. Kendall*, 14 S. & R. (Pa.) 178; *Foster v. Wallace*, 2 Mo. 231.

Upon a plea of *plene administravit* an unsatisfied creditor of the intestate was a competent witness for the defendant. *Davies v. Davies*, 1 M. & M. 345; 22 E. C. L. 330, wherein *Parke, J.*, criticised *Craig v. Cundell*, 1 Campb. 381.

A creditor was competent to prove his debt, in support of a petition by the administrator for leave to sell real estate. *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184.

6. *Warne v. Prentiss*, 9 Mo. 544; *Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236; *Gray v. Morey*, 26 Ill. 409; *Noyes v. Sturdivant*, 18 Me. 104; *Delaware, etc., R. Co. v. Irick*, 23 N. J. L. 321; *Lillie v. Wilson*, 2 Root (Conn.) 517; *Quinlan v. Davis*, 6 Whart. (Pa.) 169; *Jones v. Brownfield*, 2 Pa. St. 55; *Lothrop v. Wightman*, 41 Pa. St. 297; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Duel v. Fisher*, 4 Den. (N. Y.) 515; *Seaver v. Bradley*, 6 Me. 60.

A witness who had a written order for the payment of his claim out of the amount to be recovered by the plaintiff in an action, was held incompetent on the ground of interest. *Peyton v. Hallett*, 1 Cai. (N. Y.) 363; *Benedict v. Brownson*, *Kirby* (Conn.) 70. But the promise of an order for the amount recovered was not sufficient to exclude

of his demand depended entirely upon the fate of the cause in which he was called.¹

2. Judicial Officers.—It is contrary to the policy of the law to permit a judge who sits at the trial of a cause to be examined as a witness therein.² If, however, a judge be sitting with others, and his presence on the bench is not necessary, he may be examined as a witness; but he should then take no further judicial part in the trial.³ Neither may a judge be required to testify as to what took place on the trial of another cause at which he presided;⁴ but he may testify as to collateral matters which occurred in his presence during the progress of the trial.⁵ An arbitrator is a competent witness to prove what proceedings took place before him, so as to arrive at what was the subject-matter of the adjudication, but he may not be questioned as to the reasons of his award. "The acts of the arbitrators, and not the hidden operations of their minds, are the proper subjects of inquiry."⁶

the witness. *Ten Eyck v. Bill*, 5 Wend. (N. Y.) 55.

1. *Innis v. Miller*, 2 Dall. (Pa.) 50; *M'Veaugh v. Goods*, 1 Dall. (Pa.) 62; *Marland v. Jefferson*, 2 Pick. (Mass.) 240.

In an action concerning the title to real property, a judgment creditor of the plaintiff, whose judgment would become a lien on the property in controversy in case the plaintiff succeeded, was not a competent witness for the plaintiff. *Russell v. Sprigg*, 10 La. 421.

2. *Ross v. Buhler*, 2 Martin N. S. (La.) 312; *People v. Miller*, 2 Park. Cr. Rep. (N. Y.) 197; *McMillen v. Andrews*, 10 Ohio St. 112. So one of three referees before whom a cause is being tried cannot be sworn and examined as a witness in the cause, the other two not being authorized to proceed with the trial without him. *Morss v. Morss*, 11 Barb. (N. Y.) 510.

3. *Regicides Trial*, Kel. 12; 5 How. St. Tr. 1181, note. See also *Morss v. Morss*, 11 Barb. (N. Y.) 510.

4. *Reg. v. Gazard*, 8 C. & P. 595; 34 E. C. L. 542. But it has been held that it furnishes no ground of exception if a judge testifies to what witnesses have testified before him, without insisting upon his right to be excused. *Welcome v. Batchelder*, 23 Me. 85.

5. *Rex v. Earl of Thanet*, 27 How. St. Tr. 847.

6. *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 Exch. 227; 37 L. J. Exch. 177; *Martin v.*

Thornton, 4 Esp. 181. But in an action upon an award it has been held that an arbitrator cannot be compelled to give evidence as to matters which occurred before him during the arbitration. *Johnson v. Durant*, 4 C. & P. 327; 19 E. C. L. 406; *Habershon v. Troby*, 3 Esp. 38; *Anonymous*, 3 Atk. 644; *Steward v. East-India Co.*, 2 Vern. 380; *Ponsford v. Swaine, Johns. & H.* 433. See 2 *Story's Eq. Jur.*, §§ 1457, 1498; 1 *Taylor on Ev.*, § 938; 1 *Greenl. on Ev.*, § 249.

In *Ellis v. Saltau*, 4 C. & P. 327, note (a); 19 E. C. L. 406, Lord Mansfield told an arbitrator called as a witness that he need not be examined unless he were willing.

The following cases will serve to illustrate some matters concerning which judicial officers have been permitted to testify; thus, a justice who issues a process is competent to prove on what papers the process issued. *Matter of Heyward*, 1 Sandf. (N. Y.) 701.

A justice of the peace before whom a case was tried is competent to prove the ground upon which the cause was determined. *Taylor v. Larkin*, 12 Mo. 103; 49 Am. Dec. 119.

Upon an indictment for resisting process, the justice who issued it is competent to prove his official character. *Oliver v. State*, 17 Ark. 508.

A justice is competent to prove his docket and to explain entries upon it, and to identify the cause and parties. *Haven v. Green*, 26 Ill. 252.

It is contrary to the policy of the law to permit a justice of the peace to

3. Jurors.—In early English practice traverse jurors were taken from the immediate neighborhood where the cause of the litigation occurred. This was done on the hypothesis that those who knew most about the matter in controversy were best able to render a just verdict, but this theory was long since exploded, and a juror is not now permitted to communicate informally to his associates his personal knowledge of material facts. If he is cognizant of matters material in evidence, he should be sworn and examined as a witness.¹

In some early cases in *England*, the affidavits of jurors were admitted to impeach their own verdicts,² but in the time of Lord Mansfield this doctrine was completely exploded, and since that time the courts have consistently refused to admit jurors to prove misconduct or mistake in arriving at their verdict.³ The great

contradict as a witness what he certified to as a magistrate. *Highberger v. Stiffler*, 21 Md. 338; 83 Am. Dec. 593.

A magistrate before whom a deed was acknowledged is not precluded from testifying to the legal incapacity of the grantor at the time. *Truman v. Lore*, 14 Ohio St. 144.

A judge before whom the proof of a deed was made is competent to prove that it was made outside of the state, thereby showing it to be illegal and void. *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498.

At the trial of an issue joined upon the return to a writ of *mandamus* to a court, the individual members of the court are competent for the court, *Justices v. House*, 20 Ga. 328; and where a note signed by the justices of the inferior court is sought to be enforced by *mandamus* against the county treasurer, the justices are competent to prove fraud or mistake in the consideration of the note. *Rogers v. Mandeville*, 20 Ga. 627.

If a third person brings suit upon an administrator's bond in the name of the ordinary, the latter is competent to prove the bond. *Price v. Gregory*, 4 McCord (S. Car.) 261.

1. *Rex v. Rosser*, 7 C. & P. 648; 32 E. C. L. 670; *Manley v. Shaw*, 1 C. & M. 361; 41 E. C. L. 200; *Bennett v. Hertford*, Sty. 233; *Fitzjames v. Moys*, 1 Sid. 133; *Rex v. Heath*, 18 How. St. Tr. 123; *Rex v. Sutton*, 1 M. & S. 532; 6 How. St. Tr. 1612, note; *Pennsylvania v. Leach*, Add. (Pa.) 352; *Hausser v. Com.* (Pa.), 5 Am. L. Reg. N. S. 668; *State v. Powell*, 7 N. J. L. 244; *Dunbar v. Parks*, 2 Tyler (Vt.) 217; *Fellows' Case*, 5 Me. 335; *Rondeau v.*

New Orleans Imp., etc., Co., 15 La. 160.

If a juror knows material facts not in evidence he should declare it and be sworn as a witness. *Pennsylvania v. Leach*, Add. (Pa.) 352.

It is a violation of a juror's duty to disclose material facts concerning the cause on trial for the first time in the jury room. *M'Kain v. Love*, 2 Hill (S. Car.) 506; 27 Am. Dec. 401; *Green v. Hill*, 4 Tex. 465; *Anderson v. Barnes*, 1 N. J. L. 235; *Wood River Bank v. Dodge*, 36 Neb. 708; *McWilliams v. State* (Tex. Crim. App. 1893), 22 S. W. Rep. 970.

Jurors are competent witnesses to prove what testimony was given before them in a trial upon which they served. *Hewett v. Chapman*, 49 Mich. 4; *Merchants' Bank v. Schulenburg*, 48 Mich. 102.

2. *Metcalfe v. Deane*, Cro. Eliz. 189; *Parr v. Seames*, Barnes 438; *Phillips v. Fowler*, Barnes 441. See also *Vicary v. Farthing*, Cro. Eliz. 411; *Norman v. Beamont*, Willes 487 (2).

3. *Vaise v. Delaval*, 1 T. R. 11; *Jackson v. Williamson*, 2 T. R. 281; *Owen v. Warburton*, 1 B. & P. N. R. 326; *Rex v. Wooler*, 6 M. & S. 366; 2 Stark. 111; 3 E. C. L. 338; *Harvey v. Hewett*, 8 Dowl. P. C. 598.

Much less will the court receive evidence of another person stating that jurors have confessed to misconduct in agreeing upon a verdict. *Aylett v. Jewel*, 2 W. Bl. 1299; *Clark v. Stevenson*, 2 W. Bl. 803; *Straker v. Graham*, 4 M. & W. 721; *Burgess v. Langley*, 5 M. & G. 722; 44 E. C. L. 377; *Davis v. Taylor*, 2 Chitty Rep. 268; 18 E. C. L. 331; *McCray v. Stewart*, 16 Ind.

weight of authority in the *United States* is in support of the rule laid down by Lord Mansfield.¹ The misconduct of jurors,

377; *Drummond v. Leslie*, 5 Blackf. (Ind.) 453; *Clum v. Smith*, 5 Hill (N. Y.) 560; *Taylor v. Everett*, 2 How. Pr. (N. Y.) 23; *Gale v. New York Cent.*, etc., R. Co., 53 How. Pr. (N. Y. Supreme Ct.) 385; *Cain Bros. Co. v. Wallace*, 46 Kan. 138; *Com. v. Meserve*, 156 Mass. 61.

1. *Curtiss v. Georgetown*, etc., Turnpike Co., Cranch C. C. 81; *Holmead v. Corcoran*, 2 Cranch C. C. 119; *Mirick v. Hemphill*, Hempst. (U. S.) 179; *Ladd v. Wilson*, 1 Cranch C. C. 305; *Glaspell v. Northern Pac. R. Co.*, 43 Fed. Rep. 900; *Fuller v. Fletcher*, 44 Fed. Rep. 34; *Clay v. Montgomery* (Ala. 1894), 14 So. Rep. 646; *Brister v. State*, 26 Ala. 133; *Pleasants v. Heard*, 15 Ark. 403; *Stanton v. State*, 13 Ark. 317; *Amsby v. Dickhouse*, 4 Cal. 102; *Castro v. Gill*, 5 Cal. 40; *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78; *People v. Wyman*, 15 Cal. 70; *Boyce v. California Stage Co.*, 25 Cal. 460; *Ex p. Sontag*, 64 Cal. 528; *Knight v. Fisher*, 15 Colo. 176; *Wray v. Carpenter*, 16 Colo. 271; *State v. Freeman*, 5 Conn. 348; *Meade v. Smith*, 16 Conn. 346; *Haight v. Turner*, 21 Conn. 593; *Howard v. Cobb*, 3 Day (Conn.) 310; *Territory v. King*, 6 Dakota 131; *Croasdale v. Tatum*, 6 Houst. (Del.) 218; *Coker v. Hayes*, 16 Fla. 368; *State v. Doon*, R. M. Charl. (Ga.) 1; *Bishop v. State*, 9 Ga. 121; *Hester v. State*, 17 Ga. 130; *Clark v. Carter*, 12 Ga. 500; 58 Am. Dec. 485; *Brown v. State*, 28 Ga. 199; *Coleman v. State*, 28 Ga. 78; *McElven v. State*, 30 Ga. 869; *Hoye v. State*, 39 Ga. 718; *Anderson v. Green*, 46 Ga. 361; *King v. King*, 49 Ga. 622; *Stafford v. State*, 55 Ga. 591; *Moughon v. State*, 59 Ga. 309; *Oatis v. Brown*, 59 Ga. 711; *Hill v. State*, 64 Ga. 453; *Jacobs v. Dooley*, 1 Idaho 41; *Forester v. Guard*, 1 Ill. 74; 12 Am. Dec. 141; *Martin v. Ehrenfels*, 24 Ill. 187; *Allison v. People*, 45 Ill. 37; *Nicolls v. Foster*, 89 Ill. 386; *Palmer v. People*, 138 Ill. 356; *Frank v. Taubman*, 31 Ill. App. 592; *Chicago Sanitary Dist. v. Cullerton*, 147 Ill. 385; *Bennett v. State*, 3 Ind. 167; *Dunn v. Hall*, 8 Blackf. (Ind.) 32; *Conner v. Winton*, 8 Ind. 315; 65 Am. Dec. 761; *Elliott v. Mills*, 10 Ind. 371; *Sinclair v. Roush*, 14 Ind. 450; *Hughes v. Listner*, 23 Ind. 396; *Haun v. Wilson*, 28 Ind. 296; *Stanley v. Sutherland*, 54

Ind. 339; *Honk v. Allen*, 126 Ind. 568; *Cain v. Cain*, 1 B. Mon. (Ky.) 213; *Johnson v. Davenport*, 3 J. J. Marsh. (Ky.) 393; *Taylor v. Giger*, Hard. (Ky.) 595; *Steele v. Logan*, 3 A. K. Marsh. (Ky.) 394; *Heath v. Conway*, 1 Bibb (Ky.) 398; *Doran v. Shaw*, 3 T. B. Mon. (Ky.) 415; *Lucas v. Cannon*, 13 Bush (Ky.) 650; *Com. v. Skeggs*, 3 Bush (Ky.) 19; *Campbell v. Miller*, 1 Martin N. S. (La.) 514; *Digard v. Michaud*, 9 Rob. (La.) 387; *State v. Caldwell*, 3 La. Ann. 435; *State v. Brette*, 6 La. Ann. 653; *Cire v. Rightor*, 11 La. Ann. 140; *Jeter v. Heard*, 12 La. Ann. 3; *State v. Millican*, 15 La. Ann. 557; *Duhon v. Landry*, 15 La. Ann. 591; *Heffron v. Gallupe*, 55 Me. 563; *Studley v. Hall*, 22 Me. 198; *Greeley v. Mansur*, 64 Me. 211; *State v. Pike*, 65 Me. 111; *Bridge v. Eggleston*, 14 Mass. 245; *Com. v. Drew*, 4 Mass. 399; *Murdock v. Sumner*, 22 Pick. (Mass.) 156; *Woodward v. Leavitt*, 107 Mass. 453; 9 Am. Rep. 40; *Cook v. Castner*, 9 Cush. (Mass.) 266; *Folsom v. Manchester*, 11 Cush. (Mass.) 334; *Boston*, etc., R. Co. v. Dana, 1 Gray (Mass.) 83; *Chadbourne v. Franklin*, 5 Gray (Mass.) 312; *Hannum v. Belchertown*, 19 Pick. (Mass.) 311; *Dorr v. Fenno*, 12 Pick. (Mass.) 521; *Hewett v. Chapman*, 49 Mich. 4; *St. Martin v. Desnoyer*, 1 Minn. 156; 61 Am. Dec. 494; *Knowlton v. McMahon*, 13 Minn. 386; 97 Am. Dec. 236; *State v. Stokely*, 16 Minn. 282; *State v. Mims*, 26 Minn. 183; *Bradt v. Rommel*, 26 Minn. 505; *State v. Lentz*, 45 Minn. 177; *State v. Coupenhaver*, 39 Mo. 430; *Pratte v. Coffman*, 33 Mo. 71; *Sawyer v. Hannibal*, etc., R. Co., 37 Mo. 264; 90 Am. Dec. 382; *State v. Underwood*, 57 Mo. 40; *State v. Branstetter*, 65 Mo. 149; *State v. Alexander*, 66 Mo. 148; *Ryan v. Kelly*, 9 Mo. App. 592; *State v. Ayer*, 23 N. H. 301; *Folsom v. Brawn*, 25 N. H. 114; *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323; *Walker v. Kennison*, 34 N. H. 257; *Breck v. Blanchard*, 27 N. H. 100; *Nichols v. Suncook Mfg. Co.*, 24 N. H. 437; *Smith v. Smith*, 50 N. H. 212; *Schenck v. Stevenson*, 2 N. J. L. 365; *Brewster v. Thompson*, 1 N. J. L. 36; *Dare v. Ogden*, 1 N. J. L. 107; *Randall v. Grover*, 1 N. J. L. 175; *Den v. M'Alister*, 7 N. J. L. 46; *Clark v. Read*, 5 N. J. L. 560; *Hutchinson v. Consumers*

however, may be proved by other persons who observe it,¹ and in that case the affidavits of jurors may be read in support of their verdict.²

The obligation of secrecy imposed upon grand jurors is due to

Coal Co., 36 N. J. L. 24; *Lindauer v. Teeter*, 41 N. J. L. 256; *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *Cium v. Smith*, 5 Hill (N. Y.) 560; *People v. Carnal*, 1 Park. Cr. Rep. (N. Y.) 256; *Brownell v. McEwen*, 5 Den. (N. Y.) 367; *Taylor v. Everett*, 2 How. Pr. (N. Y.) 23; *Green v. Bliss*, 12 How. Pr. (N. Y. Supreme Ct.) 428; *People v. Columbia Common Pleas*, 1 Wend. (N. Y.) 207; *Clark v. Lude*, 63 Hun (N. Y.) 363; *Suttrel v. Dry*, 1 Murph. (N. Car.) 94; *State v. McLeod*, 1 Hawks. (N. Car.) 344; *State v. Smallwood*, 78 N. Car. 560; *Johnson v. Parrotte*, 34 Neb. 26; *Wells v. State*, 11 Neb. 409; *Cline v. Broy*, 1 Oregon 89; *Oregon, etc., R. Co. v. Oregon Steam Nav. Co.*, 3 Oregon 178; *Cluggage v. Swan*, 4 Binn. (Pa.) 150; 5 Am. Dec. 400; *Willing v. Swasey*, 1 Browne (Pa.) 123; *White v. White*, 5 Rawle (Pa.) 61; *Smalley v. Morris*, 157 Pa. St. 349; *Tucker v. South Kingstown*, 5 R. I. 558; *Luft v. Lingane*, 17 R. I. 420; *Garside v. Ladd Watch Case Co.*, 17 R. I. 694; *State v. Tindall*, 10 Rich. (S. Car.) 212; *Smith v. Culbertson*, 9 Rich. (S. Car.) 106; *Gaines v. White*, 1 S. Dak. 434; *Murphy v. Murphy*, 1 S. Dak. 316; *Mason v. Russel*, 1 Tex. 721; *Burns v. Paine*, 8 Tex. 159; *Johnson v. State*, 27 Tex. 759; *Davis v. State*, 43 Tex. 189; *Letcher v. Morrison*, 79 Tex. 240; *People v. Flynn*, 7 Utah 378; *Homer v. Inter-Mountain Abstract Co.*, 9 Utah 193; *Robbins v. Windover*, 2 Tyler (Vt.) 11; *Downer v. Baxter*, 30 Vt. 467; *Sheldon v. Perkins*, 37 Vt. 550; *Price v. Warren*, 1 Hen. & M. (Va.) 385; *Shobe v. Bell*, 1 Rand. (Va.) 39; *Harnsbarger v. Kinney*, 6 Gratt. (Va.) 287; *Koiner v. Rankin*, 11 Gratt. (Va.) 420; *Bull's Case*, 14 Gratt. (Va.) 632; *Howard v. McCall*, 21 Gratt. (Va.) 212; *Read v. Com.*, 22 Gratt. (Va.) 924; *Thomas v. Jones*, 28 Gratt. (Va.) 383; *Steptoe v. Flood*, 31 Gratt. (Va.) 323; *Buchanan v. Reynolds*, 4 W. Va. 681; *Lewis v. McMullin*, 5 W. Va. 582; *Edmister v. Garrison*, 18 Wis. 594; *Birchard v. Booth*, 4 Wis. 67; *Shaw v. Fisk*, 21 Wis. 368; 94 Am. Dec. 547; *Schultz v. Catlin*, 78 Wis. 611. Compare *Ex p. Caykendoll*, 6 Cow. (N. Y.) 53; *Sargent v. —*, 5 Cow. (N. Y.) 106.

Overruled Cases.—*Grinnell v. Phillips*, 1 Mass. 541; *Smith v. Cheetham*, 3 Cal. (N. Y.) 57.

In *Iowa*, the affidavits of jurors may not be read for the purpose of impeaching the verdict, but they may be read in support of a motion for a new trial if they do not tend directly to impeach the verdict. *Cook v. Sypher*, 3 Iowa 484; *Butt v. Tuthill*, 10 Iowa 585; *Stewart v. Burlington, etc.*, R. Co., 11 Iowa 62; *Wright v. Illinois, etc.*, Tel. Co., 20 Iowa 195; *Hall v. Robison*, 25 Iowa 91; *Cowles v. Chicago, etc.*, R. Co., 32 Iowa 515; *Garretty v. Brazell*, 34 Iowa 100; *Walker v. Dailey*, 87 Iowa 375.

In *Kansas*, affidavits of jurors may be read in support of a motion for a new trial, but they may not be read to impeach the verdict on any ground essentially necessary to consider in making up the verdict. *State v. Horne*, 9 Kan. 119; *Perry v. Bailey*, 12 Kan. 539; *Johnson v. Husband*, 22 Kan. 277.

In *Montana*, it is provided by statute that the affidavits of jurors may be received to prove that the verdict was the result of a determination by chance. *Gordon v. Trevathan*, 13 Mont. 387.

In *Tennessee*, the rule is that affidavits of jurors should not be read on applications for new trials, except in extraordinary cases. *Fish v. Cantrell*, 2 Heisk. (Tenn.) 579; *Larkins v. Tarter*, 3 Sneed (Tenn.) 681; *Scott v. State*, 7 Lea (Tenn.) 232.

Jurors will not be allowed to stultify themselves and vitiate their verdict by swearing that they misunderstood the charge of the court. *Scruggs v. State*, 90 Tenn. 81; citing *Norris v. State*, 3 Humph. (Tenn.) 333; 39 Am. Dec. 175; *Saunders v. Fuller*, 4 Humph. (Tenn.) 518; *Wade v. Ordway*, 1 Baxt. (Tenn.) 229; *Roller v. Bachman*, 5 Lea (Tenn.) 160; *Richardson v. McLemore*, 5 Baxt. (Tenn.) 586; *Cartwright v. State*, 12 Lea (Tenn.) 621.

1. *Wright v. Abbott*, 160 Mass. 395; *Haun v. Wilson*, 28 Ind. 297.

2. *Barlow v. State*, 2 Blackf. (Ind.) 114; *Haun v. Wilson*, 28 Ind. 296; *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *People v. Murray*, 94 Cal. 212.

the public rather than to the witnesses who testify before them, and when justice requires it, as in a prosecution for perjury committed before the grand jury, they may be called as witnesses to prove who testified before them and what testimony was given.¹ But according to the weight of authority, they are not competent to undo their own work by showing facts which will vitiate an indictment found by them.²

4. Defect of Understanding—*a*. IMMATURITY OF MIND—(See INFANTS, vol. 10, p. 619).—The test of an infant's competency is his ability to comprehend the meaning of an oath.³ The court,

1. Fenwick's Case, 5 Horg. St. Tr. 72; Sands v. Robison, 12 Smed. & M. (Miss.) 704; 51 Am. Dec. 132; Rocco v. State, 37 Miss. 357; People v. Young, 31 Cal. 564; Burnham v. Hatfield, 5 Blackf. (Ind.) 21; Shattuck v. State, 11 Ind. 473; State v. Benner, 64 Me. 267; Gordon v. Com., 92 Pa. St. 216; 37 Am. Rep. 672; Com. v. Green, 126 Pa. St. 531; Com. v. McComb, 157 Pa. St. 611; Clanton v. State, 13 Tex. App. 139 (*overruling* Ruby v. State, 9 Tex. App. 353); Com. v. Mead, 12 Gray (Mass.) 167; 71 Am. Dec. 741; Way v. Butterworth, 106 Mass. 76; Izer v. State, 77 Md. 110; Crocker v. State, Meigs. (Tenn.) 127; Jones v. Turpin, 6 Helsk. (Tenn.) 181; People v. Hulbut, 4 Den. (N. Y.) 133; 47 Am. Dec. 244.

Thus, in an action for malicious prosecution, one of the grand jurors may be called to prove the fact that the defendant was the prosecutor. Sykes v. Dunbar, Sel. N. P. 1305; Freeman v. Arkell, 1 C. & P. 135; White v. Fox, 1 Bibb (Ky.) 369; 4 Am. Dec. 643; Huidekoper v. Cotton, 3 Watts (Pa.) 56. So a member of the grand jury may be called to testify that a certain person did not testify before them. Com. v. Hill, 11 Cush. (Mass.) 137.

The fact that a witness sat as one of the grand jury which found an indictment, does not render him incompetent as a witness for the prosecution upon the trial of the prisoner. State v. McDonald, 73 N. Car. 346.

In State v. Broughton, Ired. (N. Car.) 96; 45 Am. Dec. 507, Ruffin, C. J., after commenting on the reasons for the secrecy of grand juries, said: "But that is the immunity of the public and not the privilege of the witness, and, therefore, it would seem that the rule should create an obligation on the conscience of the juror and be enforced by a court only when the public justice may be advanced by it, and that it can-

not be urged by the witness himself, when it would defeat justice, and thus encourage witnesses before that body to commit perjury by false statements or the suppression of the truth. For it is obvious that if grand jurors are, through all time and to all purposes, prohibited from disclosing and proving the testimony of witnesses before them, there is a perfect exemption from temporal penalties of perjury before a grand jury. The consequences of such a doctrine would be alarming, for, besides the danger of tempting the witnesses to commit so great a crime without the fear of punishment, grand jurors would have no credible evidence on which to act, on the one hand, and the citizen, on the other, would be deprived of one of his most boasted and valuable protections against arbitrary accusations and arrests."

But in Imlay v. Rogers, 7 N. J. L. 347, the court refused to admit a grand juror to prove that a witness, who had been examined, swore differently before the grand jury.

Where there was a misnomer in an indictment, it was held that a grand juror was not competent to prove who was meant. State v. Wammack, 70 Mo. 410.

2. Rex v. Marsh, 6 Ad. & El. 236; 33 E. C. L. 66; State v. Fasset, 16 Conn. 457; State v. Hamlin, 47 Conn. 95; 36 Am. Rep. 54; Gitchell v. People, 146 Ill. 175; State v. Baker, 20 Mo. 338; State v. Gibbs, 39 Iowa 318; State v. Davis, 41 Iowa 311; State v. Mewherter, 46 Iowa 88; State v. Oxford, 30 Tex. 428.

But it has been held that a grand juror is a competent witness as to whether twelve of the panel concurred in the finding of an indictment. Low's Case, 4 Me. 439; People v. Shattuck, 6 Abb. N. Cas. (N. Y. Buffalo Super. Ct.) 33.

3. Flanigan v. State, 25 Ark. 96;

upon inquiry, decides the question;¹ and it is only for gross abuse of discretion that an appellate court will revise its decision.²

b. IDIOTS, INSANE PERSONS, ETC.—All persons who are examined as witnesses must be fully possessed of their understanding; that is, such understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; therefore, idiots and lunatics while under the influence of their malady, not possessing their share of understanding, are excluded.³

Holst v. State, 23 Tex. App. 1; 59 Am. Rep. 770; *Oliver v. Com.*, 77 Va. 590; *State v. Michael*, 37 W. Va. 565; *Jones v. Brooklyn, etc., Co.* (Brooklyn City Ct.), 3 N. Y. Supp. 253; *Davis v. State*, 31 Neb. 247; *McGuff v. State*, 88 Ala. 147; *Sandford v. Hestonville, etc., Co.*, 136 Pa. St. 84.

See, generally, *Givens v. Com.*, 29 Gratt. (Va.) 830; *Spears v. Snell*, 74 N. Car. 210; *State v. Lattin*, 29 Conn. 389; *Warner v. State*, 25 Ark. 448; *People v. Bernal*, 10 Cal. 66.

A boy of fourteen years, who said that he knew it was wrong to tell a lie, but did not know that he would be punished if he swore falsely, is an incompetent witness. *McKelton v. State*, 88 Ala. 181; *Johnson v. State*, 76 Ga. 76.

A boy of six may testify if the court finds him qualified. *Buck v. People's St., etc., R. Co.*, 46 Mo. App. 555.

In most jurisdictions the settled rule is that a child cannot be examined without being sworn. *State v. Tom*, 8 Oregon 178; *State v. Doherty*, 2 Overt (Tenn.) 80; *People v. Frindel*, 58 Hun (N. Y.) 482.

In one case it was held that if a child appeared to possess a sufficient sense of the danger and wickedness of false swearing, he could be a witness, no matter what his age. *Com. v. Hutchinson*, 10 Mass. 225. See also *State v. Morea*, 2 Ala. 278; *Wade v. State*, 50 Ala. 164; *Cadmus v. St. Louis Bridge, etc., Co.*, 15 Mo. App. 86; *Blackwell v. State*, 11 Ind. 196.

1. *State v. Doyle*, 107 Mo. 36; *Moore v. State*, 79 Ga. 498; *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433; *State v. Michael*, 37 W. Va. 565; *State v. Whittier*, 21 Me. 347; 38 Am. Dec. 272; *Simpson v. State*, 31 Ind. 90.

When he is under fourteen years of age, his competency is to be determined by the court on proper examination. *Hawkins v. State*, 27 Tex. App. 273; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270.

The examination, it has been said, should be made by the court itself; it cannot be safely left to counsel. *Hughes v. Detroit, etc., R. Co.*, 65 Mich. 10.

As to illustrative tests of a child's competency, see *Carter v. State*, 63 Ala. 54; 35 Am. Rep. 4; *Beason v. State*, 72 Ala. 191; *State v. Belton*, 24 S. Car. 185; 58 Am. Rep. 245; *Vincent v. State*, 3 Heisk. (Tenn.) 120; *Com. v. Carey*, 2 Brews. (Pa.) 404; *Reg. v. Holmes*, 2 F. & F. 788; *Logston v. State*, 3 Heisk. (Tenn.) 414; *Draper v. Draper*, 68 Ill. 19; *Davidson v. State*, 39 Tex. 129; *McKelton v. State*, 88 Ala. 181; *Territory v. Duran*, 3 N. Mex. 134.

The competency must be determined in the presence of the party against whom the child is called to testify. *People v. McNair*, 21 Wend. (N. Y.) 668.

2. *Brown v. State*, 2 Tex. App. 115; *Williams v. State*, 12 Tex. App. 127; *Ake v. State*, 6 Tex. App. 398; 32 Am. Rep. 586; *Hawkins v. State*, 27 Tex. App. 273; *State v. Edwards*, 79 N. Car. 648; *State v. Manuel*, 64 N. Car. 601; *State v. Levy*, 23 Minn. 104; 23 Am. Rep. 678; *State v. Jackson*, 9 Oregon 457; *State v. Severson*, 78 Iowa 653; *State v. Richie*, 28 La. Ann. 327; 26 Am. Rep. 100; *Com. v. Mullins*, 2 Allen (Mass.) 296; *Washburn v. People*, 10 Mich. 374; *State v. Scanlan*, 58 Mo. 206; *Buck v. People's St., etc., R. Co.*, 46 Mo. App. 555; *State v. Jefferson*, 77 Mo. 138; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 288; *Smith v. Com.*, 85 Va. 924; *Van Pelt v. Van Pelt*, 3 N. J. L. 202; *Peterson v. State*, 47 Ga. 524.

When a boy twelve years of age stated on his *voir dire* that "it was wrong to tell a lie, and that, if he told a lie, he would be punished," the court did not abuse its discretion in permitting him to testify. *Parker v. State* (Tex. Crim. App. 1893), 21 S. W. Rep. 604.

3. *Coleman v. Com.*, 25 Gratt. (Va.) 865; 18 Am. Rep. 711; *Hartford v. Palmer*, 16 Johns. (N. Y.) 143; Can-

Thus, an idiot is incompetent to testify; and, as his infirmity is incurable, he can, under no circumstances, become competent.¹

A witness is not excluded merely because he is a lunatic. That is not enough *per se* to exclude him; but he must, at the time of the examination, be so under the influence of his malady as to be deprived of that "share of understanding which is necessary to enable him to retain in memory the events of which he has been witness, and gives him a knowledge of right and wrong." This is the test of competency; and, if at the time of his examination the witness has this degree of understanding, he is competent.²

nady v. Lynch, 27 Minn. 435; *Huling v. Huling*, 32 Ill. App. 519.

It is provided by Gen. Stats. of *Minnesota*, 1878, ch. 73, § 7, that persons "who are of unsound mind or intoxicated at the time of their production for examination," shall be incompetent. It was held that it was the intent of the statute to exclude persons as witnesses only when unsound or intoxicated to a degree that would exclude them at common law. *Cannady v. Lynch*, 27 Minn. 435. Compare *Clements v. McGinn* (Cal. 1893), 33 Pac. Rep. 920.

Infirmity of Persons from Age.—Testimony of a person eighty years of age was held insufficient upon an issue in chancery as to the fairness of a conveyance, his memory being too impaired to recollect whether he made alleged payments, amounting to \$1,300, in 1861, 1862, 1863, 1864, or 1865, or whether he got any of the money from the grantor, his son-in-law. *McCutchen v. Pigue*, 4 Helsk. (Tenn.) 565.

At the trial of an action, a witness seventy-eight years old, with little knowledge of passing events, and but a feeble memory of past transactions, who did not know, while upon the stand, where he stayed the night before, or where he came from to the court room, and seemed to have absolutely no memory in reference to the recent events in his life, was permitted to testify as to the circumstances attending a conveyance executed to him some six years previously. It was held that his testimony was worthless. *Woodhull v. Whittle*, 63 Mich. 575.

Texas.—In *Lopez v. State*, 30 Tex. App. 487, the court said: "But under our statute declaring the persons incompetent to testify, it is expressly provided that 'insane persons who are in an insane condition of mind at the time when they are offered as witnesses,

or who were in that condition when the events happened of which they are called to testify, as well as other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions in respect to which they are interrogated, or who do not understand the obligations of an oath,' are absolutely incompetent to testify. Code Crim. Proc., art. 730, subdivisions 1, 2. Under the plain, unambiguous and imperative language of our statute we are compelled to hold that such persons are totally incompetent and inadmissible as witnesses. There is no exception to this statutory rule."

1. *Rapalje's Witnesses*, § 3; *Phebe v. Prince*, Walk. (Miss.) 131; *Gebhart v. Shindle*, 15 S. & R. (Pa.) 235; 2 *Taylor* (Text-Book ed.), § 1240.

An idiot is defined by Sir Edward Coke to be one who, from his nativity, is, by a perpetual infirmity, *non compos mentis*. Co. Lit. 247a. But Mr. Wharton says: "It was held that an idiot was inadmissible, and so of a lunatic. It is now settled, however, that in all cases, either an idiot or a lunatic may be received, if, in the discretion of the court, he appears to have sufficient understanding to apprehend the obligation of an oath, and be able to give a correct answer to the questions put." Whart. Crim. Law, § 752. Thus implying that an idiot may have lucid intervals, or be of sufficient understanding to comprehend the nature of an oath.

2. *Coleman v. Com.*, 25 Gratt. (Va.) 865; 18 Am. Rep. 711; *Holcomb v. Holcomb*, 28 Conn. 177; *Worthington v. Mencer*, 96 Ala. 310; *Walker v. State*, 97 Ala. 85.

In *Reg. v. Hill*, 20 L. J. M. C. 222; 5 Eng. L. & Eq. 547, it was held that the mere fact of insanity is not enough *per se* to exclude a witness. The judges were all of opinion that if, at the time

Thus a lunatic is competent during a lucid interval.¹

And a witness, though of unsound mind at the time of the examination, may testify, if it appears that he has sufficient intellect to understand the obligation of an oath and to be able to give a correct account of the matters which he has seen or heard in reference to the questions in issue.²

But a witness permanently insane and unable to understand the obligation of an oath is incompetent.³

A witness is presumed, upon reaching the age of fourteen, to be competent, and to exclude him upon the score of idiocy or insanity, the defect in the understanding must ordinarily be shown by the party objecting to his competency; not upon his preliminary examination, but by testimony *aliunde*.⁴

The burden of proof as to restoration to sanity rests upon the party offering the witness. Thus, an inquisition of lunacy found

of his examination, he appeared to the judge to be of sufficient understanding to distinguish between right and wrong—to appreciate the nature and obligation of an oath—then he was admissible; all beyond was matter affecting the weight of his testimony and his credit as a witness, and was, therefore, matter for the consideration of a jury. "If," says Coleridge, J., "his evidence had, in the course of the trial, been so tainted with insanity as to be unworthy of credit, it was the proper function of the jury to disregard it, and not to act upon it."

Condition of the Witness at the Time of the Event to Which He Testifies.—"A respectable text writer observes that the witness, to be competent, must have been in possession of his intellect at the time of the event to which he testifies, as well as at the time of the examination, and that it ought to appear that no serious fit of insanity had intervened so as to cloud his recollection and to cause him to mistake the illusions of the imagination for the events he had witnessed." Rapalje's Witnesses, § 4, citing Allison's Pr. 436.

And it is expressly provided by Texas Code of Civ. Proc., art 730, subd. 1, 2, that persons "who were insane when the events happened of which they are called to testify are incompetent as witnesses." Lopez v. State, 30 Tex. App. 487.

But in Holcomb v. Holcomb, 28 Conn. 177, it was held that the question whether a person who has appeared as a witness was insane at the time of the event goes to the credibility of the witness and not to his compe-

tency. And it has been held that one who has been adjudged restored to sanity may testify as to facts that occurred while he was under guardianship as insane. Sarbach v. Jones, 20 Kan. 497. Compare Endel v. Walls, 16 Fla. 786.

1. Evans v. Hettich, 7 Wheat. (U. S.) 453; Campbell v. State, 23 Ala. 44.

2. District of Columbia v. Armes, 107 U. S. 519; Reg. v. Hill, 5 Cox C. C. 259; Coleman v. Com., 25 Gratt. (Va.) 865; 18 Am. Rep. 711; Worthington v. Mencer, 96 Ala. 310; Cannady v. Lynch, 27 Minn. 435; see, however, Lopez v. State, 30 Tex. App. 487.

3. Armstrong v. Timmons, 3 Harr. (Del.) 343; Livingston v. Kiersted, 10 Johns. (N. Y.) 362.

4. Robinson v. Dana, 16 Vt. 474. In that case the court said: "But a witness of fourteen is regarded by the law as having arrived at the age of maturity and as competent to give testimony, and whatever exists that would exclude him from being a witness, except in case of being interested, should be established by testimony *aliunde*. If a witness is objectionable on the ground of legal insanity, is wanting in a sense of moral obligation, is a lunatic, or *non compos*, he cannot be permitted to testify; but the fact should not be proved by the witness himself, —for he is as unsuitable to prove or disprove those facts as any other.

... Perhaps the court may exercise a discretion, in allowing this preliminary examination of a witness over fourteen, but it is not error in the court to refuse it."

This is the general rule that a party

against one is *prima facie* evidence of his incompetency, and unless it be overcome by evidence of his sanity, he should not be permitted to testify, even as against one not a party to the proceedings in lunacy.¹

The question as to whether a monomaniac is competent is one upon which the text writers differ, and upon which there seems to be no direct adjudication,² unless a case before the court of

objecting to a witness as incompetent must show the incompetency. *State v. Holloway*, 8 Blackf. (Ind.) 45; *Perine v. Grand Lodge*, 48 Minn. 82; *Knight v. Jackson*, 36 S. Car. 10.

But in *Lopez v. State*, 30 Tex. App. 487, the trial court permitted defendant's counsel to examine the prosecuting witness upon her *voir dire* to determine her competency, and upon the evidence thus adduced, together with testimony, the appellate court held her to be incompetent.

Pleadings.—The witness's competency cannot be determined "by the allegations of the pleadings. It is not the purpose or office of pleadings to ascertain or make or present any issue on the competency of witnesses to be sworn on the trial. The trial court may take into account the allegations and admissions in the pleadings bearing on the mental condition of any person offered as a witness, as it may resort to any other evidence to ascertain the fact; but they are not to be taken as conclusively determining such condition. The court below did not err in overruling defendant's objection to plaintiff as a witness based on the allegation in her complaint that she was at one time insane. It was not the duty of the trial court to examine plaintiff as to her mental soundness, merely because defendant alleged her to be unsound, unless it saw in her some indication of unfitness to testify." *Cannady v. Lynch*, 27 Minn. 437.

Although one alleging that he is of unsound mind, and suing by his next friend, under Code, § 2580, admits his mental incapacity, yet it is a question for the court to determine whether or not he is competent to testify. *Worthington v. Mencer*, 96 Ala. 310.

In an action for assault and battery the plaintiff is not rendered incompetent by an allegation in his complaint that the injuries received have impaired his mind. *Dickson v. Waldron*, 135 Ind. 507.

1. *Rapalje Wit.*, § 4; *Hoyt v. Adees*, 3

Lans. (N. Y.) 173; *Armstrong v. Timmons*, 3 Harr. (Del.) 342.

2. 1 Greenl. Ev., § 365, note.

In *Roscoe's Crim. Ev.* 128, it is said that the safest rule is to exclude their testimony.

In *Best's Principles of Ev.*, § 149, it is said: "Whether the evidence of a monomaniac, *i. e.*, a person insane on only one subject, can be received on matters not connected with his delusion, remained unsettled until recently, and some text writers thought it the safest rule to exclude the testimony of such persons, it being impossible to calculate with accuracy the extent and influence of such a state of mind. This would be hard measure. A monomaniac may perfectly understand the nature and obligation of an oath; his general intellect may equal or surpass that of his interrogators, and, indeed, he seems much in the condition of a lunatic who is in a perpetual lucid state on all subjects save one."

In his work on *Criminal Evidence*, Mr. Wharton says: "Insanity, unless amounting to entire extinction of reason, is not considered ground for absolute exclusion from the witness box. It is, however, admissible, in order to affect his credit, to prove that witness was subject to insane delusions. If insanity or other mental incompetency be set up as a ground for exclusion, the preliminary examination of the witness is the peculiar province of the court. If the witness, in the opinion of the court, is absolutely incompetent, he should be ruled out. But to justify such exclusion mere streaks of insanity are not sufficient. A man may have many delusions, and yet be capable of narrating facts truly; and, in any view, the existence of such delusions on his part at the time of trial goes to his credit, and not to his competency. Evidence of mental disturbance at the time of the event narrated can be received to affect credibility. An inquisition of lunacy may be *prima facie* evidence of incompetency, but does not exclude if, upon

criminal appeals in *England* may be considered as decisive in favor of admitting the monomaniac.¹

hearing, the court find that the witness understands the nature of an oath, and the facts of which he speaks. When there is no inquisition, the burden is on the party disputing sanity. We have already noticed that where it appears that a witness was absolutely deficient of the requisite perceptive powers at the time of the event to be testified to he may be excluded by the court. Instances of this kind, however, are of very rare occurrence." Whart. Crim. Ev. (8th ed.), §§ 370-373.

1. *Reg. v. Hill*, 5 Cox C. C. 259. But compare *Waring v. Waring*, 12 Jur. 947.

In *District of Columbia v. Armes*, 107 U. S. 519, the court, by Field, J., says of this case: "Such was the decision of the Court of Criminal Appeal in *England*, in the case of *Reg. v. Hill*, 5 Cox C. C. 259. There the prisoner had been convicted of manslaughter; and on the trial a witness had been admitted whose incompetency was urged on the ground of alleged insanity. He was a patient in a lunatic asylum, under the delusion that he had a number of spirits about him which were continually talking to him, but the medical superintendent testified that he was capable of giving an account of any transaction that happened before his eyes; that he had always found him so; and that it was solely with reference to the delusion about the spirits that he considered him a lunatic. The witness himself was called, and he testified as follows: 'I am fully aware I have a spirit, and twenty thousand of them. They are not all mine. I must inquire. I can where I am. I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the rheumatics. All are now in my body and around my head. They speak to me incessantly, particularly at night. That spirits are immortal, I am taught by my religion from my childhood. No matter how faith goes, all live after my death, those that belong to me and those that do not.' After much more of this kind of talk he added: 'They speak to me instantly; they are speaking to me now; they are not separate from me; they are around me speaking to me now; but I can't be a spirit, for I am flesh and blood.

They can go in and out through walls and places which I cannot.' He also stated his opinion of what it was to take an oath: 'When I swear,' he said, 'I appeal to the Almighty. It is perjury, the breaking of a lawful oath, or taking an unlawful one; he that does it will go to hell for all eternity.' He was then sworn, and gave a perfectly collected and rational account of a transaction which he declared that he had witnessed. He was in some doubt as to the day of the week on which it took place, and on cross-examination said: 'These creatures insist upon it, it was Tuesday night, and I think it was Monday;' whereupon he was asked: 'Is what you have told us what the spirits told you, or what you recollected without the spirits?' And he said: 'No. The spirits assist me in speaking of the date, I thought it was Monday and they told me it was Christmas eve, Tuesday; but I was an eye-witness, an ocular witness to the fall to the ground.' The question was reserved for the opinion of the court whether this witness was competent, and after a very elaborate discussion of the subject, it was held that he was. Chief Justice Campbell said that he entertained no doubt that the rule laid down by Baron Parke, in an unreported case which had been referred to, was correct, that wherever a delusion of an insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind and sufficient understanding of the nature of an oath, and it is for the jury to decide what amount of credit they will give to his testimony.

"Various authorities," said the Chief Justice, 'have been referred to, which lay down the law that a person *non compos mentis* is not an admissible witness; but in what sense is the expression *non compos mentis* employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath and capable of giving very material evidence upon the subject-matter under consideration.' And the Chief Justice added: 'The proper test must always be—does the lunatic

c. INTOXICATED PERSONS.—A person intoxicated at the time of the trial is incompetent.¹ But, unlike the case of a lunatic, his incapacity is not shown by the introduction of witnesses on the part of the party objecting to him; but the court, from its own view, will decide upon his competency.²

The fact that a person has been judicially declared a drunkard, does not raise a presumption of incompetency, as does an inquisition of lunacy.³

While the intoxication of a witness at the time of the transactions of which he testifies does not destroy his credibility, it undoubtedly impairs it; but if his testimony is corroborated, or his recollection of the transaction appears to be distinct and clear, he is entitled to belief.⁴

d. DEAF MUTES.—It was formerly held that persons who were deaf and dumb from their birth were, in contemplation of law, idiots,⁵ but, owing to the remarkable success achieved in educating such persons in modern times, this presumption no longer exists.⁶ And when a deaf mute is brought forward as a witness, if the court is satisfied that he possesses the requisite amount of intelligence and understands the obligation of an oath, he may

understand what he is saying; and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest.' He also observed that in a lunatic asylum the patients are often the only witnesses of outrages upon themselves and others, and there would be impunity for offenses committed in such places if the only persons who can give information are not to be heard. Baron Alderson, Justice Coleridge, Baron Platt and Justice Talfourd agreed with the Chief Justice, the latter observing that, 'If the proposition that a person suffering under an insane delusion cannot be a witness were maintained to the fullest extent, every man subject to the most innocent, unreal fancy would be excluded. Martin Luther believed that he had a personal conflict with the devil. Doctor Johnson was persuaded that he had heard his mother speak to him after death. In every case, the judge must determine according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case there may be the most disastrous consequences.' This case is also found in

the 2d of Denison and Pearce's Crown Cases 254, where Lord Campbell is reported to have said that the rule contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him. The doctrine of this decision has not been overruled, that we are aware of, and it entirely disposes of the question raised here."

1. *Hartford v. Palmer*, 16 Johns. (N. Y.) 143.

2. *Hartford v. Palmer*, 16 Johns. (N. Y.) 143; *Gould v. Crawford*, 2 Pa. St. 89.

3. *Gibhart v. Shindle*, 15 S. & R. (Pa.) 235.

Evidence that a witness is an habitual drunkard is not admissible. *Thayer v. Boyle*, 30 Me. 475.

4. *State v. Castello*, 62 Iowa 404.

5. 1 Hale P. C. 34; *Rex v. Steel*, 1 Leach C. C. 451. Compare *Rex v. Pritchard*, 7 C. & P. 303; 32 E. C. L. 517; *Rex v. Dyson*, 7 C. & P. 305; 32 E. C. L. 518; *State v. Harris*, 8 Jones (N. Car.) 136; 78 Am. Dec. 272.

6. *Harrod v. Harrod*, 1 K. & J. 9; *Com. v. Hill*, 14 Mass. 207; *State v. Howard*, 118 Mo. 127; *Brown v. Brown*, 3 Conn. 299; 8 Am. Dec. 187; *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Snyder v. Nations*, 5 Blackf. (Ind.) 295; *Barnett v. Barnett*, 1 Jones Eq. (N. Car.) 221; *Christmas v. Mitchell*, 3 Ired. Eq. (N. Car.) 541.

be sworn and examined.¹ He may give his evidence through an interpreter by means of signs,² or, if he can read and write, he may be required to reduce his answers to writing.³

5. Want of Religious Belief.—It was the rule of the common law—a rule which still obtains in many of the states—that persons who are insensible to the obligations of an oath are incompetent to testify as witnesses.⁴ This doctrine is based upon the ground that the law requires all evidence to be given under the sanction of an oath, and, as without religious belief a person cannot be subject to this indispensable sanction, he should not be permitted to blasphemously invoke the name of a supreme being in whose existence as “the rewarder of truth and avenger of falsehood he does not believe.”⁵

That a witness would feel bound to speak the truth out of regard to his own character, or from a sense of moral rectitude, or from any other motive than a regard for the sanctity of his oath, is not sufficient.⁶

1. *Morrison v. Lennard*, 3 C. & P. 127; 14 E. C. L. 238; *People v. McGee*, 1 Den. (N. Y.) 19; *State v. DeWolf*, 8 Conn. 93; 20 Am. Dec. 90; *Snyder v. Nations*, 5 Blackf. (Ind.) 295; *State v. Weldon*, 39 S. Car. 318.

2. *Ruston's Case*, 1 Leach C. C. 408; *State v. DeWolf*, 8 Conn. 93; 20 Am. Dec. 90; *People v. McGee*, 1 Den. (N. Y.) 19; *Snyder v. Nations*, 5 Blackf. (Ind.) 295.

3. *Morrison v. Lennard*, 3 C. & P. 127; 14 E. C. L. 258.

This will not be required if the witness can relate the facts correctly by signs and can communicate his ideas only imperfectly by writing. *State v. DeWolf*, 8 Conn. 93; 20 Am. Dec. 90.

4. *Greenl. Ev.*, § 368; *Omychund v. Barker*, 1 Atk. 48; *Maden v. Catanach*, 7 H. & N. 360; *People v. M'Garren*, 17 Wend. (N. Y.) 460; *Norton v. Ladd*, 4 N. H. 444; *Thurston v. Whitney*, 2 Cush. (Mass.) 104; *Smith v. Coffin*, 18 Me. 157; *Arnold v. Arnold*, 13 Vt. 362; *Scott v. Hooper*, 14 Vt. 535; *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541.

Where a child eleven years old said she had never heard of God, heaven or hell, and did not know that she would be punished if she swore falsely, otherwise than by being put in jail, held that she should not have been allowed to testify. *Beason v. State*, 72 Ala. 191.

5. *Greenl. Ev.*, § 368; *Omychund v. Barker*, 1 Atk. 48; *Willes* 538; 1 *Smith's Leading Cases* (8th ed.) 1360.

In *Arnold v. Arnold*, 13 Vt. 362, the

court said: “If the witness does not believe in any Supreme Governor of the universe, who will reward virtue and punish vice, there is no mode known to us by which an oath can be made binding upon his conscience. If a man sincerely believe himself to belong to the highest order of intelligences, it may be his misfortune, not his fault, but he cannot be sworn by the greater. If sworn he must be allowed to swear by himself.”

6. 1 *Phill. Ev.* (10th ed.) 19; *Ruston's Case*, 1 Leach C. C. 408; *Omychund v. Barker*, *Willes* 538; *Atty. Gen'l v. Bradlaugh*, 14 Q. B. Div. 667; *Miller v. Solomons*, 7 Exch. 475; 8 Exch. 778.

Mr. Greenleaf says: “It is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from the fear of the punishment which the law inflicts upon persons guilty of perjury. Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth.” 1 *Greenl. Ev.*, § 368.

Our law, in common with the law of most civilized countries, requires the additional security afforded by the religious sanction implied in an oath; and, as a necessary consequence, rejects all witnesses who are incapable of giving this security. 1 *Greenl. Ev.*, § 368.

To be competent as a witness, one must have a conscience alive to the

The proper test of the competency of a witness, on the ground of his religious principles, is "whether he believes in the existence of a God who will punish him if he swears falsely."¹

Applying this test an universalist has been admitted to testify, it not appearing that he did not believe in the punishment of the wicked in this life.²

It is not, however, indispensable to competency that the witness should believe that the punishment of perjury will be inflicted in the next world; it will be sufficient if he has a religious sense of accountability to God, and believes that he will punish in this world the commission of perjury.³

conviction of accountability to a higher power than human law. Solely his regard for the good of society, or his fear of punishment, is not sufficient. *Com. v. Winnemore*, 2 Brews. (Pa.) 378.

1. *Omychund v. Barker*, Willes 549; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98; *Atty. Gen'l v. Bradlaugh*, 14 Q. B. Div. 667; *Butts v. Swartwood*, 2 Cow. (N. Y.) 431; *People v. Matteson*, 2 Cow. (N. Y.) 432 note; *Cubbison v. M'Creary*, 2 W. & S. (Pa.) 262. See also *Wakefield v. Ross*, 5 Mason (U. S.) 18; *Curtiss v. Strong*, 4 Day (Conn.) 51; *Brock v. Milligan*, 10 Ohio 125; *Arnold v. Arnold*, 13 Vt. 362.

But testimony is inadmissible that a witness, called by the opposing party, had stated "that he had lost his devotion; that he intended now to serve the devil as long as he had served the Lord; and that he had a pack of cards which he carried about in his pocket and called them his bible;" it not being in conflict with any statement he had made. *Halley v. Webster*, 21 Me. 461.

2. *Butts v. Swartwood*, 2 Cow. (N. Y.) 431; *People v. Matteson*, 2 Cow. (N. Y.) 432 note.

3. 1 Greenl. Ev., § 369; *Omychund v. Barker*, Willes 545; *Atty. Gen'l v. Bradlaugh*, 14 Q. B. Div. 667; *Phebe v. Prince*, Walk. (Miss.) 131; *Arnold v. Arnold*, 13 Vt. 362; *U. S. v. Kennedy*, 3 McLean (U. S.) 175; *Smith v. Coffin*, 18 Me. 157; *Jones v. Harris*, 1 Strobb. (S. Car.) 160; *Searcy v. Miller*, 57 Iowa 620; *People v. Matteson*, 2 Cow. (N. Y.) 432 note; *Noble v. People*, 1 Ill. 54; *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541; *Butts v. Swartwood*, 2 Cow. (N. Y.) 431 and note; *Shaw v. Moore*, 4 Jones (N. Car.) 25; *Blair v. Seaver*, 26 Pa. St. 274; *Bennett v. State*, 1 Swan (Tenn.) 411; *Blocker v. Burness*, 2 Ala. 354; *Free v. Buckingham*, 59 N. H. 219.

In *Maryland*, no one is incompetent as a witness, "provided he believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come." Const. Dec. of Rights, § 36.

In *Ohio*, it has been held that one who "saw God in trees, bushes, herbage and everything he saw—who believed in future punishments during this life, not beyond, and if he did anything wrong he was condemned in his conscience," was a competent witness. *Easterday v. Kilborn*, Wright (Ohio) 345. See also *Clinton v. State*, 33 Ohio St. 27.

In *Cubbison v. M'Creary*, 2 W. & S. (Pa.) 262, it was held that the test of a witness's competency is the existence of a belief in a God who will punish him if he swear falsely, and that disbelief in a future state of existence is not sufficient ground for the exclusion of testimony, though it may lessen its weight when admitted. See also *Blair v. Seaver*, 26 Pa. St. 274.

In *Kansas*, the rule has been still further relaxed, an Indian having been permitted to testify who simply believed that he would be hanged if he told a lie. *Smith v. Brown*, 8 Kan. 608. In *Nebraska*, on the contrary, an Indian was not permitted to testify; but he did not seem to have any conception of the nature of an oath, answering to all questions on the subject that he did not want to tell a lie, but would tell the truth; the supreme court sustained this ruling, and said that his parrot-like utterances that he would tell the truth amounted to nothing. *Priest v. State*, 10 Neb. 393. In both of these cases, however, the court seemed to have considered the question of the witness's competency rather with

Atheists, that is, persons who do not believe in the existence of a God, where the common-law rule is in force, are invariably held incompetent.¹

The law will never presume a person to be incompetent for want of religious belief. On the contrary, there is a presumption that a person brought up in a Christian country is of the Christian faith, and a competent witness. The burden of proof is, therefore, upon the adversary of the party producing the witness to show that he is incompetent upon this ground.²

It has been said that stronger evidence is required to exclude a witness for want of religious belief than is required to set aside a juror.³

regard to his mental than his religious capacity.

It is held, in *State v. Belton*, 24 S. Car. 187; 58 Am. Rep. 245, that a witness who stated that he had never heard of God, or of heaven, or of hell, or of the devil, was incompetent to testify, although he had learned the Lord's prayer, and stated that he had heard it said that the bad man caught those who lied and cursed. The court said, however, that "the competency of a witness is not affected by a disbelief in a future state, and that his testimony should be admitted if he believes in the existence of a God, and in divine punishment of crime." *Citing Jones v. Harris*, 1 Strobb. (S. Car.) 160.

Contra.—In *State v. Cooper*, 2 Overt. (Tenn.) 96; 5 Am. Dec. 656, the court seems to make the belief in a future state of rewards and punishment the test.

In *Atwood v. Welton*, 7 Conn. 66, it was held that a person who disbelieves in any punishment in a future state, though he believes in the existence of the Supreme Being, and that men are punished in this life for their sins, was incompetent. See also *Curtis v. Strong*, 4 Day (Conn.) 51.

In *Jackson v. Gridley*, 18 Johns. (N. Y.) 98, a belief in a future state of rewards and punishments was said to be necessary to render a witness competent. But the point was not directly in issue, as the witness believed nothing.

1. 1 Greenl., § 368; 1 Phil. Ev. (9th ed.) 10; 1 Starkie 22; Bull. N. P. 292; *Atty. Gen'l v. Bradlaugh*, 14 Q. B. Div. 667; *Omychund v. Barker*, Willes 538; *Curtiss v. Strong*, 4 Day (Conn.) 51; *People v. McGarren*, 17 Wend. (N. Y.) 460; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98; *Butts v. Swartwood*, 2 Cow. (N. Y.) 431; *U. S. v. Kennedy*, 3 McLean

(U. S.) 175; *Wakefield v. Ross*, 5 Mason (U. S.) 16; *Norton v. Ladd*, 4 N. H. 444; *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541; *Thurston v. Whitney*, 2 Cush. (Mass.) 104; *Smith v. Coffin*, 18 Me. 157; *Scott v. Hooper*, 14 Vt. 535; *Arnold v. Arnold*, 13 Vt. 363.

Infidels.—Although Professor Greenleaf and Mr. Phillips (1 Greenl. Ev., § 368; 1 Phil. Ev., pp. 10, 11) speak of infidels as being incompetent in certain cases, this view does not seem to be supported by authority. *Omychund v. Barker*, Willes 549; *Smith v. Coffin*, 18 Me. 157. Nor does it appear that, applying the test given in the text *supra*, an infidel's testimony could be excluded. And Mr. Greenleaf, in another section of his work (1 Greenl. Ev., § 371), describes the manner in which persons who are not of the Christian religion should be sworn, which would appear to be superfluous if their testimony is not admissible.

2. 1 Greenl. Ev., § 370; *Smith's Ev.* 48; *Taylor's Ev.* (Blackstone ed.), § 1385; *Atty. Gen'l v. Bradlaugh*, 14 Q. B. Div. 667; *Donnelley v. State*, 26 N. J. L. 463, 601; *Smith v. Coffin*, 18 Me. 157; *Den v. Vancleve*, 5 N. J. L. 731.

3. *McFadden v. Com.*, 23 Pa. St. 17; 62 Am. Dec. 308, where it is said: "When a witness is objected to for defect of religious principle, the rule is to let him speak for himself. And if he professes faith enough to give religious sanction to his oath, his testimony is taken. Courts incline against the total exclusion of evidence on such grounds, because it seals up what is, perhaps, the only source of information. The choice is very often between a doubtful witness and none. It is, therefore, safer to let the objection go to his credit. But there are no such reasons for tenderness in the case of a juror,

The question is as to the state of the witness's mind at the time of the trial; and this may be shown by his declarations made previously.¹

The atheistical declarations of the witness having been proved, the law will presume them to have been sincere, and that the belief thus disclosed remains unchanged.²

The witness himself cannot be questioned concerning his want of religious belief, either before or after he has been sworn.³

where the worst consequence that results from his rejection is that his place will be filled by a better man."

1. 1 Greenl. Ev., § 370; *Smith v. Coffin*, 18 Me. 157; *Anderson v. Maberry*, 2 Heisk. (Tenn.) 653; *Bow v. Parsons*, 1 Root (Conn.) 480; *Beardsly v. Foot*, 2 Root (Conn.) 399.

The incompetency of a witness on the ground of disbelief in God may be proved by his declarations on the subject. *Anderson v. Maberry*, 2 Heisk. (Tenn.) 653.

2. 1 Greenl. Ev. 370; *State v. Stinson*, 7 Law Rep. 383; *Atty. Gen'l v. Parnter*, 3 Bro. C. C. 443; *Peaslee v. Robbins*, 3 Met. (Mass.) 164; *Hix v. Whittemore*, 4 Met. (Mass.) 545.

In order that no change in the witness's opinion may have probably taken place, it has been intimated that only declarations made within a short period anterior to the trial should be admitted. *Brock v. Milligan*, 10 Ohio 126.

3. *Den v. Vancleve*, 5 N. J. L. 731; *U. S. v. Kennedy*, 3 McLean (U. S.) 175; 4 Am. Jur. 79 note; *Queen's Case*, 2 B. & B. 284; *Odell v. Koppee*, 5 Heisk. (Tenn.) 88; *Arnd v. Amling*, 53 Md. 192. See also *Smith v. Coffin*, 18 Me. 157; *Com. v. Burke*, 16 Gray (Mass.) 33; *Atwood v. Welton*, 7 Conn. 73; *Hronek v. People*, 134 Ill. 139; *Searcy v. Miller*, 57 Iowa 621.

In *Com. v. Smith*, 2 Gray (Mass.) 516; 61 Am. Dec. 478, the court, by Shaw, C. J., said: "The want of such religious belief must be established by other means than the examination of the witness upon the stand. He is not to be questioned as to his religious belief, nor required to divulge his opinion upon that subject in answer to questions put to him while under examination. If he is to be set aside for want of such religious belief, the fact is to be shown by other witnesses, and by evidence of his previously expressed opinions voluntarily made known to others."

In *Free v. Buckingham*, 59 N. H. 225, it is said: "But it is not customary,

in modern practice, to permit an inquiry into a man's peculiarity of religious belief. This is not because the inquiry might tend to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience contrary to the spirit of our institutions. *New Hampshire Bill of Rights*, arts. 4, 5; *Const. U. S.*, First Amendment."

"The witness himself is never questioned, in modern practice, as to his religious belief, though formerly it was otherwise. 1 *Swift's Dig.* 739; *Wakefield v. Ross*, 5 Mason (U. S.) 19; *American Jurist*, vol. IV., p. 79, n. It is not to be allowed, even after he has been sworn. *The Queen's Case*, 2 B. & B. 284. Not because it is a question tending to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience, foreign to the spirit of our institutions. No man is obliged to avow his belief, but if he voluntarily does avow it, there is no reason why the avowal should not be proved like any other fact. The truth and sincerity of the avowal, and the continuance of the belief thus avowed, are presumed, and very justly too, till they are disproved. If his opinions have been subsequently changed, this will generally, if not always, be provable in the same mode. *Atwood v. Welton*, 7 Conn. 66; *Curtiss v. Strong*, 4 Day (Conn.) 51; *Swift's Ev.* 48, 50; *Scott v. Hooper*, 14 Vt. 535; *Mr. Christian's note* to 3 Bl. Com. 369; 1 *Phil. Ev.* 18; *Com. v. Bachelor*, 4 Am. Jur. 79, note. If the change of opinion is very recent, this furnishes no good ground to admit the witness himself to declare it; because of the greater inconvenience which would result from thus opening a door to fraud, than from adhering to the rule requiring other evidence of this fact. The old cases, in which the witness himself was questioned as to his belief, have, on this point, been overruled. See *Christian's note* to 3 Bl. Com. (369) n. (30). The law, therefore, is not reduced to any

On the other hand, his incompetency having been shown on this ground, he cannot be sworn on the *voire dire* to restore his competency by his own testimony.¹

absurdity in this matter. It exercises no inquisitorial power, neither does it resort to secondary or hearsay evidence. If the witness is objected to, it asks third persons to testify whether he has declared his belief in God and in a future state of rewards and punishments, etc. Of this fact they are as good witnesses as he could be, and the testimony is primary and direct. It should further be noticed that the question, whether a person about to be sworn is an atheist or not, can never be raised by anyone but an adverse party. No stranger or a volunteer has a right to object. There must, in every instance, be a suit between two or more parties, one of whom offers the person in question as a competent witness. The presumption of law, that every citizen is a believer in the common religion of the country, holds good until it is disproved; and it would be contrary to all rule to allow anyone, not party to the suit, to thrust in his objections to the course pursued by the litigants. This rule and uniform course of proceeding shows how much of the morbid sympathy expressed for the atheist is wasted. For there is nothing to prevent him from taking any oath of office; nor from swearing to a complaint before a magistrate; nor from making oath to his answer in chancery. In this last case, indeed, he would not be objected to for another reason—namely, that the plaintiff, in his bill, requests the court to require him to answer upon his oath. In all these, and many other similar cases, there is no person authorized to raise an objection. Neither is the question permitted to be raised against the atheist, where he himself is the adverse party, and offers his own oath in the ordinary course of proceeding. If he would make affidavit, in his own cause, to the absence of a witness, or to hold to bail, or to the truth of a plea in abatement, or to a loss of a paper, or to the genuineness of his books of account, or to his fears of bodily harm from one against whom he requests surety of the peace, or would take the poor debtor's oath; in these and the like cases the uniform course is to receive his oath like any other person's. The law, in such cases,

does not know that he is an atheist; that is, it never allows the objection of infidelity to be made against any man seeking his own rights in a court of justice; and it conclusively and absolutely presumes that, so far as religious belief is concerned, all persons are capable of an oath of whom it requires one, as the condition of its protection, or its aid; probably deeming it a less evil that the solemnity of an oath should, in a few instances, be mocked by those who feel not its force and meaning, than that a citizen should, in any case, be deprived of the benefit and protection of the law, on the ground of his religious belief. The state of his faith is not inquired into where his own rights are concerned. He is only prevented from being made the instrument of taking away those of others."

¹ Law Rep., pp. 347, 348.

In *Arnd v. Amling*, 53 Md. 192, the trial court examined a witness on his *voire dire* as to his religious belief; and, upon his reply that he believed in God and future punishments, permitted him to testify; the appellate court, while disapproving the custom as contrary to the modern practice, held that it was not reversible error.

Contra.—Mr. Taylor says: "The witness may himself be interrogated upon the subject, either before he is sworn at all, or after he has been sworn on the *voire dire*, or, even, as it would seem, after being sworn in the cause."

² Tayl. Ev. (Text-Book Series), § 1250, citing *Rex v. White*, 1 Leach C. C. 430; *Maden v. Catanach*, 7 H. & N. 360; *Rex v. Taylor*, Peake 11; *Queen's Case*, 2 B. & B. 284. And see to the same effect, *Harrel v. State*, 1 Head (Tenn.) 125. *Compare* *Odell v. Koppée*, 5 Heisk. (Tenn.) 88.

¹ *Com. v. Wyman*, Thach. Cr. Cas. (Mass.) 432; *State v. Townsend*, 2 Harr. (Del.) 543.

Still it is said that he may be permitted to explain his religious sentiments, if he desires to do so; and if he declares that he believes in a future state of existence, and in a Supreme Being, who will punish him either in this world or the next for his misdeeds, the court will permit him to be examined as a witness, leaving his credibility to the

In a large and increasing number of states, all disqualifications for want of religious belief have been abolished by statute or constitution. Thus, in *Arizona*,¹ *California*,² *Illinois*,³ *Indiana*,⁴ *Iowa*,⁵ *Kentucky*,⁶ *Maine*,⁷ *Massachusetts*,⁸ *Michigan*,⁹ *Minnesota*,¹⁰ *Mississippi*,¹¹ *Missouri*,¹² *New York*,¹³ *Texas*,¹⁴ *Vermont*,¹⁵ *Virginia*,¹⁶

jury. *U. S. v. White*, 5 Cranch (C. C.) 38. See also *Com. v. Winnemore*, 1 Brews. (Pa.) 356.

1. Comp. L. *Arizona* 1877, p. 469.

2. Hittell's Code, § 11, 879.

In *Fuller v. Fuller*, 17 Cal. 612, it is said: "We can assign to this language no other import than that a witness is competent, without any respect to his religious sentiments or convictions; the law leaving this matter of competency to legal sanctions, or, at least, to considerations independent of religious sentiments or convictions." The provision in question was "that no person offered as a witness shall be excluded on account of his opinion on matters of religious belief."

3. Under Const. *Illinois* art. 2, § 3, which provides that "no person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations," the absence of belief in his accountability to the Deity does not disqualify a citizen from testifying in a court of justice. *Hronek v. People*, 134 Ill. 139; *Ewing v. Bailey*, 36 Ill. App. 191.

4. Rev. Stat. of *Indiana* 1881, § 505.

5. Const. of 1846, art. 1, § 4, of *Iowa*, provides that no person shall be rendered incompetent to give evidence in any court of law or equity in consequence of his opinions on the subject of religion. But it appears that want of religious belief may go to the credibility of the witness. *Searcy v. Miller*, 57 Iowa 613; *State v. Elliott*, 45 Iowa 486.

6. *Bush v. Com.*, 80 Ky. 244. In that case the court, by Hines, J., said: "The unquestioned tendency of modern legislation, as well as judicial interpretation, is to the exclusion of inquiry into religious belief as a test of the competency of a witness. In this state, legislation, in civil cases at least, has kept pace with this tendency, so that by virtue of the provisions of the Civil Code no religious test can be applied." The court then cited the provision in the *Kentucky* constitution "That the civil rights, privileges or capacities

of any citizen shall in no wise be diminished or enlarged on account of his religion," and held that this precluded the exclusion of any witness on account of his religious belief. *Ciling Perry's Case*, 3 Gratt. (Va.) 602, cited *supra* this note.

7. *Maine* Rev. Stat. 1871, § 81.

8. Gen. Stat. *Massachusetts*, ch. 131, § 12; Pub. Stat. 1882, ch. 169, § 18.

9. Rev. Stat. *Michigan* 1846, ch. 102, § 96; *People v. Jenness*, 5 Mich. 305.

10. *Minnesota* Stat. 1878, p. 792, § 7.

11. Rev. Code *Mississippi* 1880, § 1604.

12. Rev. Stat. *Missouri* 1845, ch. 186, § 21; *Londener v. Lichtenheim*, 11 Mo. App. 385.

In that case the court said: "The constitution of *Missouri* provides, art. 2, § 5, that no person shall be disqualified from testifying on account of his religious opinions. This evidently means that a witness is competent, without regard to his believing or not believing in a God who will reward the just and punish the wicked. The law leaves the matter of competency to considerations independent of the religious belief of the witness. This is the interpretation given to similar provisions in the organic law of other states. *Fuller v. Fuller*, 17 Cal. 609; *People v. Jenness*, 5 Mich. 305; *Perry's Case*, 3 Gratt. (Va.) 602."

13. In *New York*, the constitution (art. 1, § 3) declares that "no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." But it has been decided that a witness may be interrogated as to the extent and nature of his religious belief, for the purpose of impeaching his credibility and diminishing the weight which would otherwise be given to his testimony. *Stambro v. Hopkins*, 28 Barb. (N. Y.) 265.

14. Rev. Stat. *Texas* 1879, art. 2249; *Crim. Code*, art. 736.

15. Rev. Stat. *Vermont* 1880, § 1007.

16. *Perry's Case*, 3 Gratt. (Va.) 602.

Where it was held that, under the constitution of *Virginia*, which declares that one's religious opinions or beliefs

and *Wisconsin*,¹ no objection can be made to the witness's competency on the ground of his want of religious faith. So in *Florida*, atheists, agnostics, and persons who do not believe in future rewards and punishments, are made competent and amenable to punishment for perjury by a recent act of the legislature.²

In *England*, it is provided by statute that if any person, called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make a solemn promise and declaration, after which he is liable to prosecution for perjury if he testifies falsely.³

In *Connecticut* and *New Hampshire*, a belief in a Supreme Being is all that is required of a witness.⁴

In *Georgia*, a witness's disbelief goes only to his credibility.⁵

In *New Mexico*, a Chinaman who believes in the Chinese religion, but takes the ordinary oath and states that he regards it as binding, is competent, so far as religious belief is concerned.⁶

In some states, where the statutes enact that "all persons," or "every human being," or "everyone who can understand an oath," shall be competent, probably religious disbelief would not affect the competency of a witness.⁷ And where the constitution provides that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles," the right of a party to testify in his own behalf is held to be a civil right that cannot be denied on the ground that he does not believe that God will punish perjury.⁸

shall "in no wise affect, diminish, or enlarge" his "civil capacities," no person is incapacitated from being a witness on account of his real or professed religious opinions.

1. *Wisconsin* Const., art. 1, § 18.

2. Laws 1890-91, ch. 4036, § 2.

3. Stat. 32 & 33 Vict., ch. 68, § 4.

The words "court of justice" and "presiding judge" include all persons authorized by law to administer an oath for the taking of evidence. Stat. 33 & 34 Vict., ch. 49, § 1. But the act does not apply to members of Parliament who are required to take an oath before voting. *Clarke v. Bradlaugh*, 7 Q. B. Div. 38.

4. Rev. Stat. of *Connecticut* 1849, tit. 1, § 140; Gen. Stat. 1875, p. 440; Rev. Stat. *New Hampshire* 1842, ch. 188, § 9; Gen. Laws 1878, ch. 288, § 12.

One is competent to testify who believes in the existence of God, and that divine punishment, here or hereafter, will follow perjury; his disqualification

is a question of fact. *Free v. Buckingham*, 59 N. H. 219.

5. Section 3797 of the *Georgia* Code, which provides that religious belief shall go only to the credit of a witness, does not justify asking a witness if he believes in Christ as the Saviour. *Donkle v. Kohn*, 44 Ga. 266.

6. *Territory v. Yee Shun*, 3 N. Mex. 82.

7. 1 Greenl. Ev. (14th ed.), § 368n., citing *Iowa* Rev. Co. 1880, § 3636; *Ohio* Rev. Stat. 1880 (2d ed.), § 5240; *Tennessee* Stat. 1871, § 3807. But see *supra*, text, for the *Iowa* doctrine, and *infra*, this note, for *Ohio*.

8. *State v. Powers*, 51 N. J. L. 432; 15 Am. St. Rep. 693. See *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652.

The *Ohio* Bill of Rights, § 7, declares "that no religious test shall be required as a qualification of office; nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed

6. **Infamy.**—At common law, a person convicted of an infamous crime was not, thereafter, competent to testify as a witness in any court of justice, unless his competency was restored by a reversal of the judgment of conviction, or by a pardon. This subject, however, has been separately treated in another volume of this work.¹

7. **Indians, Chinamen, and Negroes.**—Formerly there were statutes in some of the states prohibiting Indians and Chinamen from testifying for or against white persons.² In the absence of such a statute, however, the law makes no such distinction.³ So, also, it was formerly the law in many states that a negro was incompetent to testify for or against a white person;⁴ but in states where this was the rule it has generally been held that the act of Congress, known as the Civil Rights Bill,⁵ placed negroes on the same footing as white persons in respect to their competency as witnesses.⁶ In one jurisdiction, however, the contrary was held on the ground that Congress has no constitutional power to prescribe rules of evidence for the courts of the states.⁷

to dispense with oaths and affirmations." In *Clinton v. State*, 33 Ohio St. 27, it was held that "the common-law rule still obtained, notwithstanding this provision, and the witness, to be competent, must believe in the existence of a God who will punish him if he swears falsely," but that one who believes in the existence of a God and that an oath is binding on the conscience, is a competent witness though he does not believe in a future state of rewards and punishments.

Maryland.—In *Maryland*, no one is incompetent as a witness or juror "provided he believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or the world to come." Const. Dec. of Rights, § 36.

1. See *INFAMY*, vol. 10, p. 606.

2. See *Harris v. Doe*, 4 Blackf. (Ind.) 369; *People v. Howard*, 17 Cal. 63; *Speer v. See Yup Co.*, 13 Cal. 73; *People v. Jones*, 31 Cal. 565.

The *California* statute applied only to criminal cases when white persons were on trial. *People v. Awa*, 27 Cal. 638.

The provision is not found in the present Penal Code of that state. See *Deering's Penal Code of California*, § 1321. Compare *In re Tung Yeong*, 19 Fed. Rep. 190.

3. *Doe v. Newman*, 3 Sm. & M. (Miss.) 565; *Coleman v. Doe*, 4 Sm. & M. (Miss.) 40; *Priest v. State*, 10 Neb. 393.

4. *Smyth v. Oliver*, 31 Ala. 39; *Du-*

pree v. State, 33 Ala. 380; 73 Am. Dec. 422; *Heath v. State*, 34 Ala. 250; *Grady v. State*, 11 Ga. 253; *Brown v. Lester*, 1 Ga. Dec. 77; *Graham v. Crockett*, 18 Ind. 119; *Nave v. Williams*, 22 Ind. 368; *Page v. Carter*, 8 B. Mon. (Ky.) 192; *Rusk v. Sowerwine*, 3 Har. & J. (Md.) 97; *Sprigg v. Negro Mary*, 3 Har. & J. (Md.) 491; *Hughes v. Jackson*, 12 Md. 450; *Jordan v. Smith*, 14 Ohio 199; *Dean v. Com.*, 4 Gratt. (Va.) 541.

For various applications of the rule, see *Ivey v. Hardy*, 2 Port. (Ala.) 548; *People v. Elyea*, 14 Cal. 144; *State v. Rash*, 1 Houst. Cr. Cas. (Del.) 271; *State v. Downhan*, 1 Houst. Cr. Cas. (Del.) 45; *Webb v. Pindergrass*, 4 Harr. (Del.) 439; *Elliott v. Morgan*, 3 Harr. (Del.) 316; *State v. Griffin*, 3 Harr. (Del.) 560; *Woodward v. State*, 6 Ind. 492; *Potts v. Harper*, 3 N. J. L. 583; *Gurnee v. Dessies*, 1 Johns. (N. Y.) 508; *Hawkins v. State*, 7 Mo. 190; *Ragland v. Huntington*, 1 Ired. (N. Car.) 561; *Gray v. State*, 4 Ohio 353; *Groning v. Devana*, 2 Bailey (S. Car.) 192; *Jones v. Jones*, 12 Rich. (S. Car.) 116; *State v. M'Dowell*, 2 Brev. (S. Car.) 145; *White v. Helmes*, 1 McCord (S. Car.) 430; *Jones v. State*, Meigs (Tenn.) 120.

5. Act of March 17, 1866.

6. *Kelley v. State*, 25 Ark. 392; *Clarke v. State*, 35 Ga. 75; *State v. Underwood*, 63 N. Car. 98; *Ex p. Warren*, 31 Tex. 143. Compare *Turner v. Parry*, 27 Ind. 163.

7. *Bowlin v. Com.*, 2 Bush (Ky.) 5; 92 Am. Dec. 468.

8. Husband and Wife—*a.* AT COMMON LAW—(1) *In General*.—At common law, neither husband nor wife was a competent witness in any action, suit, or proceeding, civil or criminal, to which the other was a party.¹ For this prohibition, jurists and text writers have assigned several reasons. Some of the early authorities place it, in part at least, upon the technical ground of the unity of husband and wife.² Again, it was put upon the ground

1. Co. Litt. 6 b; 1 Hale P. C. 301; Davis v. Dinwoody, 4 T. R. 678; Barker v. Dixie, Cas. temp. Hardw. 264; Vowles v. Young, 13 Ves. Jr. 144; Rex v. Cliviger, 2 T. R. 263; Rex v. Locker, 5 Esp. 107; Bentley v. Cook, cited in Rex v. Cliviger, 2 T. R. 265; Barbat v. Allen, 7 Exch. 609; Stein v. Bowman, 13 Pet. (U. S.) 209; Alexandria Bank v. Mandeville, 1 Cranch (C. C.) 575; Gilleland v. Martin, 3 McLean (U. S.) 490; Johnson v. State, 47 Ala. 10; Miller v. State, 45 Ala. 24; Wilson v. Sheppard, 28 Ala. 623; Pryor v. Ryburn, 16 Ark. 671; Leach v. Fowler, 22 Ark. 143; Dawley v. Ayers, 23 Cal. 108; Merriam v. Hartford, etc., R. Co., 20 Conn. 354; 52 Am. Dec. 344; Kemp v. Downham, 5 Harr. (Del.) 417; Keaton v. McGwier, 24 Ga. 217; Waddams v. Humphrey, 22 Ill. 661; Hayes v. Parmalee, 79 Ill. 563; Kyle v. Frost, 29 Ind. 382; Weikel v. Probasco, 7 Ind. 690; McCollem v. White, 23 Ind. 43; Karney v. Paisley, 13 Iowa 89; Smead v. Williamson, 16 B. Mon. (Ky.) 492; Higdon v. Higdon, 6 J. J. Marsh. (Ky.) 48; Tacket v. May, 3 Dana (Ky.) 79; Tulley v. Alexander, 11 La. Ann. 628; Cull v. Herwig, 18 La. Ann. 315; Dwelly v. Dwelly, 46 Me. 377; Bradford v. Williams, 2 Md. Ch. 1; Williamson v. Morton, 2 Md. Ch. 94; Miller v. Williamson, 5 Md. 219; Griffin v. Brown, 2 Pick. (Mass.) 304; State v. Armstrong, 4 Minn. 335; Moore v. McKie, 5 Smed. & M. (Miss.) 238; Tomlinson v. Lynch, 32 Mo. 160; Craig v. Kittredge, 20 N. H. 169; Kelley v. Proctor, 41 N. H. 139; Breed v. Gove, 41 N. H. 452; Blain v. Patterson, 47 N. H. 523; Bird v. Davis, 14 N. J. Eq. 467; Den v. Johnson, 18 N. J. L. 87; Marshman v. Conklin, 17 N. J. Eq. 282; Cramer v. Reford, 16 N. J. Eq. 367; Galway v. Fullerton, 17 N. J. Eq. 389; Petrick v. Ashcroft, 19 N. J. Eq. 339; White v. Stafford, 38 Barb. (N. Y.) 419; Warner v. Dyett, 2 Edw. Ch. (N. Y.) 497; Stewart v. Stewart, 7 Johns. Ch. (N. Y.) 229; Bihin v. Bihin, 17 Abb. Pr. (N. Y. Supreme Ct.) 19; Mof-fat v. Mount, 17 Abb. Pr. (N. Y. Super.

Ct.) 4; Rogers v. Rogers, 1 Daly (N. Y.) 194; Hall v. Hall, 30 How. Pr. (N. Y. County Ct.) 51; Hosack v. Rogers, 8 Paige (N. Y.) 229; Copons v. Kauffman, 8 Paige (N. Y.) 583; Macondray v. Wardle, 26 Barb. (N. Y.) 612; Rice v. Keith, 63 N. Car. 319; State v. Jolly, 3 Dev. & B. (N. Car.) 110; 32 Am. Dec. 656; Bird v. Hueston, 10 Ohio St. 418; Gross v. Reddig, 45 Pa. St. 406; Donnelly v. Smith, 7 R. I. 12; Footman v. Pendergrass, 2 Strobb. Eq. (S. Car.) 317; Osburn v. Black, Spears Eq. (S. Car.) 431; Kimbrough v. Mitchell, 1 Head (Tenn.) 539; Owen v. State, 89 Tenn. 698; Gee v. Scott, 48 Tex. 510; 26 Am. Rep. 331; Cameron v. Fay, 55 Tex. 58; Manchester v. Manchester, 24 Vt. 649; Seargent v. Seward, 31 Vt. 509; Baring v. Reeder, 1 Hen. & M. (Va.) 154; Farrell v. Ledwell, 21 Wis. 182; Zane v. Fink, 18 W. Va. 693.

The wife of a freedman, with whom he intermarried during the existence of their slavery, according to the ceremony then permitted to them, and with whom he continued to live as his wife, after emancipation, was not a competent witness for him or against him. Hampton v. State, 45 Ala. 82.

In *Pedley v. Wellesley*, 3 C. & P. 558; 14 E. C. L. 448, it appeared that the defendant married the plaintiff's principal witness after she was subpoenaed to give her evidence in the case. It was strongly urged that the defendant could not thus deprive the plaintiff of his evidence, but the court refused to permit her to be examined without the defendant's consent.

The husband is not a competent witness to a deed in which land is conveyed to his wife. Johnston v. Slater, 11 Gratt. (Va.) 321.

Where husband and wife are defendants, neither of them can be required to answer interrogatories to be used in evidence against the other. Carter v. Taylor, 20 La. Ann. 421; Draper v. Hensingsen, 16 How. Pr. (N. Y. Super. Ct.) 281.

2. Blackstone says this is "partly because it is impossible their testimony

of common interest, which was a disqualification at common law,¹ but perhaps the most potent reason is public policy, it being deemed of fundamental importance to society to preserve the sanctity and harmony of the marital relation.²

Conversations between husband and wife in the presence of third persons may be received in evidence if they are material to the issue.³

Where either the husband or wife was a beneficial party, though not a party to the record, the other was incompetent to testify.⁴ And where one of them was incompetent by reason of

should be indifferent, but principally because of the union of person, and, therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, *nemo in propria causa testis esse debet*, and if against each other, they would contradict another maxim, *nemo tenetur seipsum accusare*." 1 Bl. Com. 443.

In *Windham v. Chetwynd*, 1 Burr. 424, Lord Mansfield said: "In matter of evidence, husband and wife are considered as one, and cannot be witnesses, the one for the other. The husband cannot be witness for his wife in a question touching her separate estate."

1. In *Peaslee v. McLoon*, 16 Gray (Mass.) 488, the court was of the opinion that the unity of interest of husband and wife was the chief, if not the sole, reason for their exclusion as witnesses at common law.

2. Mr. Greenleaf says: "This exclusion is founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society. For it is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly cherished in its most unlimited extent."

In *Stein v. Bowman*, 13 Pet. (U. S.) 223, the court said: "In the present case, the witness was called to discredit her husband; to prove, in fact, that he had committed perjury; and the establishment of the fact depended on his own confessions; confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true, the husband was dead, but this does not weaken the principle; indeed, it would seem rather to increase than lessen the force of the rule. Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence which render

infamous the character of her husband? We think most certainly that she cannot be. Public policy and established principles forbid it. This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence." See also *Co. Litt. 6 b*; *Davis v. Dinwoody*, 4 T. R. 679, per Lord Kenyon; *Barker v. Dixie*, Cas. temp. Hardw. 264; *Wowles v. Young*, 13 Ves. Jr. 144; *O'Connor v. Marjoribanks*, 4 M. & G. 443; 43 E. C. L. 232, per Tindal, C. J.

3. *Allison v. Barrow*, 3 Coldw. (Tenn.) 414; *Com. v. Griffin*, 110 Mass. 181.

Whether or not the presence of third persons will remove the mutual disability of the husband and wife themselves to testify to such conversations does not seem clear. In *Campbell v. Chace*, 12 R. I. 333, it was held that it did not. And in *Jacobs v. Hesler*, 113 Mass. 157, it was held that the presence of young children of the family, who were not shown to have paid any attention to the conversation, did not affect the private character of the same. But in *Lyon v. Prouty*, 154 Mass. 488, the court refused to reverse the judgment, upon the objection that the husband had been permitted to testify to a conversation between himself and his wife in the presence of their daughter, a girl fourteen years of age, it appearing that the conversation was upon a topic which was necessarily of deep interest to the girl, and must have attracted her attention.

4. *Pyle v. Maulding*, 7 J. J. Marsh.

a direct interest in the event of the suit, the other was likewise incompetent.¹ But where a husband or wife is a nominal party merely, the other is not disqualified as a witness.²

Where a woman sued as a *feme sole*, her alleged husband was not competent to prove his marriage to her and thereby non-suit her;³ and conversely, where the defendant pleaded coverture, her

(Ky.) 202; *Wier v. Buford*, 8 Ala. 134; *Lisman v. Early*, 12 Cal. 282; *Beard v. Morancy*, 2 La. Ann. 347; *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 15; *Hosack v. Rogers*, 8 Paige (N. Y.) 229; *Hasbrouck v. Vandervoort*, 9 N. Y. 153; *Joice v. Branson*, 73 Mo. 28; *Edwards v. Pitts*, 3 Strobb. (S. Car.) 140; *Gelkey v. Peeler*, 22 Tex. 663; *Labaree v. Wood*, 54 Vt. 452; *Banister v. Ovlitt*, 64 Vt. 580; *Wheeler v. Wheeler*, 47 Vt. 637; *Farrell v. Ledwell*, 21 Wis. 182.

The husband was not competent to prove a marriage contract in favor of his wife. *McDuffie v. Greenway*, 24 Tex. 625.

1. *Smead v. Williamson*, 16 B. Mon. (Ky.) 492; *Pryor v. Ryburn*, 16 Ark. 671; *Alexandria Bank v. Mandeville*, 1 Cranch (C. C.) 575; *Griffin v. Brown*, 2 Pick. (Mass.) 304; *Vandiver v. Glaspy*, 7 Rich. (S. Car.) 14; *Young v. Gilman*, 46 N. H. 484; *Labaree v. Wood*, 54 Vt. 452; *Wheeler v. Wheeler*, 47 Vt. 637; *Brown v. Burrighton*, 36 Vt. 40; *Abbott v. Clark*, 19 Vt. 444; *Whitehead v. Foley*, 28 Tex. 268; *Beat v. Davis*, 44 Ill. App. 624; *Blerly's Estate*, 81* Pa. St. 419; *Lewis v. McDougal*, 17 Wis. 518; *Leggett v. Boyd*, 3 Wend. (N. Y.) 376.

In a suit to enforce a mechanic's lien on property belonging to the husband and wife jointly, neither could be a witness. *Briggs v. Titus*, 7 R. I. 441; *Main v. Stephens*, 4 E. D. Smith (N. Y.) 86. But if it were not shown that the wife had a separate interest in the property, the husband might be a witness under a statute enabling parties to testify in their own behalf. *Howell v. Zerbe*, 26 Ind. 214; *Lockwood v. Joab*, 27 Ind. 423.

In an action upon a special guaranty of a promissory note, brought by the payee against the guarantor, the wife of the maker is not competent to prove the note void for usury, without a sufficient release of her husband from his liability. *Thomas v. Catheral*, 5 Gill & J. (Md.) 23.

Where the husband's fee as an attorney was contingent upon his success

in the suit, it was held that his wife was not a competent witness. *Whitehead v. Foley*, 28 Tex. 268.

The wife of a tenant is a competent witness in a contest between the landlord and a third person. *Seigling v. Main*, 1 McMull. (S. Car.) 252.

The husband's disqualification by reason of conviction of crime does not disqualify the wife. *State v. Anthony*, 1 McCord (S. Car.) 285.

In *Dyer v. Homer*, 22 Pick. (Mass.) 253, it appeared that the defendant's intestate died before his father, who thereupon became his sole heir at law. Afterwards the father died leaving a will, in which a portion of his estate was given in trust for the sole and separate use of the wife of the witness, to whose competency objection was made. Chief Justice Shaw thought that the interest was too remote and contingent to sustain the objection. See also *Mitchell v. Clagett*, 9 Md. 42; *Carpenter v. Moore*, 43 Vt. 392; *Rutland, etc., R. Co. v. Lincoln*, 29 Vt. 206.

In an action on a promissory note by an indorsee against the maker, the wife of the payee may testify in favor of the maker, if there is nothing in her testimony to violate marital confidence. *Armstrong v. Noble*, 55 Vt. 428; *Morgan v. Hyatt*, 62 Ind. 560.

The wife is competent to support the title of her husband's bailee. *Funk v. Dillon*, 21 Mo. 294.

2. *Breton v. Sembre*, 45 La. Ann. 117; *Ratliff v. Vandikes*, 89 Va. 307; *Bonett v. Stowell*, 37 Vt. 258; *Wiley v. Hunter*, 57 Vt. 479; *Leavitt v. Bangor*, 41 Me. 458; *Patton v. Wilson*, 2 Lea (Tenn.) 101; *St. Louis, etc., R. Co. v. Rexroad*, 59 Ark. 180.

Where the husband, though a party to the record, is not a necessary party, his wife may be a witness. *Hall v. Murphy*, 14 Tex. 637.

3. *Bentley v. Cooke*, 3 Doug. 422; 26 E. C. L. 176.

There is a *dictum* to the contrary in *Willis v. Underhill*, 6 How. Pr. (N. Y. Supreme Ct.) 396, but no authority is cited.

husband was not competent to prove the marriage and thus defeat the plaintiff.¹ In a suit for enticing away the plaintiff's wife, the defendant cannot introduce her as a witness to disprove the marriage.²

The husband was not a competent witness where his testimony would tend to establish his wife's right to the property in controversy.³ Thus, where property was taken upon execution as belonging to the husband, he was not a competent witness to establish his wife's claim to the same.⁴ In a contest over the validity of a will, the husband of one who would be a distributee if the will were adjudged invalid, was not a competent witness;⁵ nor was the husband or wife of a legatee or devisee competent to support the will,⁶ unless the legacy or devise were first released to the executor.⁷ In a controversy respecting the wife's separate estate, the husband was not a competent witness for her or her trustee;⁸ nor could she testify in support of her own title where

1. *Woodgate v. Potts*, 2 C. & K. 457; 61 E. C. L. 457.

2. *Scherpf v. Szadeczeky*, 4 E. D. Smith (N. Y.) 110.

3. *Wall v. Nelson*, 3 Litt. (Ky.) 395; *Caperton v. Callison*, 1 J. J. Marsh. (Ky.) 397; *Hopkins v. Smith*, 7 J. J. Marsh. (Ky.) 263; *Hall v. Dargan*, 4 Ala. 696; *Wier v. Buford*, 8 Ala. 134; *Moore v. McKie*, 5 Smed. & M. (Miss.) 238. Compare *Meni v. Rathbone*, 21 Ind. 454.

4. *Hodges v. Montgomery Branch Bank*, 13 Ala. 455; *Gross v. Reddig*, 45 Pa. St. 406.

Neither was the wife competent to prove that property, taken under an attachment or execution against her husband, belonged to her. *Boyle v. Haughey*, 10 Phila. (Pa.) 98; *McCollem v. White*, 23 Ind. 43.

5. *Walker v. Walker*, 34 Ala. 469. *Contra*, *Robinson v. Hutchinson*, 31 Vt. 443.

The husband of an heiress may testify for or against a co-heir. *Bolsse v. Dickson*, 31 La. Ann. 741; *Starns v. Hadnot*, 45 La. Ann. 318; *McKee v. Spiro*, 107 Mo. 452.

But he may not testify in favor of the administrator of an estate of which his wife is a distributee. *Lisman v. Early*, 12 Cal. 282; *Gilkey v. Peeler*, 22 Tex. 663.

The widow is competent on behalf of her children to prove her marriage, *Christy v. Clarke*, 45 Barb. (N. Y.) 529; but she is not competent in her own behalf. *Redgrave v. Redgrave*, 38 Md. 93. Neither is the husband competent to prove his marriage, after the decease

of his wife, for the purpose of establishing his title to her personal property.

Fitzsimmons v. Southwick, 38 Vt. 509.

6. *Jones v. Norton*, 10 Tex. 120.

7. *Weems v. Weems*, 19 Md. 334.

8. *Cobb v. Edmondson*, 30 Ga. 30; *Ayres v. Ayres*, 11 Gray (Mass.) 130; *Robbins v. Abrahams*, 5 N. J. Eq. 465; *Harrell v. Hammond*, 25 Ind. 104; *Palmer v. Henderson*, 20 Ind. 297; *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 15; *Hasbrouck v. Vandervoort*, 9 N. Y. 153; *Warner v. Dyett*, 2 Edw. Ch. (N. Y.) 497; *Miller v. Williamson*, 5 Md. 219; *Williamson v. Morton*, 2 Md. Ch. 94. See also *Wilson v. Sheppard*, 28 Ala. 623; *Dwelly v. Dwelly*, 46 Me. 377; *Marshman v. Conklin*, 17 N. J. Eq. 282; *Galway v. Fullerton*, 17 N. J. Eq. 389; *Wells v. Tucker*, 57 Vt. 223.

And the fact that she had been rendered competent, by statute, to testify in her own behalf, did not change the rule. *Gee v. Lewis*, 20 Ind. 149; *Palmer v. Henderson*, 20 Ind. 297.

If a married woman had an interest in the business of a partnership, her husband was not a competent witness for the firm. *Jackson v. Miller*, 25 N. J. L. 90; *McEwen v. Shannon*, 64 Vt. 583. So, also, a person whose wife was a stockholder was not a competent witness for the corporation. *Routh v. Agricultural Bank*, 12 Smed. & M. (Miss.) 161.

Under a statute in *Illinois*, making the husband competent in suits respecting his wife's separate estate, it is held that he may testify in an action brought by her for an injury to her person. *Chicago, etc., R. Co. v. Dunn*, 52 Ill.

her husband assumed to be the owner of the property in question.¹ In a suit by a husband and wife upon a cause of action which accrued to her, *dum sola*, she is not a competent witness.²

It was a rule of the common law, founded on decency and morality, that neither the husband nor wife should be permitted to bastardize their offspring by proving non-access after their marriage.³ While the law will not permit the husband and wife to say that there has been no intercourse between themselves, yet it has been held that, in certain cases where it is impossible to procure other evidence, the wife may be permitted to prove her own

260; 4 Am. Rep. 606; Rock Island v. Deis, 38 Ill. App. 409. Also in an action brought by her for malicious prosecution, *Anderson v. Friend*, 71 Ill. 475. And, in an action by her to recover damages sustained by reason of the sale of intoxicating liquor to her husband, he is a competent witness in her behalf, as what she recovers is exclusively her property. *Davenport v. Ryan*, 81 Ill. 218; *Noy v. Creed*, 1 Ill. App. 557. In the absence of such a statute the husband is not a competent witness in such a case. *Jackson v. Reeves*, 53 Ind. 231.

He is also competent in her behalf, where she sues for partition of land which she, with others, has inherited. *Pigg v. Carroll*, 89 Ill. 205.

1. In replevin against the husband, the wife was incompetent to prove the property in controversy hers. *Harrell v. Hammond*, 25 Ind. 104. And in replevin by the wife to recover possession of goods sold by her husband, she was incompetent to prove title in herself, as she would then be testifying against her husband and might render him liable on his implied warranty of title. *Pleasanton v. Nutt*, 115 Pa. St. 266. The contrary was held in *Musser v. Gardner*, 66 Pa. St. 242, but this case must be considered as overruled, though it was not referred to in *Pleasanton v. Nutt*, 115 Pa. St. 266.

In *Pennsylvania*, however, this rule has been changed by statute, and the point would now be ruled differently under the act of 1887. See *Evans v. Evans*, 155 Pa. St. 576; *Norbeck v. Davis*, 157 Pa. St. 399.

In *Kansas*, if a married woman replevies property taken upon execution against her husband, she may testify in her own behalf. *Furrow v. Chapin*, 13 Kan. 107.

And in *Illinois*, if the defendant in

replevin pleads the ownership of his wife, she is competent to prove that fact. *McNail v. Ziegler*, 68 Ill. 224.

2. *Smith v. Boston, etc., R. Co.*, 44 N. H. 334; *Donnelly v. Smith*, 7 R. I. 12; *Cramer v. Reford*, 17 N. J. Eq. 367.

It is otherwise where the suit is upon a book account. *Perry v. Whitney*, 30 Vt. 390; *Wade v. Powell*, 31 Ga. 1; *Sneckner v. Taylor*, 1 Redf. (N. Y.) 427. Compare *Collins v. Mack*, 31 Ark. 684, where the husband was rejected as a witness in such a case.

And in a suit against husband and wife to collect a debt contracted by her while single, her admissions made after marriage are not admissible in evidence. *Brown v. Lasselle*, 6 Blackf. (Ind.) 147; 38 Am. Dec. 135.

3. *Cope v. Cope*, 1 M. & Rob. 269; *Rex v. Book*, 1 Wils. 340; *Rex v. Luffe*, 8 East 193; *Rex v. Kea*, 11 East 132; *Rex v. Sourton*, 5 Ad. & El. 180; 31 E. C. L. 312; *Reg. v. Mansfield*, 1 Q. B. 444; 41 E. C. L. 618; *Chamberlain v. People*, 23 N. Y. 85; 80 Am. Dec. 255; *Boykin v. Boykin*, 70 N. Car. 262; 16 Am. Rep. 776; *State v. Pettaway*, 3 Hawks (N. Car.) 623; *Shuman v. Shuman*, 83 Wis. 250. See also *Canton v. Bentley*, 11 Mass. 442.

In *Goodright v. Moss*, Cowp. 594, Lord Mansfield said: "As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality and policy, that they shall not be permitted to say, after marriage, that they have had no connection, and, therefore, that the offspring is spurious; more especially the mother, who is the offending party."

Thus the mother of a child begotten out of wedlock, but born after her marriage, is not competent to prove that her husband is not its father. Den-

adultery.¹ In an action for criminal conversation, the plaintiff, though competent under the statute as a witness in his own behalf, is nevertheless incompetent to prove his wife's adultery.² And, in such action, the wife is not competent to prove her own turpitude unless her disability has been removed by statute.³ But if a divorce *a vinculo* has been obtained before the trial of the action for criminal conversation, it seems that the former wife is competent for the plaintiff even to prove the charge of adultery.⁴

(2) *Effect of a Divorce or the Death of One Spouse.*—The rule was so strictly enforced that a divorce *a vinculo* did not render either spouse competent to testify to any matter which transpired during coverture, if such matter would have been excluded had the marital relation continued,⁵ though after such divorce either

nison v. Page, 29 Pa. St. 420; 72 Am. Dec. 664.

1. Thus, in bastardy cases, where the mother is a married woman, she is competent, *ex necessitate*, to prove the criminal intercourse by which the child was begotten, though she is not competent to prove the non-access of her husband. *Rex v. Reading*, Cas. temp. Hardw. 79; *Rex v. Bedell*, Andr. 8; *Rex v. Luffe*, 8 East 193; *Rex v. Kea*, 11 East 132; *Ratcliff v. Wales*, 1 Hill (N. Y.) 65; *Com. v. Shepherd*, 6 Binn. (Pa.) 283; 6 Am. Dec. 449.

2. *Cornelius v. Hambay*, 150 Pa. St. 359.

And in an action for alienating the affections of the plaintiff's wife, she is not competent to testify. *Fratini v. Caslini*, 66 Vt. 273.

3. *Mathews v. Yerex*, 48 Mich. 361; *Reynolds v. Schaffer*, 91 Mich. 495; *Carpenter v. White*, 46 Barb. (N. Y.) 291; *Hicks v. Bradner*, 2 Abb. App. Dec. (N. Y.) 362; *Fratini v. Caslini*, 66 Vt. 273.

4. *Ratcliff v. Wales*, 1 Hill (N. Y.) 63; *Wottrich v. Freeman*, 71 N. Y. 601.

In *Dickerman v. Graves*, 6 Cush. (Mass.) 309; 53 Am. Dec. 41, the court said: "The general rule, that the husband and wife are not competent to testify against each other, as to what occurred during the marriage relation, even after the marriage contract is dissolved, is, no doubt, a wise and salutary rule. The object of the law is that the most entire confidence may exist between those sustaining the relation of husband and wife, and that there may be no apprehension that such confidence can ever, at any time or in any event, be violated, so far, at least, as regards any testimony or disclosure in

a court of law. But the case now under consideration comes neither within the rule nor the principle of the rule. The wife was not called here to testify against the husband, but, on the contrary, she was called to testify, and did testify, in his favor, and on his behalf. She herself made no objection, but testified freely and voluntarily. There was and would be no violation of any confidence reposed in her by the husband, for he himself called her to testify, and she testified wholly at his request, and by his procurement. There is nothing, therefore, in the rule of law on this subject, which would warrant the exclusion of the testimony of this witness in the present case. The case of *Ratcliff v. Wales*, 1 Hill (N. Y.) 63, is precisely like the present. It was an action for criminal conversation with the plaintiff's wife. The plaintiff, after showing a divorce *a vinculo matrimonii*, called his former wife to prove the adultery with the defendant for which the action was brought. It was adjudged that the testimony of the witness was properly admitted."

For Defense.—In such action the divorced wife will not be permitted to testify for the defense except as to matters which transpired after the divorce was obtained. *Croae v. Rutledge*, 81 Ill. 266.

5. *Monroe v. Twistleton, Peake's Add. Cas.* 219; *State v. Phelps*, 2 Tyler (Vt.) 374, *overruling State v. J. N. B.*, 1 Tyler (Vt.) 36; *Barnes v. Camack*, 1 Barb. (N. Y.) 392; *Cook v. Grange*, 18 Ohio 526; *Rea v. Tucker*, 51 Ill. 110; 99 Am. Dec. 539; *Anderson v. Anderson*, 9 Kan. 112; *Brock v. Brock*, 116 Pa. St. 109; *Fidelity Ins. Co.'s Appeal*, 93 Pa. St. 242; *Perry v. Randall*, 83

of them might testify to any matter which did not violate the confidence of their former relation.¹ And neither did the death of one spouse remove the seal of secrecy from the lips of the other in regard to confidential communications which had taken place between them.² And in *England*, the rule was not confined to confidential communications.³ In the *United States*, however,

Ind. 143. See also *Croze v. Rutledge*, 81 Ill. 266; *Waddams v. Humphrey*, 22 Ill. 661; *Hitchcock v. Moore*, 70 Mich. 112.

In *Monroe v. Twistleton*, Peake's Add. Cas. 219, Lord Alvanley said: "To prove any fact arising after the divorce, this lady is a competent witness, but not to prove a contract or anything else which happened during the coverture. She was at that time bound to secrecy. What she did might be in consequence of the trust and confidence reposed in her by her husband."

1. *Woolley v. Turner*, 13 Ind. 253; *Crook v. Henry*, 25 Wis. 569; *Storms v. Storms*, 3 Bush (Ky.) 77; *French v. Ware*, 65 Vt. 338; *Dill v. People* (Cal. 1894), 36 Pac. Rep. 229; *People v. Marble*, 38 Mich. 117.

Thus, a husband may testify against his divorced wife and her husband, in a prosecution for adultery committed by them before the divorce was granted. *State v. Russell* (Iowa, 1894), 58 N. W. Rep. 915.

2. *Doker v. Hasler*, Ry. & M. 198; *Humphreys v. Boyce*, 1 M. & Rob. 140; *Edgell v. Bennett*, 7 Vt. 534; *Babcock v. Booth*, 2 Hill (N. Y.) 181; 38 Am. Dec. 578; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 519; *Keator v. Dimmick*, 46 Barb. (N. Y.) 158; *Dexter v. Booth*, 2 Allen (Mass.) 559; *Hay v. Hay*, 3 Rich. Eq. (S. Car.) 384; *Payne v. Devinal*, 11 Smed. & M. (Miss.) 400; *Lingo v. State*, 29 Ga. 470; *Gray v. Cole*, 5 Harr. (Del.) 418; *William & Mary College v. Powell*, 12 Gratt. (Va.) 372; *Herndon v. Triple Alliance*, 45 Mo. App. 426; *Bradford v. Vinton* (Mich. 1886), 26 N. W. Rep. 401.

3. In *O'Connor v. Marjoribanks*, 4 M. & G. 435; 43 E. C. L. 228, Tindal, C. J., said: "It is impossible to gain much light from the cases decided at *nisi prius* relative to this subject, as the two principal ones appear to be in direct opposition to each other. We must see, therefore, which of them best accords with the general principles of law, and it appears to me that of the

two, *Monroe v. Twistleton*, Peake's Add. Cas. 219, is the sounder, and that the doctrine therein laid down is built upon the general rule of law which, subject to certain well-known exceptions, is this: That a wife never can be admitted as a witness either for or against her husband. She cannot be a witness for him, because her interest is precisely identical with his; nor against him, upon grounds of public policy, because the admission of such evidence would lead to dissension and unhappiness, and possibly to perjury. There are cases to show that this intimate relation subsisting between the parties is not to be considered as dissolved by death, so as to let in the evidence of either party as to transactions occurring during their joint lives. But we are asked to confine the rule to cases where the communications between the husband and wife are of a confidential nature. But such a limitation of the rule would very often be extremely difficult of application, and would introduce a separate issue in each cause as to whether or not the communications between husband and wife were to be considered of a confidential character. Upon the whole, I think it better to adopt Lord Alvanley's rule in *Monroe v. Twistleton*, Peake's Add. Cas. 219, and to hold, therefore, that the evidence of the widow was improperly admitted in this case."

In the same case, Coltman, J., said: "In the argument in this case, a distinction has been taken, and it has been contended that as to some things a wife may be examined after the death of her husband, though not as to such matters as were in the nature of confidential communications between them. But, undoubtedly, that is not the rule during the lifetime of both parties, for the rule then is that, with the exception of certain well-known instances, neither husband nor wife can be admitted as a witness for or against the other. And I think that no such distinction as that now attempted to be set up arises upon the death of one of

it was very generally held that the survivor might testify to matters, a knowledge of which did not come to the witness through the confidence of the marital relation,¹ unless there was some other ground of exclusion; such, for example, as interest in the event of the suit.²

(3) *For and Against Co-defendants of Husband or Wife.*—Where two or more persons were jointly indicted and jointly tried for the commission of a crime, the husband or wife of one of them was not, at common law, a competent witness for or against the others.³ But according to the weight of authority, the rule was otherwise if the defendants had separate trials, as in that event the record of the testimony given at the trial of a co-defendant could not be used as evidence either for or against the consort of the witness.⁴ There are cases, also, in which the rule

the parties. With respect to the authorities, we are obliged to make our election between conflicting cases, and I agree that the doctrine laid down in *Monroe v. Twistleton*, Peake's Add. Cas. 219, is the sound one; that although the relation of husband and wife may have ceased to exist by a divorce of the parties, the objection as to the admissibility of evidence of either still subsists, and I think it makes no difference that the relation has been put an end to by death." Maule, J., also said: "I, also, am of opinion that this evidence was inadmissible. *Beveridge v. Minter*, 1 C. & P. 364, is favorable to the admissibility of the witness, but the previous case of *Monroe v. Twistleton*, Peake's Add. Cas. 219, is the other way. I certainly think that more weight is due to the latter case, for it appears to have been more considered and more fully argued. It does not seem to have been cited in *Beveridge v. Minter*, 1 C. & P. 364."

1. *Williams v. Baldwin*, 7 Vt. 503; *Smith v. Potter*, 27 Vt. 304; 65 Am. Dec. 198; *Wells v. Tucker*, 3 Binn. (Pa.) 366; *Cornell v. Vanartsdalen*, 4 Pa. St. 364; *Brindle v. McIlvaine*, 10 S. & R. (Pa.) 282; *Gebhart v. Shindle*, 15 S. & R. (Pa.) 237; *Chambers v. Spencer*, 5 Watts (Pa.) 404; *Pike v. Hayes*, 14 N. H. 19; 40 Am. Dec. 171; *Winship v. Enfield*, 42 N. H. 197; *Ryan v. Follansbee*, 47 N. H. 100; *Jackson v. Barron*, 37 N. H. 494; *Gaskill v. King*, 12 Ired. (N. Car.) 211; *Hester v. Hester*, 4 Dev. (N. Car.) 228; *Price v. Joyner*, 3 Hawks (N. Car.) 418; *Dexter v. Booth*, 2 Allen (Mass.) 559; *Baxter v. Knowles*, 12 Allen (Mass.) 114; *Robinson v. Talmadge*, 97 Mass. 171; *Haugh v. Blythe*, 20 Ind.

24; *Jack v. Russey*, 8 Ind. 180; *Carpenter v. Dame*, 10 Ind. 125; *Shaffer v. Richardson*, 27 Ind. 122; *Adams v. Adams*, 23 Ind. 50; *Wallis v. Britton*, 1 Har. & J. (Md.) 478; *Saunders v. Hendrix*, 5 Ala. 224; *Tatum v. Manning*, 9 Ala. 144; *Lockwood v. Mills*, 39 Ill. 602; *Romans v. Hay*, 12 Iowa 270; *Pratt v. Delavan*, 17 Iowa 307; *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Short v. Tinsley*, 1 Metc. (Ky.) 397; 71 Am. Dec. 482; *Wallingford v. Fiske*, 24 Me. 386; *Walker v. Sanborn*, 46 Me. 470; *Stuhlmuller v. Ewing*, 39 Miss. 447; *Stein v. Weldman*, 20 Mo. 17; *Sherwood v. Hill*, 25 Mo. 391; *Dobson v. Racey*, 8 N. Y. 216; *Talbot v. Talbot*, 23 N. Y. 17; *Megary v. Funtis*, 5 Sandf. (N. Y.) 376; *Stober v. McCarter*, 4 Ohio St. 513; *Moseley v. Eakin*, 15 Rich. (S. Car.) 324; *Hay v. Hay*, 3 Rich. Eq. (S. Car.) 384; *Braxton v. Hilyard*, 2 Munf. (Va.) 49.

2. *Wade v. Johnson*, 5 Humph. (Tenn.) 117; 42 Am. Dec. 422; *Chaney v. Moore*, 1 Coldw. (Tenn.) 48; *Brewer v. Ferguson*, 11 Humph. (Tenn.) 565; *Allen v. Blanchard*, 9 Cow. (N. Y.) 631; *Day v. Seely*, 17 Vt. 542.

3. *Childs v. State*, 55 Ala. 25; *Cotton v. State*, 62 Ala. 12; *Woods v. State*, 76 Ala. 35; 52 Am. Rep. 315; *Mask v. State*, 32 Miss. 405; *Cornelius v. Com.*, 3 Metc. (Ky.) 481; *Thompson v. Com.*, 1 Metc. (Ky.) 13; *State v. McGrew*, 13 Rich. (S. Car.) 316; *State v. Burnside*, 37 Mo. 343; *Collier v. State*, 20 Ark. 36; *Com. v. Manson*, 2 Ashm. (Pa.) 31.

4. *U. S. v. Addatte*, 6 Blatchf. (U. S.) 76; *State v. Drawdy*, 14 Rich. (S. Car.) 87; *State v. Anthony*, 1 McCord (S. Car.) 285; *State v. Bradley*, 9 Rich. (S. Car.) 168; *Thompson v. Com.*, 1

was relaxed where the defendants were being jointly tried, and the wife of one of them was permitted to testify in favor of her husband's co-defendant where it clearly appeared that the proffered testimony could have no bearing on the question of her husband's innocence or guilt.¹ Upon trials for criminal conspiracy,

Metc. (Ky.) 16; *Cornelius v. Com.*, 3 Metc. (Ky.) 481; *Com. v. Manson*, 2 Ashm. (Pa.) 31; *State v. Burnside*, 37 Mo. 343; *State v. McCarron*, 51 Mo. 27; *Carr v. State*, 42 Ark. 204; *Moffit v. State*, 2 Humph. (Tenn.) 99; 36 Am. Dec. 301; *Workman v. State*, 4 Sneed (Tenn.) 425; *People v. Langtree*, 64 Cal. 256; *Wixson v. People*, 5 Park. Cr. Rep. (N. Y.) 119; *Adams v. State*, 28 Fla. 511; *Smith v. Com.*, 90 Va. 759.

If a defendant wished the benefit of the testimony of the wife of a co-defendant, his proper course was to move for a separate trial. *Com. v. Easland*, 1 Mass. 15.

Where persons are jointly indicted for a misdemeanor and one is put on trial alone, he may call as a witness the wife of a co-defendant who stands defaulted on his recognizance. *State v. Worthing*, 31 Me. 62.

Where the husband or wife had been either acquitted or convicted, the other was a competent witness in the prosecution of another person for the same offense. *Reg. v. Williams*, 8 C. & P. 283; 34 E. C. L. 391; *Reg. v. Thompson*, 3 F. & F. 824.

Where two or more persons are separately indicted and tried, the wife of one may testify against another. *Blumann v. State* (Tex. Crim. App. 1893), 21 S. W. Rep. 1027; *People v. Bosworth* (Supreme Ct.), 19 N. Y. Supp. 114; *People v. Langtree*, 64 Cal. 256.

Contra.—There are cases which hold that a separate trial of the defendants did not alter the rule that the husband or wife of one of them was not competent to testify in behalf of another. *Pullen v. People*, 1 Dougl. (Mich.) 48; *State v. Smith*, 2 Fred. (N. Car.) 405.

Thus, in *People v. Colbern*, 1 Wheel. Cr. Cas. (N. Y.) 479, it appeared that two persons were indicted for forgery. One of them was put upon trial, the other not having been taken. It was held that the husband of the defendant not yet in custody could not be examined as a witness at the trial of the other defendant.

1. *Reg. v. Sills*, 1 C. & K. 494; 47 E. C. L. 494; *Reg. v. Moore*, 1 Cox

C. C. 59; *Reg. v. Bartlett*, 1 Cox C. C. 105.

Where two prisoners were jointly indicted and tried for burglary, one of them proposed to call the wife of the other to prove an alibi, and it was held that she was a competent witness for that purpose. *Reg. v. Moore*, 1 Cox C. C. 59.

So, also, where persons were jointly indicted for stealing potatoes, and some potatoes were found in the house of each, the court allowed the wife of one defendant to testify that the potatoes found in the house of the other did not belong to the prosecuting witness. *Reg. v. Bartlett*, 1 Cox C. C. 105.

And in *Reg. v. Sills*, 1 C. & K. 494; 47 E. C. L. 494, which was the trial of an indictment for burglariously breaking into a house and stealing personal property therefrom, it was proved that a part of the stolen property was found in the house of each of the prisoners, and Chief Justice Tindal permitted the wife of one of the defendants to testify that she took to the house of the other the property found there.

Where the wife and another were jointly indicted for stealing her husband's goods, it was held that the husband might testify for the Crown, since his wife could not in any event be convicted of stealing his property. *Reg. v. Glassie*, 7 Cox C. C. 1.

But it is otherwise if she can be convicted of the offense charged. Thus the Married Woman's Property Act, 1882, 45 & 46 Vict., ch. 75, gives married women complete control of their separate property, and makes the husband and wife criminally liable for theft from each other. Under this statute it is held that where a wife and her paramour are jointly indicted for the larceny of the husband's property at the time of their elopement, the husband is not a competent witness for the Crown. *Reg. v. Brittleton*, 12 Q. B. Div. 266.

But where the wife's testimony would improve or injure her husband's case, she could not testify. *Reg. v. Hamp*, 6 Cox C. C. 167; *Rex v. Webb*, cited in 3 Russ. on Crimes 630; 1 Hale 301.

the husbands and wives of the defendants were excluded from the witness stand, because any evidence relevant to the issue on trial must necessarily tend either to acquit or convict all of the defendants.¹

(4) *In Collateral Proceedings.*—It was laid down as a rule, in an early English case, that neither husband nor wife ought to be permitted to give any evidence, in any form of proceeding, which would even tend to charge the other with the commission of a crime.² After much discussion, this rule was discarded as too broad and general, and it became the established rule of Westminster Hall that, in collateral proceedings which did not involve the mutual interests of husband and wife, either of them might testify to matters which merely tended to criminate the other, since neither the record of such collateral proceedings, nor the testimony given therein, could afterwards be used as evidence in a direct prosecution against the consort of the witness.³ This

Thus, she could not be examined where her proposed testimony would impeach the credit of witnesses who had testified against her husband. *Rex v. Smith*, 1 M. C. C. 289; *Reg. v. Denslow*, 2 Cox C. C. 230.

1. *Rex v. Locker*, 5 Esp. 107; *Rex v. Serjeant, R. & M.* 352; *Mask v. State*, 32 Miss. 405; *Com. v. Manson*, 2 Ashm. (Pa.) 31; *State v. Burlingham*, 15 Me. 104.

In *Shields v. Ruddy*, 2 Idaho 884, which was a civil action to recover damages for a conspiracy to defraud the plaintiff, it was held that the wife of one of the defendants might testify for the plaintiff under an instruction from the court that her testimony was not to be considered against her husband.

2. *Rex v. Cliviger*, 2 T. R. 263.

3. In *Rex v. All Saints*, 6 M. & S. 194, Lord Ellenborough said: "The objection rests only on the language of *Rex v. Cliviger*, 2 T. R. 263, that it may tend to criminate him, for it has not an immediate tendency, inasmuch as what she stated could not be used in evidence against him. The passage from Lord Hale P. C. 301, has been pressed upon us where it is said the wife is not bound to give evidence against another in a case of theft, if her husband be concerned, though her evidence be material against another and not directly against her husband. Admitting the authority of that passage, it assumes that the husband was under the criminal charge, that he was included in the *simul cum aliis*. But if we were to determine, without regard to the form of proceeding, whether the hus-

band was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which, connected with other facts, may, perhaps, go to form a link in the complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds; and there is not any authority to sustain it; unless, indeed, what has been laid down, as it seems to me, somewhat too largely, in *Rex v. Cliviger*, 2 T. R. 263, may be supposed to do so."

In *Rex v. Bathwick*, 2 B. & Ad. 639; 22 E. C. L. 152, upon a question as to the settlement of a pauper, a witness was produced who testified that he had married her. Another witness was then produced to prove that the marriage was void on the ground that the pretended husband had been married to her before his marriage to the pauper. It was held that she was competent to prove that fact. Lord Tenterden, C. J., said: "The decision in the case of *Rex v. Cliviger*, 2 T. R. 263, appears to have been founded on a supposed legal maxim of policy, viz., that a wife cannot be a witness to give testimony in any degree to criminate her husband. This will undoubtedly be true in the case of a direct charge and proceeding against him for any offense; but in such a case she cannot be a witness to prove his innocence of the charge. The present case is not a direct charge or proceeding against the husband. It is true that if the testimony given by both be considered as true, the husband, Cook, has been guilty of the crime of

latter rule was generally adopted in the *United States*,¹ though it seems that such testimony should not be compelled if the witness declines to give it voluntarily.² And even in collateral proceedings, neither the husband nor the wife should be permitted to testify directly to the criminality of the other.³

(5) *Where the Marriage Is Void*.—Where the supposed marriage is void the alleged husband and wife are competent witnesses for or against each other, even though they in good faith

bigamy; but nothing that was said by the wife in this case, nor any decision of the court of session founded upon her testimony, can hereafter be received in evidence to support an indictment against him for that crime. This is altogether *res inter alios acta*. Neither the husband nor the wife has any interest in the decision of the question, and the interest of the parish of Pancras required that the illegality of the second marriage should be established if it was in fact illegal." See also Reg. v. Halliday, Bell C. C. 257.

1. Woods v. State, 76 Ala. 35; 52 Am. Rep. 315; U. S. v. Addatte, 6 Blatchf. (U. S.) 76; State v. Bridgman, 49 Vt. 202; 24 Am. Rep. 124; Moffit v. State, 2 Humph. (Tenn.) 99; 36 Am. Dec. 301; State v. Briggs, 9 R. I. 361; 11 Am. Rep. 270; State v. Dudley, 7 Wis. 664; Com. v. Reid, 8 Phila. (Pa.) 385. See also Fincher v. State, 58 Ala. 215; Powell v. State, 58 Ala. 362.

A married woman is competent to prove threats made by her husband to induce her to sign a deed. Vicknair v. Trosclair, 45 La. Ann. 373.

In *New Jersey*, a husband or wife, in a suit in which neither is a party, may be asked a question for the purpose of discrediting the testimony of the other, when the matter inquired into is not an indictable offense. Ware v. State, 35 N. J. L. 553.

2. Woods v. State, 76 Ala. 39; 52 Am. Rep. 315; State v. Dudley, 7 Wis. 668; State v. Briggs, 9 R. I. 362; 11 Am. Rep. 270.

3. Thus, on the trial of an indictment against a man for the crime of adultery, the husband of the woman, with whom the crime is alleged to have been committed, is not a competent witness to prove the act of adultery, as such testimony would be a direct charge of criminality against his wife. State v. Welch, 26 Me. 30; 45 Am. Dec. 94; State v. Gardner, 1 Root (Conn.) 485; Com. v. Gordon, 2 Brews. (Pa.) 569; Cotton v. State, 62 Ala. 12.

In Com. v. Sparks, 7 Allen (Mass.) 534, the same question arose and the witness was excluded.

The court said: "It has never been determined that a husband or wife is admissible as a witness, in any collateral proceeding, to testify directly to the commission of any criminal act of the other. Nor ought such testimony to be received in any proceeding or upon any trial; for, as nothing would be more likely to exasperate the parties and be the means of implacable discord and dissension between them, its admission would be a violation of that principle of public policy upon which the general rule of their exclusion as witnesses against each other is founded."

In *Minnesota*, the husband of the faithless wife may testify in such cases. State v. Vollander (Minn. 1894), 58 N. W. Rep. 878. To the same effect is Van Cort v. Van Cort, 4 Edw. Ch. (N. Y.) 621.

In State v. Wilson, 31 N. J. L. 77, the alleged guilty parties were jointly indicted for adultery. The woman was first tried and acquitted; and, upon the trial of her alleged paramour, the husband of the woman was offered as a witness to prove that he had come upon the defendant and his wife *in flagrante delicto*. The court, upon a review of the authorities, held that he was not competent to give such testimony.

Upon the trial of an indictment for stealing wheat, a married woman was called on the part of the Crown to prove that her husband, who had absconded, was present when the wheat was stolen, and that she saw him deliver it to the prisoner then on trial. Taunton, J., after consultation with Littledale, J., excluded the evidence on the ground that the wife was directly accusing her husband of crime, and while her testimony could not be used against him if he were put upon trial for that offense, yet it might cause a charge to be made against him. Rex v. Gleed, Gloucester Lent Assize 1832, cited in 3 Russ. on

believe themselves to be lawfully married ;¹ *a fortiori*, persons who co-habit as husband and wife without the formality of a marriage ceremony are not disqualified as witnesses for or against each other.² Upon an indictment for the forcible abduction and marriage of a woman, she is a competent witness, as there could be no legal marriage without her consent.³

The first and lawful wife of a bigamist is not competent to testify against her husband;⁴ and it has been ruled that after

Crimes 631. See also *Den v. Johnson*, 18 N. J. L. 87; *State v. Bradley*, 9 Rich. (S. Car.) 168.

1. *Wells v. Fletcher*, 5 C. & P. 12; 24 E. C. L. 190; *Wells v. Fisher*, 1 M. & Rob. 99; *Reg. v. Young*, 5 Cox C. C. 296; *Meunier v. Couet*, 2 Martin (La.) 56; *People v. McCraney*, 6 Park. Cr. Rep. (N. Y.) 49. Compare *Reg. v. Chadwick*, 11 Q. B. 173; 63 E. C. L. 173; *Reg. v. Blackburn*, 6 Cox C. C. 333.

Slaves could not contract a valid marriage, and hence, though married according to the ceremonies permitted to them, they were not disqualified as witnesses for or against each other. *State v. Samuel*, 2 Dev. & B. (N. Car.) 177; *State v. Taylor*, Phil. (N. Car.) 508.

But where such marriages were legalized by statute after the emancipation of the parties, the same rules applied as if they had been lawfully married in the first instance. *Hampton v. State*, 45 Ala. 82; *Jackson v. State*, 53 Ala. 472; *Johnson v. State*, 61 Ga. 305; *Williams v. State*, 67 Ga. 260.

2. *Batthews v. Galindo*, 4 Bing. 610; *Dennis v. Crittenden*, 42 N. Y. 542; *Rickerstricker v. State*, 31 Ark. 207; *Flannagin v. State*, 25 Ark. 92; *Sims v. State*, 30 Tex. App. 605; *Mann v. State*, 44 Tex. 642; *Hill v. State*, 41 Ga. 484; *State v. Brown*, 28 La. Ann. 279.

Whether or not persons who represent themselves as husband and wife may, at the trial of a cause to which one of them is a party, prove their cohabitation meretricious for the purpose of removing their mutual disability as witnesses, was at one time a question of considerable doubt. See *Campbell v. Twemlow*, 1 Price 81. It is said that Lord Kenyon once refused to admit a woman as a witness for the defendant in a trial for forgery where, in the course of the trial, the prisoner had frequently referred to her as his wife; but, upon hearing an objection to her competency, denied that they were in fact married. Ruled on *Chester Circuit* 1782, and referred to by *Richards*,

C. B., in *Campbell v. Twemlow*, 1 Price 81. Upon the authority of this ruling of Lord Kenyon, Best, C. J., sitting as a trial judge, rejected as a witness a woman who had been held out to the world as the wife of the defendant, and lived with him at his home as his wife, though she stated, when called as a witness, that she was not his wife. *Batthews v. Galindo*, 4 Bing. 610. Upon a rule nisi for a new trial, it was unanimously decided, by the court of common pleas, that the witness should not have been excluded. The Chief Justice himself said: "I am clearly of opinion that my decision at nisi prius was wrong; but I was led into error by the decision of Lord Kenyon, which, I am satisfied, bears directly upon the point. It cannot be material when or where the declarations are made as to the character in which the female stands. . . . The true principle to follow on such occasions is that which is stated in *Starkie*, that the witness is not to be excluded, unless *de jure* wife of the party. Where the situation of the female may be changed in a moment, and is so different from that of a wife, who cannot be separated, it is much better that the objection should go to the credit than to the competency of the witness." Compare *Divoll v. Leadbetter*, 4 Pick. (Mass.) 220.

3. 1 Hale P. C. 301; 2 Hawk., ch. 46, § 78; *Buller N. P.* 286; *Rex v. Wakefield*, 2 Lewin C. C. 279; *Rex v. Perry*, cited, by the court, in *Rex v. Serjeant*, R. & M. 352; *Rex v. Yore*, 1 Jebb & Sy. 563.

4. 1 Hale P. C. 693; 1 East P. C. 469 (citing *Ann Cheney's Case*, O. B. May, 1730, Serj. Forster's MS.); *Miles v. U. S.*, 103 U. S. 314; *Bassett v. U. S.*, 137 U. S. 496; *Hussey v. State*, 87 Ala. 121; *Salter v. State*, 92 Ala. 68; *Williams v. State*, 44 Ala. 24; *State v. McDavid*, 15 La. Ann. 403; *People v. Houghton*, 24 Hun (N. Y.) 501; *Williams v. State*, 67 Ga. 260; *People v.*

prima facie proof of a valid marriage, the first wife is not competent to prove such marriage invalid.¹ But after proof of the first marriage, the second wife is a competent witness to prove the defendant's marriage to her, because such marriage is void and she is not his lawful wife.² If, however, the second marriage is not disputed, and the issue is as to the fact or validity of the first marriage, the alleged second wife should not be admitted as a witness, because she is *prima facie* the lawful wife of the defendant.³

Quanstrom, 93 Mich. 254; Boyd v. State (Tex. Crim. App. 1894), 26 S. W. Rep. 1080; State v. Ulrich, 110 Mo. 350.

1. In Peat's Case, 2 Lewin C. C. 288, the prisoner was indicted for marrying a second wife during the lifetime of the first, and his defense was that the first marriage was void, because the first wife had a husband living at the time of her marriage to the defendant, and he proposed to call her as a witness to prove that fact. Alderson, Baron, was first inclined to permit her to testify, but after consultation with Williams, J., he determined not to do so. The point was reserved, but the prisoner was acquitted and the case did not come up for review. This ruling has been followed in Canada. See Reg. v. Madden, 14 U. C. Q. B. 588; Reg. v. Tubbee, 1 U. C. Pr. Rep. 98, but it has been much criticised by able text writers. Mr. Russell says: "The first impression of the very learned baron seems to have been the correct one. The only ground on which the witness could be rejected was that she was the lawful wife of the prisoner, for the general rule does not extend to a wife *de facto* but not *de jure*." 1 Russ. Cr., p. 319, note (m), citing 2 Stark. Ev. (2d. ed.) 402. Mr. Wharton, also, in criticism of the Canadian cases above cited, says: "This, however, is founded on a *petitio principii*. The question is whether the first marriage is valid. If so, she is not a witness. But she is a witness if such marriage is invalid. For the court to refuse to admit her when called by the defendant to disprove the marriage, is to prejudge the question in issue." 1 Whart. Ev., § 426. And in Wells v. Fletcher, 5 C. & P. 12; 24 E. C. L. 190, it appeared that a woman called as a witness for the defendant had been married to him, but she was permitted to state that she had previously been married to another man, but not having seen him for thirty years she thought he was dead, and,

therefore, married the defendant, but afterwards learned that her first husband was living. The court admitted her as a witness, on the ground that the second marriage was void.

In Dumas v. State, 14 Tex. App. 464; 46 Am. Rep. 241, the defendant called his alleged first wife to testify in his behalf, in rebuttal of evidence of their marriage which had been introduced by the state. She refused to be examined, and it was held on appeal that the trial court properly compelled her to testify.

2. Wells v. Fletcher, 5 C. & P. 12; 24 E. C. L. 190; Wells v. Fletcher, 1 M. & Rob. 99; Johnson v. State, 61 Ga. 305; Finney v. State, 3 Head (Tenn.) 544; Salter v. State, 92 Ala. 68.

Upon a prosecution for bigamy, Lord Chief Justice Hale said: "The first and true wife is not allowed to be a witness against her husband, but I think it clear the second may be admitted to prove the second marriage, for she is not his wife, contrary to the sudden opinion delivered in July, 1664, at the Assizes in Surrey in Arthur Armstrong's Case, for she is not so much as his wife *de facto*." 1 Hale P. C. 693.

In 1 East P. C. 469, it is said: "The first and true wife cannot be a witness against her husband, nor *vice versa*, but the second may be admitted to prove the second marriage, for, the first being proved, she is not so much as wife *de facto*. But that must be first established."

In Norris' Peake on Ev. 248, it is said: "It is clearly settled that a woman who was never legally the wife of a man, though she has been in fact married to him, may be a witness against him. As, in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not *de jure* his wife."

3. In Miles v. U. S., 103 U. S. 304,

(6) *Assignment or Release of Interest.*—In many cases, where the husband or wife was disqualified at common law by reason of a direct interest of the other in the event of the suit, such a disqualification might be removed by a valid assignment or release of such interest.¹ Thus, the husband of a legatee whose legacy had been released to the executor was a competent witness in

reversing 2 Utah 19, the court said: "The marriage of the plaintiff in error with Caroline Owens was charged in the indictment and admitted by him upon the trial. The fact of his previous marriage with Emily Spencer was, therefore, the only issue in the case, and that was contested to the end of the trial. Until the fact of the marriage of Emily Spencer with the plaintiff in error was established, Caroline Owens was *prima facie* his wife, and she could not be used as a witness against him. The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife by proof of the fact that the accused had previously married another wife, who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage and not to the first. The testimony of the second wife to prove the only controverted issue in the case, viz., the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency. As her competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose; even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all." See also *Dixon v. People*, 18 Mich. 84, where it appeared that the defendant's wife had first married one Phillips, who disappeared in April, 1860. In 1862 she read in a newspaper what she supposed to be an account of his death. In 1865, having heard nothing more of her husband, she married the defendant. The trial court admitted her as a witness for the state, over the defendant's objection. For this error the conviction was reversed, the appellate court saying that, in the absence of further

evidence, it must be presumed that Phillips was dead, and that the witness was the defendant's lawful wife. Compare *Griggs' Case*, T. Raym. 1; *Finn v. Finn*, 12 Hun (N. Y.) 339.

1. Pending a suit by a husband and wife against a common carrier, for injury to her goods, the plaintiffs, for value and without recourse, assigned the right of action to the father of the wife, and it was held that the husband was a competent witness for the assignee. *Norfolk, etc., R. Co. v. Read*, 87 Va. 186.

In an action to recover damages for wrongfully causing the death of the plaintiff's intestate, the widow may release her interest to the other beneficiaries and become a witness for the plaintiff. *Gayle v. Morrissey*, 5 Sneed (Tenn.) 445. So, also, a widow, to whom land which had been bought by her father in the lifetime of her husband was conveyed, may convey it to her children without warranty, and be a witness for them in a contest between them and her husband's creditors. *Thomas v. Maddan*, 50 Pa. St. 261.

If husband and wife join in a conveyance releasing her right of dower in the lands of her first husband to the heir, the second husband is a competent witness for the heir of the first, in an action of ejectment brought by such heir to recover possession of the lands. *Ross v. Blair, Meigs* (Tenn.) 525. Compare *Hadley v. Chapin*, 11 Paige (N. Y.) 245.

The wife of the payee in a promissory note which has been assigned without recourse, is a competent witness for the maker. *Armstrong v. Noble*, 55 Vt. 428. And also for the holder. *Bisbing v. Graham*, 14 Pa. St. 14; 53 Am. Dec. 510.

If the husband and wife convey to their children all their interest in a devise to the wife, they are competent witnesses to sustain the will. *Meredith v. Hughes*, 28 Ga. 571.

In *Alabama*, the rule was otherwise. *Locke v. Noland*, 11 Ala. 249; *Powell v. Powell*, 10 Ala. 900.

support of the will.¹ And the wife of a grantor who had been released from his covenants of warranty was a competent witness for the grantee.²

(7) *Exceptions to the Rule*—(a) *Crimes Committed Against Each Other*.—An exception to the rule excluding the testimony of husband and wife against each other is to be found in cases of personal outrage committed by one upon the other. In all manner of offenses involving personal injury to the wife or affecting her liberty, she has always been allowed to testify directly against her husband as a matter of necessity.³ And similarly, where the husband is the injured party, he may testify against his wife.⁴ In cases where the husband and wife are competent to testify against each other, they may also testify in favor of each other.⁵

Upon the trial of an indictment of a husband or wife for assault and battery committed upon the other, the injured party

1. *Weems v. Weems*, 19 Md. 334. Compare *Borneman v. Sidlinger*, 21 Me. 185.

In *Daniel v. Proctor*, 1 Dev. (N. Car.) 428, it was held that the wife of a sole executor who had renounced the office was a competent witness to prove the execution of the will, upon the ground that the executor took nothing under the will, and no commissions were given him thereunder. The court thought that any interest which he may have had at the time of the execution of the will was contingent upon the allowance of commissions by the court. But in *Huie v. McConnell*, 2 Jones (N. Car.) 455, it was held that the wife of one named as an executor in a will was not a competent witness to prove the same, although her husband had entered a renunciation of the office in open court, and had released all his interest under the will. This decision went upon the ground that a witness to a will must be competent at the time of its execution. The court disapproved the case of *Daniel v. Proctor*, 1 Dev. (N. Car.) 428, saying that it had been virtually overruled.

2. *Peaceable v. Keep*, 1 Yeates (Pa.) 576.

3. 1 Hale P. C. 301; 1 East P. C., ch. 11, § 5, p. 455; 2 Hawk. P. C., ch. 46, § 47; Buller N. P. 287; *Rex v. Serjeant, R. & M.* 352; *Reg. v. Jellyman*, 8 C. & P. 604; 34 E. C. L. 547.

The wife is a competent witness against her husband upon a charge of procuring a miscarriage. *State v. Dyer*, 59 Me. 303.

The wife may be admitted as a witness against her husband upon his trial

for shooting at her, *Whitehouse's Case*, 3 Russ. on Crimes 633; *Reg. v. Pearce*, 9 C. & P. 667; 38 E. C. L. 281; or for attempting to poison her in any manner. *Rex v. Jagger*, 3 Russ. on Crimes 637; *People v. Northrup*, 50 Barb. (N. Y.) 147; *Com. v. Sapp* (Ky. 1890), 14 S. W. Rep. 834.

She may also exhibit articles of peace against him. *Rex v. Doherty*, 13 East 171; *Vane's Case*, 13 East 171, note (a); 2 Stra. 1202.

Some doubt has been expressed as to whether the wife should be admitted to prove facts which can be proved by other witnesses. See *Rex v. Jagger*, 3 Russ. on Crimes 633; *Reg. v. Pearce*, 9 C. & P. 667; 38 E. C. L. 281; *State v. Davis*, 3 Brev. (S. Car.) 3.

But in *Audley's Case*, 1 St. Tr. 393; 3 How. St. Tr. 402, the wife of the defendant was admitted to prove facts which were proved by another witness.

The Wife's Dying Declarations are admissible against her husband upon his trial for her murder. *Rex v. Woodcock*, 1 Leach C. C. 500; *Johns' Case*, 1 Leach C. C. 504, note (a); *State v. Pearce*, 56 Minn. 226.

In *Kentucky*, the rule of the text is abolished by statute, and husband and wife are not competent against each other in any criminal prosecution. *Turnbull v. Com.*, 79 Ky. 495.

4. *Whipp v. State*, 34 Ohio St. 87; 32 Am. Rep. 359. See also *State v. Davidson*, 77 N. Car. 522.

5. *Rex v. Serjeant, R. & M.* 352; *Tucker v. State*, 71 Ala. 342; *State v. Neill*, 6 Ala. 685; *Com. v. Murphy*, 4 Allen (Mass.) 491.

is a competent witness to testify for the prosecution;¹ and upon the trial of a husband for assisting another man to commit a rape upon his wife she may be a witness against him.²

This relaxation of the rule excluding husband and wife as witnesses for or against each other is demanded by the necessities of justice, but it extends no farther than such necessities require. Consequently, the exception is confined to cases of personal violence endangering the bodily safety or liberty of the witness.³

No outrage upon the feelings of the wife by the commission of an offense, however detestable, will render her competent as a witness against her husband when he is put upon trial for the offense. Thus bigamy, adultery, and even incest committed by the husband with the wife's daughter, are not such personal wrongs to the wife as will render her testimony admissible against the offender.⁴

1. *Rex v. Azire*, 1 Stra. 633; *Tucker v. State*, 71 Ala. 342; *State v. Neill*, 6 Ala. 685; *Turner v. State*, 60 Miss. 351; 45 Am. Rep. 412; *State v. Davis*, 3 Brev. (S. Car.) 3; *Whipp v. State*, 34 Ohio St. 87; 32 Am. Rep. 359; *U. S. v. Fitton*, 4 Cranch (C. C.) 658; *U. S. v. Smallwood*, 5 Cranch (C. C.) 35; *Com. v. Murphy*, 4 Allen (Mass.) 491.

In such case the injured party is not only competent, but compellable, to testify. *Johnson v. State*, 94 Ala. 53; *Turner v. State*, 60 Miss. 351; 45 Am. Rep. 412.

Upon the return of a writ of *habeas corpus* directed to the father-in-law of the relator, requiring him to bring before the court the wife and infant child of the relator, the wife is a competent witness for the defendant to prove acts of cruelty committed by her husband, which justify her separation from him and her refusal to return to his house. *People v. Mercein*, 8 Paige (N. Y.) 47. Compare *People v. Chegarey*, 18 Wend. (N. Y.) 637.

In *North Carolina*, it has been held that the husband or wife is not a competent witness against the other upon the trial of an indictment for assault and battery where no lasting injury is inflicted or threatened. *State v. Hussey*, Busb. (N. Car.) 123; *State v. Rhodes*, Phil. (N. Car.) 453; 98 Am. Dec. 78; *State v. Oliver*, 70 N. Car. 60.

Where the wife struck her husband with an axe without sufficient provocation, the court, without saying what would be sufficient provocation, held that the husband might testify against her. *State v. Davidson*, 77 N. Car. 522.

2. In *Rex v. Castlehaven*, commonly

known as *Lord Audley's Case*, 1 St. Tr. 393; 3 How. St. Tr. 402, the offense charged was that the defendant had compelled his countess to submit to sexual intercourse with one Bradway, a servant of the defendant, and it was held that she was a competent witness for the Crown, although the servant, the instrument of the outrage, was examined as a witness and testified to the same facts.

3. *Rex v. Serjeant, R. & M.* 352; *Bentley v. Cooke*, 3 Doug. 422; 26 E. C. L. 176; *Bassett v. U. S.*, 137 U. S. 496; *Stein v. Bowman*, 13 Pet. (U. S.) 222; *State v. Burlingham*, 15 Me. 104; *People v. Carpenter*, 9 Barb. (N. Y.) 580; *People v. Quanstrom*, 93 Mich. 256; *Com. v. Jailer*, 1 Grant's Cas. (Pa.) 218; *State v. Berlin*, 42 Mo. 572; *Compton v. State*, 13 Tex. App. 271; 44 Am. Rep. 703, *overruling* *Morrill v. State*, 5 Tex. App. 447, and *Roland v. State*, 9 Tex. App. 277.

Upon a complaint against the husband for deserting his wife and children, the wife is not a competent witness against him. *Reeve v. Wood*, 10 Cox C. C. 58. Compare *People v. Bartholf*, 24 Hun (N. Y.) 272.

Subornation of perjury, to wrong the wife in a judicial proceeding affecting her property rights, is not such a crime against her as will let in her testimony against her husband. *People v. Carpenter*, 9 Barb. (N. Y.) 580.

4. *Bigamy*.—*Bassett v. U. S.*, 137 U. S. 496; *People v. Quanstrom*, 93 Mich. 254; *State v. Ulrich*, 110 Mo. 350; *Boyd v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 1080.

Adultery.—*McLean v. State*, 32 Tex.

Crim. Rep. 531; *State v. Armstrong*, 4 Minn. 335.

Incest.—*Compton v. State*, 13 Tex. App. 271; 44 Am. Rep. 703, *overruling* *Morrill v. State*, 5 Tex. App. 447, and *Roland v. State*, 9 Tex. App. 277.

Indecent Assault.—Neither can a wife make a complaint against her husband for an indecent assault upon the person of his daughter, nor is she a competent witness against him on his trial for said offense. *People v. Westbrook*, 94 Mich. 629, *following* *People v. Quantstrom*, 93 Mich. 254.

In *State v. Armstrong*, 4 Minn. 335, *Flandran, J.*, said: "A prosecution for the crime of adultery does not fall within the cases in which a wife could testify against her husband under the general rule, for two reasons. *First*, the necessity which warrants the exception does not exist, as all the material features of such an offense are susceptible of proof without her aid as readily as in other crimes. *Second*, it is not a crime against her person, and involves no violence to or abuse of her."

In *Bassett v. U. S.*, 137 U. S. 496, the prisoner was indicted for polygamy, and his wife was called as a witness for the prosecution and permitted to testify as to confessions made by him to her in respect to the crime charged, and her testimony was the only direct evidence against him. This testimony was admitted under the first paragraph of section 1156 of the Code of Civil Procedure, enacted in 1884, section 3878 of the Compiled Laws of *Utah*, 1888, which reads: "A husband cannot be examined for or against his wife without her consent, nor the wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." The contention was that polygamy is, within the language of that paragraph, a crime committed by the husband against a wife. But it was held by the Supreme Court of the *United States* that this statutory provision was merely declaratory of the common law, and that at common law such an offense was not a crime against the wife within the exception to the general rule admitting her testimony against her

husband. Mr. Justice Brewer, delivering the opinion of the court, said: "We conclude, therefore, that the section quoted from the Code of Civil Procedure, if applicable to a criminal case, should not be adjudged as working a departure from the old and established rule, unless its language imperatively demands such construction. Does it? The clause in the Civil Code is negative, and declares that the exception of the incompetency of wife or husband as a witness against the other does not apply to a criminal action or proceeding for a crime committed by one against the other. Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded; and the common-law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder, or robbery, or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old familiar and just common-law rule. We conclude, therefore, that under the statute the wife was an incompetent witness as against her husband."

In *Iowa* and *Nebraska*, the courts have taken the position that bigamy, adultery and incest committed by the husband are crimes against his wife; and, in prosecutions for those offenses, she is permitted to testify against him. *State v. Bennett*, 31 Iowa 24; *State v. Hazen*, 39 Iowa 648; *State v. Sloan*, 55 Iowa 219; *State v. Hughes*, 58 Iowa 165; *Lord v. State*, 17 Neb. 529; *Owens v. State*, 32 Neb. 174.

These decisions are criticised and

(b) *Agency*.—Where the wife has acted as agent for her husband in the transaction of his business, he is bound by her acts, declarations and admissions concerning that business, and they are admissible in evidence against him the same as those of any other agent.¹ But, at common law, she could not be called as a witness to prove her acts as such agent.² It is, however, pretty generally provided by statute that where the husband or wife acts as agent for the other in any business transaction, the one so acting may be a witness for the other concerning all things done or said within the scope of such agency.³ And in one jurisdic-

disapproved in *People v. Quantstrom*, 93 Mich. 254; *Bassett v. U. S.*, 137 U. S. 496. They do not seem to be supported by reason or authority. Nevertheless, in direct opposition to the emphatic language of the Supreme Court of the *United States*, *Colorado* has fairly outdone *Iowa* and *Nebraska* by holding that a husband's perjury in a divorce suit against his wife is a crime against her which renders her competent to testify against him upon his trial for the offense. *Dill v. People*, 19 Colo. 469.

1. *Emerson v. Blonden*, 1 Esp. 142; *Bull. N. P.* 294b; *Anderson v. Saunderson*, Holt 591; *White v. Cuyler*, 6 T. R. 176; *Clifford v. Burton*, 1 Bing. 199; 8 E. C. L. 471; *Gregory v. Parker*, 1 Campb. 394; *Paethorp v. Furnish*, 2 Esp. 511, note; *Carey v. Adkins*, 4 Campb. 92; *Fenner v. Lewis*, 10 Johns. (N. Y.) 38; *Riley v. Suydam*, 4 Barb. (N. Y.) 222; *Williamson v. Morton*, 2 Md. Ch. 94; *Hughes v. Stokes*, 1 Hayw. (N. Car.) 372; *Curtis v. Ingham*, 2 Vt. 289; *Spencer v. Tisue*, Add. (Pa.) 316; *Pickering v. Pickering*, 6 N. H. 120; *Thomas v. Hargrave*, Wright (Ohio) 595.

But her admissions were not admissible in evidence until the fact of her agency was established. *Duckworth v. Johnston*, 1 C. & K. 584; 47 E. C. L. 584.

And her statements concerning matters outside of the scope of her agency are not admissible at all. *Meredith v. Footner*, 11 M. & W. 202; *Karney v. Paisley*, 13 Iowa 89.

Her declaration that her child was born alive is not admissible in support of his claim to an estate by the curtesy. *Gardner v. Klutts*, 8 Jones (N. Car.) 375; 80 Am. Dec. 331.

2. 1 Phill. Ev. 93; *O'Connor v. Marjoribanks*, 4 M. & G. 435; 43 E. C. L. 228.

In *Watkins v. Turner*, 34 Ark. 675,

overruling *Magness v. Walker*, 26 Ark. 470, the court said: "The result of the cases, here and elsewhere, upon this subject is that the common-law disability to testify for or against each other as between husband and wife remains; that in all cases where they act as agents for each other, their acts, declarations and admissions in the course of the business of the agency may be proved by others and will bind the principal, but they cannot themselves testify in the case. We recognize the fact that this in some degree militates against the principle of mutuality, allowing one party to testify and disqualifying the agent, who may be the husband or wife of the other. The harmony of the rules of evidence has been broken by the restricting nature of the enabling clause of the constitution removing only the disqualification of interest and allowing that springing from policy to remain. The constitution itself restores the mutuality in cases of suits for or against the estate of persons deceased, but does not proceed farther. We cannot do so without judicial legislation; *expressio unius est exclusio alterius*. If it be desirable, the change is within the power of the legislature. Meanwhile, husbands and wives who avail themselves of each other's agency, must rest upon the common-law modes of proof."

3. *Burke v. Savage*, 13 Allen (Mass.) 408; *Morony v. O'Laughlin*, 102 Mass. 184; *Wheeler & Wilson Mfg. Co. v. Tinsley*, 75 Mo. 458; *Haerle v. Kreihn*, 65 Mo. 202; *Hardy v. Matthews*, 42 Mo. 406; *Chesley v. Chesley*, 54 Mo. 347; *Degenhart v. Schmidt*, 7 Mo. App. 117; *Flannery v. St. Louis, etc., R. Co.*, 44 Mo. App. 396; *Leete v. State Bank*, 115 Mo. 184; *Lunay v. Vantyne*, 40 Vt. 501; *Town v. Lamphire*, 37 Vt. 52; *Sanborn v. Cole*, 63 Vt. 590; *Pierce v. Bradford*, 64 Vt. 219; *Sargeant v. Marshall*, 38 Ill. App. 642; *Robnett v.*

tion at least, the court appears to have departed from the common-law rule without the aid of an enabling statute.¹

Where the wife acts in her husband's presence, she cannot be said to act as his agent, and her testimony is not, therefore, admissible.² Proof of the agency must, in any such case, be given as a condition precedent to the testimony of the husband or wife, as the case may be,³ and then such testimony must be confined

Robnett, 43 Ill. App. 191; Robertson v. Brost, 83 Ill. 116; Owen v. Cawley, 36 Barb. (N. Y.) 52. See also Quade v. Fisher, 63 Mo. 325.

It is not necessary that the wife should have been agent for her husband in all the matters in controversy in a suit, in order that her testimony may be admitted. Thus, in an action on an account annexed, each item of the account upon which a distinct issue is raised, is a cause of action as to which she may testify, if it was transacted by her in her husband's absence. Packard v. Reynolds, 100 Mass. 153.

1. Birdsall v. Dunn, 16 Wis. 235; Hobby v. Wisconsin Bank, 17 Wis. 167; Meek v. Pierce, 19 Wis. 300; Mountain v. Fisher, 22 Wis. 93; O'Connor v. Hartford F. Ins. Co., 31 Wis. 160; Chunot v. Larson, 43 Wis. 538; 28 Am. Rep. 567; Engmann v. Immel, 59 Wis. 249. Compare Bach v. Parmely, 35 Wis. 238; Menk v. Steinfert, 39 Wis. 370; Arndt v. Harshaw, 53 Wis. 269.

In Birdsall v. Dunn, 16 Wis. 239, Dixon, C. J., said: "If the *ex parte* declarations of the wife without oath are admissible in such a case, it is difficult to perceive upon what principle her testimony under oath, if properly tendered to the same facts, is to be excluded. Courts might not compel her to testify against her own will, or at the instance of the opposite party, but if she comes willingly, her husband consenting, it would seem that she ought to be admitted." And after a review of authorities, the learned Chief Justice continues: "It is apparent from this brief examination of decisions that the rules of the common law excluding witnesses, either on the ground of interest or of public policy, are by no means inflexible. They yield to the exigencies of particular cases, and an exception is formed whenever the purposes of justice require it. We are of opinion, especially since the enactment of the statute removing the disability of parties, that the case of a wife acting as the agent of her husband should con-

stitute an exception as to all business transactions by her within the scope of her employment, and, therefore, that the testimony of Mrs. Dunn, the wife of the defendant, should have been received to that extent."

In *Alabama*, under a statute which removed the incompetency of parties and persons interested in the event of the suit, the court held that a husband who managed his wife's separate estate might be a witness as to what disposition he had made of money belonging to her. As the statute had removed the objection arising from interest and from being a party, the court took the view that the necessity of the case should override the objection arising from public policy. Robison v. Robison, 44 Ala. 227.

2. Bates v. Sabin, 64 Vt. 511; Trepp v. Barker, 78 Ill. 146; Waggoner v. Rexford, 2 Ill. App. 455.

3. Orcutt v. Cook, 37 Vt. 515; Gilson v. Gilson, 16 Vt. 464; Meek v. Pierce, 19 Wis. 300; Case v. Colter, 66 Ind. 336.

In an action to recover damages for injuries inflicted on the plaintiff by a vicious dog, it was held that the fact that the defendant's wife sometimes tied the dog and watched him in her husband's absence, did not constitute her his agent so as to let in her testimony in his behalf. Garrison v. Barnes, 42 Ill. App. 21; Bates v. Cilley, 47 Vt. 1.

In an action against a railroad company for killing the plaintiff's cow, which had escaped from the pasture, the fact that the plaintiff's wife was the only person who saw and knew the circumstances does not make her a competent witness. Baxter v. Boston, etc., R. Co., 102 Mass. 383.

Where the husband has acted as agent for his wife or she for him, the witness is competent to prove the agency. Sumner v. Cooke, 51 Ala. 521; Burke v. Savage, 13 Allen (Mass.) 408; Chunot v. Larson, 43 Wis. 536; 28 Am. Rep. 567; Schmied v. Frank,

to the matters which come properly within the scope of the agency.¹

Where the wife has kept her husband's books of original entry, she is a competent witness for him when he sues on the book account.² But it is necessary that they be books of original entry. If she has made up the books from original memoranda, made

86 Ind. 250; *Leete v. State Bank*, 115 Mo. 184, *overruling*, on this point, *Williams v. Williams*, 67 Mo. 661; *Wheeler & Wilson Mfg. Co. v. Tinsley*, 75 Mo. 458. But see *Washington v. Bedford*, 10 Lea (Tenn.) 243, where it was held that a wife was not competent to prove that her husband gave her the money to pay a note. This decision was put upon the ground that these facts must have come to her knowledge through the confidence of the marital relation.

1. *Mountain v. Fisher*, 22 Wis. 93; *Robertson v. Brost*, 83 Ill. 116; *Robertson v. Robnett*, 43 Ill. App. 191.

In an action for malicious prosecution for perjury, alleged to have been committed by the plaintiff concerning a business transaction in which the defendant's wife acted as his agent, it was held that she was not a competent witness, as she had not acted as her husband's agent in the alleged wrongful prosecution of the plaintiff, which was then the matter at issue, and not the business transaction which she had conducted as his agent. *Bliss v. Franklin*, 13 Allen (Mass.) 244.

Under the *Massachusetts* statute, she may testify only to a contract or cause of action which is in issue and on trial. It is accordingly held that she may not testify to the payment by her, in her husband's absence, of a promissory note upon which he is sued. *Bruce v. Matthews*, 101 Mass. 64. Neither is she a competent witness for him in an action for breaking and entering his dwelling house in his absence, and using vile and abusive language to her, such being a transaction in which she took no active part. *Bunker v. Bennett*, 103 Mass. 516.

In *Robertson v. Brost*, 83 Ill. 119, it was held that where the wife is sent to demand money due her husband, she is not thereby rendered competent to prove admissions of the defendant going to prove a prior contract. The court said: "The asserted agency of the wife was only in going after the money some time afterward. She demanded payment and it was refused. That was all the transaction there was of the business of such agency. Had it

been material to the issue, which it was not, to prove the facts of demand of payment and refusal of payment, then the wife might have been an admissible witness to prove these facts as matters of a business transaction, where the transaction was had and conducted by a married woman as the agent of her husband. But the claim that such an agency as there was here to go for the money for the coal converted the wife into a competent witness to prove a prior contract of the sale of the coal, by testifying to admissions made at the time of her demand of payment, is, as we view it, a perversion of this provision of the statute. Its allowance would be to enable the wife to be made a competent witness for the husband in every suit. He would need but to send her to the adverse party for some purpose pertaining to the subject of litigation, and thus qualify her, under the guise of an agency, to testify to admissions made which would go to establish the cause of action."

So, also, a wife, requested by her husband to call the indorser of a note held by him into the house and ask him whether he was going to pay it or not, is not competent to prove admissions made by the indorser, or prove an agreement by him which would make him liable on the note without demand of payment from the maker. *Hale v. Danforth*, 40 Wis. 382.

2. *Littlefield v. Rice*, 10 Met. (Mass.) 287; *Stanton v. Willson*, 3 Day (Conn.) 37; 3 Am. Dec. 255.

A contrary ruling was made in an early *Vermont* case. One reason given by the court for the decision was that, if the wife were admitted, she would be subject to cross-examination and might be compelled to testify against her husband. *Carr v. Cornell*, 4 Vt. 116. The same point was urged in *Littlefield v. Rice*, 10 Met. (Mass.) 290, but the court did not consider it a sufficient reason for excluding the wife as a witness, and disproved the reasoning of the *Vermont* court. Since the decision of *Carr v. Cornell*, 4 Vt. 116, a statute has been passed in that state

by him from day to day, she is not thereby rendered a competent witness.¹

(e) *Actions for the Value of Lost Baggage*.—A well-known exception to the common-law rule excluding parties from the witness stand was to be found in actions against carriers for the loss of baggage, the amount and value of which was known only to the owner. As the wife generally packs her husband's trunk, and always her own, it will readily be seen that the same ground of necessity which justified the admission of the plaintiff himself would also, in such cases, render his wife admissible as a witness in his behalf.²

(b) *UNDER ENABLING STATUTES*—(1) *Statutes Removing Disqualification of Interest*.—Statutes removing the disability of parties and persons interested in the event of the suit, do not render the husbands or wives of such parties and interested persons competent to testify, because, as has been seen, interest is not the only ground upon which they are excluded from the witness stand.³ But in actions where they are both parties, either as

making the wife a competent witness for her husband in such cases. See *Eastabrooks v. Prentiss*, 34 Vt. 457.

1. *Eastabrooks v. Prentiss*, 34 Vt. 457.

2. *Sasseeen v. Clark*, 37 Ga. 242; *Illinois Cent. R. Co. v. Taylor*, 24 Ill. 323; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; 76 Am. Dec. 749; *Northern Line Packet Co. v. Shearer*, 61 Ill. 263.

In *Dibble v. Brown*, 12 Ga. 223; 56 Am. Dec. 460, the court said: "Justice has her necessities, one of which is that wrong must be prevented, even by overriding rules of evidence which are ordinarily not only salutary but indispensable. The rule is applicable to this case. It is not pretended that there is any evidence attainable, to prove the contents of this trunk, but that of Mrs. Dibble. She packed it and she alone knew its contents. The necessity of her admission is found in the fact, which clearly appears on the face of this record, that if she is excluded the plaintiff loses his rights. The reason of the rule is fortified by a consideration of the confidence and trust which the public are obliged to repose in carriers, and the facility with which that confidence may be abused."

In *McGill v. Rowand*, 3 Pa. St. 452; 45 Am. Dec. 654, Rogers, J., said: "The principle of necessity, which alone enables a party under certain circumstances to prove the contents of a box or trunk, applies with as much, if not greater, force to the wife as to the hus-

band. The wife usually packs her husband's trunk, and always her own, and, therefore, to say that she cannot, in a proper case, be a witness, will amount almost to a repeal of the rule and in most cases to a denial of justice. We, therefore, see no reasonable objection to the admission of the husband or wife, or both, to testify to the amount of their wearing apparel, and to its value, belonging to each, including in the catalogue the wife's jewelry and every other article pertaining to her wardrobe that may be necessary or convenient to either in traveling."

In *Illinois*, however, the wife, though competent to prove the contents of lost baggage, is not competent to prove the value thereof. *Illinois Cent. R. Co. v. Taylor*, 24 Ill. 323; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; 76 Am. Dec. 749.

3. *Stapleton v. Crofts*, 18 Q. B. 367; 83 E. C. L. 367; *Alcock v. Alcock*, 12 Eng. L. & Eq. 354; *McKeen v. Frost*, 46 Me. 239; *Ray v. Smith*, 9 Gray (Mass.) 141; *Barber v. Goddard*, 9 Gray (Mass.) 71; *Kelly v. Drew*, 12 Allen (Mass.) 107; 90 Am. Dec. 138; *Erwin v. Smaller*, 2 Sandf. (N. Y.) 340; *Hasbrouck v. Vandervoort*, 4 Sandf. (N. Y.) 596; *Pillow v. Bushnell*, 5 Barb. (N. Y.) 156; *People v. Reagle*, 60 Barb. (N. Y.) 537; *Cram v. Cram*, 33 Vt. 15; *Haworth v. Norris*, 28 Fla. 763; *Kelley v. Proctor*, 41 N. H. 142; *Breed v. Gove*, 41 N. H. 452; *Wheeler v. Towns*, 43 N. H. 50;

plaintiffs or defendants, and each of them has an interest in the matter in controversy, each may testify in his or her own behalf, notwithstanding their incompetency to testify in favor of each other, provided, of course, that no testimony is given in violation of the confidence of the marital relation.¹ In an action by the

Smith v. Boston, etc., R. Co., 44 N. H. 325; Mitchinson v. Cross, 58 Ill. 366; Eichengreen v. Appel, 44 Ill. App. 19; Dunlap v. Hearn, 37 Miss. 471, *overruling* Lockhart v. Luker, 36 Miss. 68.

In *Connecticut*, the rule is otherwise. Merriam v. Hartford, etc., R. Co., 20 Conn. 362; 52 Am. Dec. 344; Fortune v. Buck, 23 Conn. 2; Lucas v. State, 23 Conn. 19.

1. St. Louis, etc., R. Co. v. Amos, 54 Ark. 159; Klenk v. Knoble, 37 Ark. 298; Bell v. Hannibal, etc., R. Co., 86 Mo. 599; Fugate v. Pierce, 49 Mo. 441; Buck v. Ashbrook, 51 Mo. 539; Tingley v. Cowgill, 48 Mo. 291; Brownlee v. Fenwick, 103 Mo. 420; Cooper v. Cooper, 60 Mo. 420; Evers v. America L. Assoc., 59 Mo. 429; Quade v. Fisher, 63 Mo. 325; Wilcox v. Todd, 64 Mo. 388; Steffen v. Bauer, 70 Mo. 399; Barber v. Goddard, 9 Gray (Mass.) 71; Clouse v. Elliott, 71 Ind. 302; Rogers v. Rogers, 46 Ind. 1; McConnell v. Martin, 52 Ind. 434; Wood v. Bibbins, 58 Ind. 392; Scarry v. Eldridge, 63 Ind. 44; Lockwood v. Joab, 27 Ind. 423; Albaugh v. James, 29 Ind. 398; Lowe v. Hughes, 29 Ind. 399; Crane v. Buchanan, 29 Ind. 570; Ruth v. Ford, 9 Kan. 17; Marsh v. Potter, 30 Barb. (N. Y.) 506; Babbott v. Thomas, 31 Barb. (N. Y.) 277; Schaffner v. Reuter, 37 Barb. (N. Y.) 44; Hooper v. Hooper, 43 Barb. (N. Y.) 292; Matteson v. New York Cent. R. Co., 62 Barb. (N. Y.) 364; Shoemaker v. McKee, 19 How. Pr. (N. Y. Supreme Ct.) 86; Wehrkamp v. Willet, 4 Abb. App. Dec. (N. Y.) 548; Maverick v. Eighth Ave. R. Co., 36 N. Y. 378; Nuser v. Beach, 15 Ohio St. 172; Robinson v. Chadwick, 22 Ohio St. 527; Orr v. Cox, 3 Lea (Tenn.) 617; Patton v. Wilson, 2 Lea (Tenn.) 101; Robinson v. Hutchinson, 31 Vt. 443; Cameron v. Fay, 55 Tex. 58; Hayes v. Virginia Mut. Protection Assoc., 76 Va. 225; Hackett v. Bonnell, 16 Wis. 471. Compare Kusch v. Kusch, 143 Ill. 357; Shantz v. Stoll, 34 La. Ann. 1237; Blanchard v. Moors, 85 Mich. 380.

The wife, being the real party in interest, is competent for all purposes, except to disclose confidential com-

munications. Scrutchfield v. Sauter, 119 Mo. 615; Hutchinson v. Hutchinson, 16 Colo. 349; Williams v. Jacksonville, etc., R. Co., 26 Fla. 533.

In such case, the witness must have an interest in the event of the suit. Thus, where a married woman, claiming as heir of her deceased father in conjunction with her husband, sues to set aside a deed executed by her father, on the ground of undue influence and mental incapacity, her husband has no such interest in the event of the suit as will make him a competent witness in the case. His wife never having been seised of the land, he is not even a tenant by the curtesy *inchoate*. Wood v. Broadley, 76 Mo. 23; 43 Am. Rep. 754.

Notwithstanding the existence of a statute making parties competent to testify in their own behalf, the husband and wife may not testify to matters protected by the confidence of the marital relation, and even where no objection is made the court may *ex mero motu* interpose and put an end to such violation. Goodrum v. State, 60 Ga. 509.

In Babbott v. Thomas, 31 Barb. (N. Y.) 277, which was an action brought to cancel a bond and mortgage and to restrain the foreclosure of the mortgage, upon the ground that the consideration was usurious, the plaintiff offered himself as a witness in his own behalf, and it was objected that, as the wife was joined as a party plaintiff, the husband was an incompetent witness in the case. Pratt, J., delivering the opinion of the court, said: "I think the husband was a competent witness on his own behalf. In the first place, the wife was not a necessary party to the suit. If she could be affected by the result of the suit, it would not be in consequence of any direct adjudication upon her rights but from the adjudication upon the rights of her husband. If the suit had been brought by the husband alone the effect of an adjudication would be precisely the same. If he should succeed in procuring the bond and mortgage to be canceled, the land would be free from the mortgage, as well in regard to her inchoate right of dower

husband and wife to recover damages for a personal injury inflicted upon the wife, the husband, being the real party in interest, may testify in his own behalf,¹ and should the husband die before

as to the husband's fee. So, on the other hand, had he failed it would forever be conclusive upon the question of usury. She might as well be made a party in an action of ejectment by or against the husband. Her inchoate right of dower is not such a right as to be capable of being established or divested by a judicial determination against the wife directly."

In *Kentucky*, it is held that where the husband and wife sue as joint owners of property, only one of them may testify. *Covington v. Geyler*, 93 Ky. 275; *Raison v. Williams* (Ky. 1892), 18 S. W. Rep. 8.

In *Virginia*, it was held, prior to the act expressly making husband and wife competent witnesses, that where they were both parties, and both interested in the event of the suit, neither of them was competent to testify. *DeFarges v. Ryland*, 87 Va. 406; *Burton v. Mills*, 78 Va. 470; *William & Mary College v. Powell*, 12 Gratt. (Va.) 372; *Murphy v. Carter*, 23 Gratt. (Va.) 486; *Perry v. Ruby*, 81 Va. 317. But if one of them, though a party, had no interest in the matter in controversy, the other might testify. *Thomas v. Sellman*, 87 Va. 683; *Farley v. Tillar*, 81 Va. 279; *Hayes v. Virginia Mut. Protection Assoc.*, 76 Va. 228.

But the disinterested party might not testify for or against the other. *Keagy v. Trout*, 85 Va. 390.

Thus, in a suit to annul a postnuptial settlement upon the wife, neither the husband nor wife could testify, as both were interested. *Perry v. Ruby*, 81 Va. 317; *Wiltz v. Osburn*, 83 Va. 227.

1. *North Western Union Packet Co. v. Clough*, 20 Wall. (U. S.) 528; *Simkins v. Eddie*, 56 Vt. 612; *Snell v. Westport*, 9 Gray (Mass.) 321; *Barnes v. Martin*, 15 Wis. 240; 82 Am. Dec. 670; *Kaime v. Omro*, 49 Wis. 371; *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 260; 4 Am. Rep. 606; *Rock Island v. Deis*, 38 Ill. App. 409.

In *Kaime v. Omro*, 49 Wis. 372, the court said: "This action was brought by the respondents against the village of Omro in its corporate name, for the purpose of recovering damages for an injury sustained by Mahitabel Kaime upon one of the sidewalks of a street

in said village, which the respondents alleged was out of repair at the time, and that such want of repair caused the injury. The respondents are husband and wife, and the only claim made by them on the trial of the action was for the personal injuries sustained by the wife. The first error assigned by the learned counsel for the appellants is that the circuit judge permitted the husband to testify in behalf of the plaintiffs on the trial, against the objection of the defendants. It is urged by the learned counsel that the husband is a nominal party only, and that he is, therefore, excluded under the rule which holds that a husband cannot testify either for or against his wife in an action to which he is not a party. *Farrell v. Ledwell*, 21 Wis. 183; *Yager v. Larsen*, 22 Wis. 184; *Mountain v. Fisher*, 22 Wis. 93. If it were admitted that in an action in which the husband has joined as a mere nominal party, having no pecuniary interest whatever in the result of the action, as in an action by the wife concerning her own property, or to recover money or property which belonged to her and in which the husband had no interest, he would not be a competent witness, such admission would not exclude the husband in this case. The husband had a direct interest in the result of the action. He was, in fact, the real party in interest, and the judgment, if any were recovered, and the money collected thereon, would belong to him. *Shaddock v. Clifton*, 22 Wis. 114; 94 Am. Dec. 588. In that case it was held that an admission made by the husband was evidence in the case against him and his wife. It was so held upon the ground that he was the real party in interest. There can be no doubt that under this decision the husband was a competent witness for himself and wife in this case, and that no error was committed in permitting him to testify."

In *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378, which was an action by husband and wife to recover damages for a personal injury sustained by the wife while a passenger on the defendant's car, the court said: "The testimony of the plaintiff, Augustus Maverick, was properly received. The question

such action is brought, the widow may testify in her own behalf, because she can then recover damages for such injuries only as she has herself received.¹ So, also, where husband and wife are opposing parties to an action, each may testify in his or her own behalf.² The rule is otherwise, however, in suits for divorce, where the husband offers himself as a witness to prove the adultery of his wife.³ Nor, indeed, is either party to such suits competent to testify unless the statute plainly authorizes them to do so.⁴

(2) *Under Statutes Expressly Removing the Disability.*—In

is not whether he can be a witness for his wife, but whether, being a party, he must be debarred from testifying in his own behalf because his wife is also a party to the action. If the result of the action could only affect his wife or her separate property, and he was merely a nominal plaintiff, having no pecuniary interest whatever in the result, and he should be offered as a witness, the question as to his admissibility on account of his marital relation to the real plaintiff in interest would be presented; as, having no interest in the result of the action, he could not be considered as a party offering to testify in his own behalf or in any other character than as a witness for or against his wife. But in cases like this before us, the husband has a direct pecuniary interest in the result. The action was commenced and the judgment rendered before the passage of the act of 1861 giving to the married woman the right to maintain an action in her own name, the same as if she were a *feme sole*, for injuries to her person, and declaring that the moneys recovered on a judgment in such action shall be her sole and separate property. As the law stood at the time of the injury on account of which this action was brought, and of the judgment, the husband was entitled to the money which should be recovered in his lifetime for injuries to the person of his wife, and the necessity for making the wife a party to such actions arose from the fact that the damages would survive to the wife if the husband died before they were recovered. The interest of the husband in the recovery was direct and immediate, while that of the wife was uncertain and contingent. He had the right, as a real party in interest, to be examined as a witness in his own behalf, and the circumstance that the wife might be benefited by his testimony if he should

die before recovery, is merely incidental and would not justify the exclusion of his testimony."

1. *Winship v. Enfield*, 42 N. H. 197.

2. *Southwick v. Southwick*, 49 N. Y. 510; *Westerman v. Westerman*, 25 Ohio St. 500. See also *Barber v. Goddard*, 9 Gray (Mass.) 71.

3. *Doughty v. Doughty*, 32 N. J. Eq. 32; *Woodrick v. Woodrick* (Supreme Ct.), 20 N. Y. Supp. 468; *Cook v. Cook*, 46 Ga. 308.

4. *Marsh v. Marsh*, 29 N. J. Eq. 296; *Rivenburgh v. Rivenburgh*, 47 Barb. (N. Y.) 419; *Lincoln v. Lincoln*, 6 Robt. (N. Y.) 525; *Hennessey v. Hennessey*, 58 How. Pr. (N. Y. Supreme Ct.) 304; *Dickinson v. Dickinson*, 63 Hun (N. Y.) 516; *Cornish v. Cornish*, 56 Tex. 564; *Stafford v. Stafford*, 41 Tex. 111; *Burdette v. Burdette*, 2 Mackey (D. C.) 469; *Dillon v. Dillon*, 32 La. Ann. 643; *Daspit v. Ehringer*, 32 La. Ann. 1174.

It has been held that the injured party may testify to acts of cruel and inhuman treatment by the other. *Burdette v. Burdette*, 2 Mackey (D. C.) 469; *Smith v. Smith*, 77 Ind. 80. Also to the fact of willful desertion. *Stebbins v. Anthony*, 5 Colo. 348.

In *North Carolina*, the plaintiff is competent to prove the impotence of the defendant. *Barringer v. Barringer*, 69 N. Car. 179.

They are made competent by statute in *Massachusetts*. *Foss v. Foss*, 12 Allen (Mass.) 26. Also in *Missouri*. *Moore v. Moore*, 51 Mo. 118; *Berlin v. Berlin*, 52 Mo. 151; *Darrier v. Darrier*, 58 Mo. 222.

Where both parties to divorce suits are expressly made competent witnesses in their own behalf, the husband may not even then testify to his wife's admission that she has been guilty of adultery. *Briggs v. Briggs* (R. I. 1893), 26 Atl. Rep. 198.

England, the common-law rule excluding husband and wife as witnesses has, in its application to civil actions, been swept away by a series of statutes, though it is still applicable in criminal prosecutions, subject to the exceptions arising from necessity which have already been considered.¹ So, also, in the *United States*, great innovations have been made, ranging from slight modifications of the common-law rule to statutes making husband and wife competent witnesses for or against each other in all judicial proceedings, whether civil or criminal, subject to the restriction that they are not to be permitted to testify to matters which came to their knowledge in the confidence of the marital relation, if objection be made.²

In many jurisdictions it has been thought that an intermediate rule is more consistent with public policy, and better calculated to subserve the ends of justice, than either the common-law rule or the complete removal of incompetency. It is accordingly provided, in substance, that husband and wife may be witnesses for each other, but, if objection be made, they may not testify against each other, except in cases where they might have done so at common law.³

IV. DETERMINING THE QUESTION OF COMPETENCY—1. The Objection—*a. TIME OF MAKING.*—Owing to the preliminary nature of an objection to the competency of a witness, it must be made before the examination in chief, if the fact of incompetency is at that time known to the objecting party.⁴ And, indeed, this

1. See Statutes 14 & 15 Vict., ch. 99; 16 & 17 Vict., ch. 83; 47 & 48 Vict., ch. 14; 2 Taylor Ev., § 1362 *et seq.*

2. See the statutes of the various states. As examples where the legislature has gone to the extreme length of permitting one spouse to testify against the other, even in criminal prosecutions, see *Kansas* Crim. Code, § 215; *State v. Geer*, 48 Kan. 754; *Everett v. State* (Fla. 1894), 15 So. Rep. 543. See also *Virginia* Acts of 1894, ch. 619; approved March 5, 1894. It may be added that these statutes do not authorize the court to compel one spouse to testify against the other in criminal cases.

In *Indiana*, husband and wife are witnesses for or against each other in all cases, civil or criminal, except as to communications made to each other during the marriage, and, in an action for criminal conversation, the plaintiff's wife is not competent for him. *Brown v. Norton*, 67 Ind. 424; *Hutchason v. State*, 67 Ind. 449.

In *Tennessee*, the objection to husband and wife is confined to facts, the knowledge of which was acquired

through their confidential relations. *Orr v. Cox*, 3 Lea (Tenn.) 617; *Patton v. Wilson*, 2 Lea (Tenn.) 101.

3. See the following decisions under statutes where the rule is substantially as stated in the text: *Johnson v. Watson*, 157 Pa. St. 454; *Norbeck v. Davis*, 157 Pa. St. 399; *In re Holt's Will*, 56 Minn. 33; *Skinner v. Skinner*, 38 Neb. 756; *State v. Willis*, 119 Mo. 485; *McFadin v. Catron*, 120 Mo. 252; *People v. Gordon*, 100 Mich. 518.

But in such cases an objection to the admission of the witness should be seasonably made. *Benson v. U. S.*, 146 U. S. 325.

In *Bevins v. Cline*, 21 Ind. 37, it was held that the objection to the disclosure of confidential communications could not be waived.

4. *Howell v. Lock*, 2 Campb. 14; *Yardley v. Arnold*, 10 M. & W. 145; *Beeching v. Gower*, Holt 313; *Rex v. Watson*, 2 Stark. 116; 3 E. C. L. 341; *Donelson v. Taylor*, 8 Pick. (Mass.) 390; *Snow v. Batchelder*, 8 Cush. (Mass.) 513; *Milsap v. Stone*, 2 Colo. 137; *Patterson v. Wallace*, 44 Pa. St. 88; *State v. Crab*, 121 Mo. 554;

rule was formerly so strictly adhered to that an objection made after the witness had been sworn in chief, came too late to be considered.¹ This rule, however, has been greatly relaxed, and objections of this sort made at various stages of the examination have frequently been sustained when, of course, the testimony of the witness previously given in the case should be stricken out, or the jury should be instructed to disregard it.² And in cases where the adverse party was not previously aware of the incompetency of the witness, it has long been the practice to consider the objection whenever, in the course of the examination, cause for excluding him is made to appear, provided the objection is made as soon as the disability of the witness becomes apparent.³ This rule applies as well to criminal prosecutions as to civil

Inglebright v. Hammond, 19 Ohio 337; 53 Am. Dec. 430.

An objection to the competency of a witness, made before the cross-examination begins, is not necessarily too late. *Hill v. Postley*, 90 Va. 200; *Warwick v. Warwick*, 31 Gratt. (Va.) 70.

After the testimony of a witness has been received without objection by the party against whom he is called, and has been commented upon by such party to the jury, he cannot afterwards ask its withdrawal from the jury on the ground of incompetency of the witness. *McInroy v. Dyer*, 47 Pa. St. 118; *Newsom v. Huey*, 36 Ala. 37.

1. *Hartshorne v. Watson*, 5 Bing. N. Cas. 477; 35 E. C. L. 187; *Dewdney v. Palmer*, 4 M. & W. 664.

In *Abrahams v. Bunn*, 4 Burr. 2252, the witness was examined and cross-examined, and, after he had given his whole evidence, he was objected to as incompetent upon what he had himself said as to his interest in the event of the suit. Lord Mansfield said: "In strictness, the objection came too late, after he had been sworn in chief, examined, and cross-examined. The strictness of law in this respect is very wise and ought to be more adhered to, for the relaxation may be abused, and must always occasion waste of time."

2. *Jacobs v. Layborn*, 11 M. & W. 685; *Reg. v. Whitehead*, 35 L. J. M. C. 186; 10 Cox C. C. 234; *Hill v. Postley*, 90 Va. 200.

Where the court has overruled a preliminary objection to the competency of a witness, a subsequent objection may, nevertheless, be sustained, if his incompetency appears in the course of the examination. *Heely v. Barnes*, 4 Den. (N. Y.) 73; *Schillinger v. McCann*, 6

Me. 364. The contrary was held in *Coit v. Bishop*, 2 Root (Conn.) 222; *Mallet v. Mallet*, 1 Root (Conn.) 501.

Where the objection is merely technical, and the objecting party knows it or has means of knowing it, as, for example, a misdescription of a witness in the list furnished the defendant in a criminal prosecution, it should always be taken before the witness is sworn in chief. *Reg. v. Frost*, 9 C. & P. 129; 38 E. C. L. 70.

3. *Needham v. Smith*, 2 Vern. 463; *Stone v. Blackburn*, 1 Esp. 37; *Yardley v. Arnold*, C. & M. 437; 41 E. C. L. 240; *Brooks v. Crosby*, 22 Cal. 42; *Veiths v. Hagge*, 8 Iowa 163; *State v. Damery*, 48 Me. 327; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202; *Fisher v. Willard*, 13 Mass. 379; *Johnson v. Alexander*, 14 Tex. 382; *Sheridan v. Medara*, 10 N. J. Eq. 469; 64 Am. Dec. 464; *Carter v. Graves*, 6 How. (Miss.) 9; *Mitchell v. Mitchell*, 11 Gill & J. (Md.) 388; *Andre v. Bodman*, 13 Md. 241; 71 Am. Dec. 628; *Morton v. Beall*, 2 Har. & G. (Md.) 136; *Swift v. Dean*, 6 Johns. (N. Y.) 523.

But it is too late to object when the witness is recalled for further examination, if his incompetency appeared when he was first on the stand. *Wollaston v. Hakewill*, 3 M. & G. 297; 42 E. C. L. 161; *Beeching v. Gower*, Holt 313; *Fellingham v. Sparrow*, 9 Dowl. P. C. 141.

An objection on the ground of interest must be distinctly made at the first opportunity, or it will be considered as waived. *Hudson v. Crow*, 26 Ala. 515; *Drake v. Foster*, 28 Ala. 649; *Lewis v. Morse*, 20 Conn. 216; *Kingsbury v. Buchanan*, 111 Iowa 387; *Stuart v. Lake*, 33 Me. 87; *Dent v.*

actions;¹ and it has always been the rule in equity where there is no examination on the *voire dire*.² But it is too late to make the objection after the conclusion of the trial,³ unless the party who introduced the incompetent witness has intentionally taken advantage of his adversary by sharp practice.⁴

Where a party or his attorney attends at the taking of the deposition of a witness for the opposing party, he should then and there raise any known objection to the competency of such

Hancock, 5 Gill (Md.) 120; Baugher v. Duphorn, 9 Gill (Md.) 325; Andre v. Bodman, 13 Md. 241; 71 Am. Dec. 628; Groshon v. Thomas, 20 Md. 243.

In Dewdney v. Palmer, 4 M. & W. 664, the plaintiff put a witness on the stand whom he called James Dewdney. After he had been examined, without objection, it was ascertained that he was really George Dewdney, the plaintiff, himself. Notwithstanding this fraud upon the defendant, the court said he should have made his objection on the *voire dire*. This case is not supported by reason, and, indeed, it must be considered as overruled in Jacobs v. Layborn, 11 M. & W. 685.

1. Lovat's Case, 18 How. St. Tr. 596.

2. Needham v. Smith, 2 Vern. 463; Vaughan v. Worrall, 2 Madd. 322; 2 Swanst. 400; Selway v. Chappell, 12 Sim. 113; Bousfield v. Mould, 1 De G. & S. 347; Jacobs v. Layborn, 11 M. & W. 691, Lord Abinger.

3. Com. v. Green, 17 Mass. 537; State v. Scott, 1 Bailey (S. Car.) 270. Compare Com. v. Waite, 5 Mass. 261; Jackson v. Jackson, 5 Cow. (N. Y.) 163; Essex Bank v. Rix, 10 N. H. 201; Jackson v. Barron, 37 N. H. 494; House v. House, 5 Ind. 237.

In Turner v. Pearte, 1 T. R. 719, Buller, J., said: "There has been no instance of this court's granting a new trial on an allegation that some of the witnesses examined were interested; and I should be very sorry to make the first precedent. Anciently, no doubt, the rule was that if there were any objection to the competency of the witness, he should be examined on the *voire dire*, and it was too late after he was sworn in chief. In later times, that rule has been a little relaxed, but the reason of doing so must be remembered. It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out. It has been done principally for the convenience of the court, and it is for the furtherance of justice.

The examination of a witness to discover whether he be interested or not, is frequently to the same effect as his examination in chief; so that it saves time and is more convenient to let him be sworn in chief in the first instance, and, in case it should turn out that he is interested, it is then time enough to take the objection. But there never has yet been a case in which the party has been permitted after trial to avail himself of any objection which was not made at the time of the examination."

4. In Wade v. Simeon, 2 C. B. 342; 52 E. C. L. 342, it appeared that the plaintiff's attorney was examined as a witness for the plaintiff, and it was afterwards discovered that his client had previously assigned to him all his interest in the event of the suit. Upon motion for a new trial, the court set the verdict aside, without entering into the probable effect of the evidence so given upon the minds of the jury. Tindal, C. J., said: "The case of Turner v. Pearte, 1 T. R. 719, only decides that the mere incompetency of a witness is not of itself a sufficient ground for granting a new trial. That, however, is not the ground upon which we mean to proceed here. We decide this upon the ground of *mala praxis*. The witness, the attorney upon the record, was the real plaintiff."

In Niles v. Brackett, 15 Mass. 378, it appeared that a witness was examined who was known to the party producing him to be interested, and this circumstance was not known to the other party at the time of the trial, and, in fact, was concealed from him. The court granted a new trial, saying: "A new trial is granted, it appearing that the interest of the witness was not known to the plaintiff until after the trial, and that it was known to the defendant, who produced him. In a cause so nearly balanced as this appears to have been, a little evidence is sufficient to turn the scale."

witness. If he, with full knowledge of the incompetency of the witness, cross-examines him without objection, the court will not permit him to raise the objection at the hearing.¹ To permit such a course would be to give the objecting party an undue advantage, since in many cases the incompetency may be removed by release or otherwise, or the party in whose behalf the witness is examined may be able to procure other evidence.² But the objection may be made at the time of the reading of the deposition, if the facts constituting it were not known to the objecting party when the witness was examined.³

1. *Corporation de Sutton Coldfield v. Wilson*, 1 Vern. 254; *Ogle v. Paley*, Holt 485; 3 E. C. L. 193; *Bland v. Armagh*, 3 Bro. P. C. 620; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *U. S. v. One Case Hair Pencils*, 1 Paine (U. S.) 400; *Gregory v. Dodge*, 14 Wend. (N. Y.) 593, *aff'd* 4 Paige (N. Y.) 558; *Town v. Needham*, 3 Paige (N. Y.) 545; *Mohawk Bank v. Atwater*, 2 Paige (N. Y.) 60; *Roosevelt v. Ellithorp*, 10 Paige (N. Y.) 415; *Hord v. Colbert*, 28 Gratt. (Va.) 49; *Glasgow v. Ridgeley*, 11 Mo. 34; *Walsh v. Agnew*, 12 Mo. 520; *Smith v. Hutchings*, 30 Mo. 384.

In *Hudson v. Crow*, 26 Ala. 521, *Chilton, C. J.*, said: "The court below did not err in refusing to exclude the deposition of Williams, conceding that he was an interested witness. For it is not permitted to a party knowing of a witness's interest to allow his adversary to go on and examine him by deposition, raising no objection on the ground of interest, thus enabling himself to read the deposition, if it should prove beneficial to his side of the case, but, in the event it should prove detrimental to him, then for the first time to spring the objection at the trial and exclude it. The rule which usually obtains of not allowing questions to be asked upon cross-examination which properly belong only to an examination on the *voire dire* is founded upon a similar reason—the objecting party ought not to be allowed to speculate upon the testimony of a witness whose interest is known to him. The true rule requires the party against whom an interested witness is offered to elect whether he will permit him to be examined or not, as soon as the opportunity to make such election is offered, and if he does not do so he is presumed to waive it forever."

Miffin v. Bingham, 1 Dall. (Pa.) 272, is not really authority for permit-

ting objections to be made at the hearing when none were made at the examination of the witness. In that case, the witness, who was about to depart on a voyage, was examined under a rule subject to all legal exceptions at the trial.

2. *Mohawk Bank v. Atwater*, 2 Paige (N. Y.) 60; *Gregory v. Dodge*, 14 Wend. (N. Y.) 593, *aff'd* 4 Paige (N. Y.) 558; *Snow v. Batchelder*, 8 Cush. (Mass.) 513.

In *Town v. Needham*, 3 Paige (N. Y.) 551, *Chancellor Walworth* said: "The question of interest in respect to these witnesses, even if there had been no release, could not be raised for the first time at the hearing. When the testimony in this court was taken in secret, as was formerly the practice, if it appeared from the deposition of a witness that he was interested in the event of the suit, his testimony might be objected to and suppressed after the order to pass publication or at the hearing. This mode of proceeding was then necessary, as the adverse party had no opportunity to object to the competency of the witness until the testimony in chief in the cause was closed. But after the statute authorizing and directing an open examination of the witnesses a different practice was adopted, in analogy to the practice pursued in courts of law, and the party must now object to the testimony of the witness at the time of his examination, if his interest is then known, so as to enable the adverse party to show a release or discharge of the interest; or, at least, the objection should be made before the testimony in the cause is finally closed. Where the interest is of such a nature that it can be released, and the party suffers the witness to be examined without objection and waits until after the rule to close the proofs has been entered, it will then be too late for him to make the objection."

3. *U. S. v. One Case Hair Pencils*, 1

b. SPECIFYING GROUND OF OBJECTION.—In many cases a witness may be competent to testify concerning some of the facts in issue, though incompetent as to others. In such cases, he should

Paine (U. S.) 400; Talbot v. Clark, 8 Pick. (Mass.) 51.

In *U. S. v. One Case Hair Pencils*, 1 Paine (U. S.) 400, which was a libel filed for the forfeiture of the merchandise therein set forth, on account of an alleged false entry of the goods at the customhouse, the deposition of a witness, whose name appeared on the bond as one of the sureties for the appraised value of the goods in question, was admitted in evidence without objection, but it appeared that the attorney for the *United States* did not know this fact, which would have rendered the witness incompetent had his testimony been objected to on that ground. It was held that the objection might be made at the hearing, as there was no opportunity to make it sooner. Thompson, J., said: "It is not pretended that the district attorney had any personal knowledge or actual notice that Cornell was security in the bond, or that any objection would be made to his testimony when he attended the examination, and I cannot think that the *United States* are to be concluded by any presumed knowledge of the fact by the district attorney. . . . There can be no presumption of a waiver where the party is ignorant of the fact from which it is to be presumed, and where the law does not cast upon him any such knowledge. Good faith and fair dealing require the objection to be made at the time of the examination of the witness, when known, in order to give the party an opportunity of removing the objection. . . . In the case of *Bland v. Armagh*, 3 Bro. P. C. 620, the evidence was voluntary affidavits taken at the commencement of the suit by the consent of parties. The objection was not on the ground of interest, but bias or partiality, growing out of circumstances well known to the party at the time the affidavits were taken, and he had also consented to a hearing in the cause after publication without taking an objection to the evidence. If the objection would, therefore, at any time have gone to the competency of the testimony, it was a strong case of waiver with full knowledge of the circumstances. So, also, in the case of *Corporation de Sutton Coldfield v. Wilson*,

1 Vern. 254, the objection was that the witness was a member of the corporation, and he had been cross-examined, not only as to his being a member of the corporation but on the merits. Here, then, was full knowledge of the interest when the cross-examination was gone into, and when the court, therefore, say the cross-examination makes a witness competent, though otherwise liable to exception, it must be taken in reference to the circumstances appearing in that case, and which brings the case within the rule I have laid down. The same remarks are applicable to the case of *Ogle v. Paleski*, Holt 485; 3 E. C. L. 193, which was much relied upon on the argument. The action was against the defendant as owner of a ship, which by negligence in the management had injured the plaintiff's brig. The cause had been put off on a former occasion at the instance of the defendant, with liberty reserved to the plaintiff to examine witnesses on interrogatories, and the evidence offered was the answers of the captain of the plaintiff's ship; and the first answer disclosed the fact that the witness was on board of the ship at the time of the accident. The objection was that his examination could not be read without showing a release before it was taken. The answer was that the objection was apparent on the examination and should then have been made before cross-examining the witness, that the objection might be waived, and that it had been waived, by not taking it at the time when it might have been disposed of by a release. And Chief Justice Gibbs said the objection ought to have been made in a former stage of the cause, and not having been thus made when it might have been cured, it ought not to prevail. This was a decision in perfect harmony with the rule which governed the other cases I have referred to, and to which I yield my full assent. But the present case does not fall within it. There is an essential, and I think a controlling, fact which distinguishes it: the want of either actual or constructive notice of the interest of the witness, when the deposition was taken."

not be excluded from the stand upon a general objection to his competency. It, therefore, follows that the objection should be sufficiently specific to enable the court to pass upon the competency of the witness as regards the particular facts which he is called to prove.¹

2. Evidence Upon the Question of Competency—*a*. EXAMINATION UPON THE VOIRE DIRE.—A witness is said to be examined on the *voire dire* when he is sworn and examined in regard to facts touching his competency to testify as a witness in the cause upon trial.² And upon such examination the strict rules of evidence are somewhat relaxed, and the witness may, if necessary, testify to the contents of written documents which are not in court, so far as they contain matters affecting his competency to testify in the cause,³ though if such documents be in court they should be

1. *Bent v. Baker*, 3 T. R. 35; *Wright v. Rogers*, 3 McLean (U. S.) 229; *Prather v. Lentz*, 6 Blackf. (Ind.) 244; *White Water Valley Canal Co. v. Dow*, 1 Ind. 141; *Leach v. Kelsey*, 7 Barb. (N. Y.) 466.

The substantial ground of objection must be explicitly stated at the trial, or it will not be considered upon a review of the case. *Bunker v. Gilmore*, 40 Me. 90. Compare *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *M'Allister v. Reab*, 4 Wend. (N. Y.) 484; *Jones v. Osgood*, 6 N. Y. 235; *McConihe v. Sawyer*, 12 N. H. 396.

It is not here attempted to point out the various grounds of objection, as that would involve a second investigation of the whole question of competency.

2. This is usually done before the witness is sworn in chief, and formerly this rule was strictly adhered to. 1 Phil. Ev. 98; *Turner v. Pearte*, 1 T. R. 747; *Dewdney v. Palmer*, 4 M. & W. 664. But Mr. Phillips says it may now be done at any time during the examination, though in that case the formality is not necessary. 1 Phil. Ev., p. 99, *citing* opinion of Baron Rolfe, in *Jacobs v. Layborn*, 11 M. & W. 688.

3. *Butchers' Co. v. Jones*, 1 Esp. 160; *Botham v. Swinger*, 1 Esp. 164; *Rex v. Gisburn*, 15 East 57; *Lunniss v. Row*, 10 Ad. & El. 606; 37 E. C. L. 191; *Carlisle v. Eady*, 1 C. & P. 232; *Brockbank v. Anderson*, 7 M. & G. 295; 49 E. C. L. 295; *Butler v. Carver*, 2 Stark. 433; 3 E. C. L. 477; *Babcock v. Smith*, 31 Ill. 57; *Hays v. Richardson*, 1 Gill & J. (Md.) 366; *Mayo v. Gray*, 3 N. J. L. 405.

If it be shown by the preliminary ex-

amination of a witness that he has been convicted of felony, it may also be shown by him that he has been pardoned. It is not necessary to produce the pardon. *Howser v. Com.*, 51 Pa. St. 332.

In *Miller v. Mariner's Church*, 7 Me. 54, the court said: "The examination of the witness to ascertain his interest was in effect upon the *voire dire*. It was a preliminary inquiry, not a part of the issue on trial, which is to be proved by the best evidence; a rule well known, and with which every party is or ought to be prepared to comply. But an objection to a witness upon the ground of interest is often unexpectedly made. Neither the witness, therefore, nor the party producing him, can be reasonably required to have with them written papers and documents which may happen to be referred to upon such an inquiry. The witness is to make true answers to such questions as may be put to him, and his mouth is not to be stopped as to any fact within his knowledge, by a technical rule which is altogether just and proper with respect to facts involved in the issue. Has he given a note? Has he given a deed? Is he a member of a certain corporation? Doubtless, the production of the note, the deed, and the books of the corporation, would be the best evidence of these facts. But they are within the knowledge of the witness, and the party objecting has a right to appeal to him upon the *voire dire*. A different rule would not only be unnecessary, but exceedingly inconvenient in practice, as it would occasion the delay or the continuance of the cause from time to time, as objections

produced for inspection and would themselves be the best evidence of their contents.¹

And where the disqualification of the witness appears from his own testimony, it may be removed by his further examination, even though there be documentary evidence of the restoration of his competency.² According to the practice as it has long been established, the objecting party may either have the witness sworn and examined on the *voire dire*, or permit him to be sworn in chief and make his objection when, in the course of the examination, any ground therefor first appears, in which case, if the objection is sustained, the court will order the evidence already given by the witness to be stricken out.³ The exercise of this option should not be restrained by the court, because, as we have seen, the disqualification of the witness is frequently evidenced by written instruments which the objecting party cannot produce at the trial, and to compel him to forego the examination on the *voire dire*, and rely on his bringing to light the disqualifying facts after the witness has been sworn in chief, might, under the rules of evidence, deprive him of his only means of getting rid of an incompetent hostile witness.⁴

of this sort might successively arise in the progress of a trial."

1. *Butler v. Carver*, 2 Stark. 434; 3 E. C. L. 477; *Gumcester v. Phillips*, 4 Ad. & El. 550; 31 E. C. L. 132; *Lucas v. Eades*, 1 Dowl. N. S. 424; *Quarterman v. Cox*, 8 C. & P. 97; 34 E. C. L. 309.

2. *Ingram v. Dade*, 1 C. & P. 235, note; *Wandless v. Cawthorne*, M. & M. 321, note; 22 E. C. L. 322; *Carlisle v. Eady*, 1 C. & P. 232; *Lunniss v. Row*, 10 Ad. & El. 606; 37 E. C. L. 191; *Butchers' Co. v. Jones*, 1 Esp. 160; *Brockbank v. Anderson*, 7 M. & W. 295; 49 E. C. L. 295; *Tarleton v. Johnson*, 25 Ala. 300; 60 Am. Dec. 575; *Montgomery, etc., Plank-Road Co. v. Webb*, 27 Ala. 618; *Ault v. Rawson*, 14 Ill. 484; *Blackstock v. Leidy*, 19 Pa. St. 335; *Fanning v. Myers, Anth.* (N. Y.) 47; *McMicken v. Fair*, 6 Martin N. S. (La.) 515.

Thus, where a witness on her *voire dire* stated that she was the wife of the party calling her, it was held that she might restore her competency by further stating that she had been divorced *a vinculo*, even though it was objected that the record should have been produced. *Wells v. Fletcher*, 5 C. & P. 12; 24 E. C. L. 190.

But if the party who called the witness attempts to remove the objection by independent proof, and not by ques-

tioning the witness himself, he will be subject to all the ordinary rules of evidence, and the best proof will be required. *Corking v. Jarrard*, 1 Campb. 37.

3. 1 Phil. Ev., p. 99; *Turner v. Pearte*, 1 T. R. 720; *Stone v. Blackburn*, 1 Esp. 37; *Howell v. Lock*, 2 Campb. 14; *Jacobs v. Layborn*, 11 M. & W. 690; *Evans v. Eaton*, 1 Pet. (C. C.) 322; *reversed* on other grounds, 3 Wheat. (U. S.) 454; *Fisher v. Willard*, 13 Mass. 379; *Bank of North America v. Wikoff*, 2 Yeates (Pa.) 39; 4 Dall. (Pa.) 151; *Gordon v. Bowers*, 16 Pa. St. 226; *Butler v. Butler*, 3 Day (Conn.) 214; *Dorr v. Os-good*, 2 Tyler (Vt.) 28; *Stuart v. Lake*, 33 Me. 87.

4. In *Seeley v. Engell*, 13 N. Y. 545, *reversing* 17 Barb. (N. Y.) 530, *Denio, C. J.*, said: "The determination of this case involves two questions. First, whether the defendant was entitled to go into a preliminary inquiry to ascertain whether the witness, Mrs. Seeley, was competent to testify for the plaintiff upon the issue before she was sworn in chief; and secondly, whether the defendant was entitled, under the pleadings, to go into evidence to show that the note of \$90.39 was given under a mistake of fact. On both points the referee ruled against the defendant, and in both instances he was, in my opinion, wrong. First, the point upon which the defendant objected against

b. PROOF FROM OTHER SOURCES.—A party who objects to a witness on the ground that he is incompetent may, as we have seen, examine him on the *voire dire*, but he is not confined to this mode of proof. He may introduce other evidence, either written or verbal, of the facts upon which he relies to sustain his objection.¹ In some early English cases, it was ruled that both of these modes of proving incompetency could not be pursued upon the same objection; that the election of one conclusively barred any subsequent recourse to the other.² But this rule has been

Mrs. Seeley, as a witness, was that she was the wife of Nehemiah Seeley, and that the said Nehemiah was the party for whose immediate benefit the suit was prosecuted. The objection was not put in these precise words, but that was the effect of it. The case states that the defendant insisted that she was the wife of the real plaintiff in interest. The defendant asked that she might be sworn on her *voire dire*. This was refused, and after it had appeared by her examination in chief that she was Nehemiah Seeley's wife, the defendant offered to prove that Nehemiah Seeley was the real owner of the note and that the suit was brought for his sole benefit. This the referee refused, and he persisted in allowing the plaintiff to examine Mrs. Seeley in chief before the question was determined whether she was a competent witness or not. If the defendant's position had been limited to the allegation that the witness was N. Seeley's wife, then, inasmuch as she admitted that fact on the plaintiff's examination immediately after being sworn in chief, and the defendant was allowed an opportunity of objecting to her further examination, and did object, and the question arising upon that objection was correctly determined as the case then stood, no prejudice would have arisen out of the refusal to administer the preliminary oath, and the judgment should not be disturbed for that reason. But it was a part of the defendant's objection that N. Seeley was the real plaintiff, and this the defendant offered to prove, first, by the preliminary examination of the witness on the *voire dire*, and, when that was refused, by other witnesses. This request in both forms was denied to him. The referee ruled in effect that she should be examined in the first instance by the plaintiff, on the merits, after which she might be examined by the defendant's counsel as to her competency. This was inverting the

regular order of proceeding, and was obviously incorrect. Previous to the witness being sworn, it is competent for the counsel for the party against whom he is called to have him examined on the *voire dire*, in order to ascertain whether he is competent to testify. (Stephens' N. P. 1731, 1769; Cowen & Hill's Notes 257.) This well settled rule has not been departed from, as the opinion of the supreme court intimates, in modern cases. The principle in respect to which the rigor of the ancient practice has been relaxed, is the one which precluded the party who had suffered an adverse witness to be sworn in chief from afterward objecting to his competency on the ground of interest, though such interest should appear in the course of the examination in chief. At present, if it appear at any time during the examination of the witness that he is incompetent, the objection may be taken and the testimony will be expunged. (1 Phil. Ev. 267; Jacobs v. Layborn, 11 M. & W. 685.) But there are still cases in which it may be expedient for a party to put an adverse witness on the *voire dire*. For instance, if the interest arises upon written documents with which the witness is cognizant, but which are not present, their contents may be shown by parol upon the preliminary examination, but not after the witness has been sworn in chief."

1. Smallwood v. Mitchell, 2 Hayw. (N. Car.) 145; Davis v. Whiteside, 4 J. J. Marsh. (Ky.) 116.

2. 1 Phil. Ev., p. 103; Case of the Corporation of Bewdley, 10 Mod. 151. In Reg. v. Muscot, 10 Mod. 193, Parker, C. J., said: "The law gives a party tried his election to prove a person, offered as evidence, interested, two ways, viz., either by bringing other evidence to prove it, or else by swearing the person himself upon the *voire dire*; but though he may do either he cannot have recourse to both."

discarded as having no substantial foundation in reason.¹ In the *United States*, however, the early English rule has been strictly followed in most cases.² A failure to prove one set of facts relied on to exclude the witness, will not, however, preclude the objecting party from examining the witness on the *voire dire* in regard to other facts upon which an objection is made;³ and an objection based upon the opposing party's own evidence already in the case, is not such an attempt to prove the incompetency of the witness by evidence *aliunde* as will preclude a resort to an examination on the *voire dire*.⁴ Though, after an examination on the *voire dire*, other evidence may not be introduced to contradict the witness, yet if it afterwards appears in the course of the examination, upon the facts at issue and on trial, that the witness is incompetent, the court may sustain a motion to expunge his testimony.⁵

The unsworn declarations of the witness touching his interest

1. 1 Phil. Ev., p. 103; Opinion of Lord Abinger, Chief Baron, in *Jacobs v. Layborn*, 11 M. & W. 685, and that of Lord Hardwicke, in *Lovat's Case*, 18 How. St. Tr. 596.

2. *Miffin v. Bingham*, 1 Dall. (U. S.) 272; *The Watchman*, 1 Ware (U. S.) 232; *Stebbins v. Sackett*, 5 Conn. 258; *Mallet v. Mallet*, 1 Root (Conn.) 501; *Chance v. Hine*, 6 Conn. 231; *Butler v. Butler*, 3 Day (Conn.) 214; *Gordon v. Bowers*, 16 Pa. St. 226; *Schnader v. Schnader*, 26 Pa. St. 384; *Davis v. Barr*, 9 S. & R. (Pa.) 138; *M'Alister v. Williams*, 1 Overt. (Tenn.) 107; *Bridge v. Wellington*, 1 Mass. 219; *Waughop v. Weeks*, 22 Ill. 350; *Diversy v. Will*, 28 Ill. 216; *Walker v. Collier*, 37 Ill. 362; *Welden v. Buck*, Anth. (N. Y.) 9; *Dorr v. Osgood*, 2 Tyler (Vt.) 28; *Le Barron v. Redman*, 30 Me. 536; *Stuart v. Lake*, 33 Me. 87; *Bisbee v. Hall*, 3 Ohio 449.

In *Florida*, the modern English rule is adopted. Thus, in *Hooker v. Johnson*, 6 Fla. 730, a witness for the plaintiff was examined by the defendant on the *voire dire*, and denied his interest in the suit. The defendant then offered to prove by other witnesses that the witness objected to was in fact a partner of the plaintiff. The trial court refused to permit him to do so, and for this error the judgment was reversed.

A witness having denied his interest on the *voire dire* may be further interrogated as to his situation for the purpose of discovering his interest. *Reid v. Dodson*, 1 Overt. (Tenn.) 396; *Blackwell v. Hagerman*, 3 N. J. L. 585.

A contrary ruling was sustained in

Moore v. Sheridine, 2 Har. & M. (Md.) 453.

3. In *Stebbins v. Sackett*, 5 Conn. 258, the court said: "The rule is not that, in the same case, the interest of the witness on one set of facts may not be proved by disinterested testimony, and that, afterwards, his interest on a different set of facts may not be proved under the *voire dire*; but it is that, 'at the same time,' or, more correctly, on the same ground, these distinct modes may not be resorted to. When a party has proof of the witness's interest, which, for the moment, he thinks proper to suppress, he shall not be permitted to inquire of him under the *voire dire*, and thus 'sport with his conscience' (*Butler v. Butler*, 3 Day. (Conn.) 218), with a view of contradicting him by other evidence; or, if he has made the inquiry, by other testimony, he is equally precluded from interrogating the witness under the *voire dire*. But where, as in the present case, the inquiry of interest arises at different times, and on distinct grounds, I can see no possible objection to the establishment of it by different modes of testimony."

4. *Bridge v. Wellington*, 1 Mass. 219. Compare *Mott v. Hicks*, 1 Cow. (N. Y.) 513; 13 Am. Dec. 550.

5. *Davis v. Barr*, 9 S. & R. (Pa.) 138; *Heely v. Barnes*, 4 Den. (N. Y.) 73; *Schillinger v. McCann*, 6 Me. 364; *Butler v. Tufts*, 13 Me. 302.

In *Hamblett v. Hamblett*, 6 N. H. 351, the court remarked that the rule confining the party to an election in the first place was no longer of much value. And in *Butler v. Tufts*, 13 Me. 302, it

in the matter in controversy are merely hearsay and are not admissible in evidence on the question of his competency; ¹ though

is said that where a party has attempted to exclude a witness by introducing evidence of his interest and has failed, the judge may, in his discretion, permit him to examine the witness on the *voire dire*.

In *Chatfield v. Lathrop*, 6 Pick. (Mass.) 417, the witness upon whose testimony the verdict was found, denied on the *voire dire* that he had any interest in the case. Upon the hearing of a motion for a new trial, the court admitted newly discovered evidence of his interest, as well as evidence of admissions by the witness and the party who had called him that his testimony on the *voire dire* was untrue; and upon this evidence it was held that a new trial was properly granted.

In *Le Barron v. Redman*, 30 Me. 537, the court said: "The interest of a witness may be proved by his own examination, or by evidence *aliunde*, but the adoption of either mode of proof by the party objecting to the competency of the witness precludes a resort to the other for a like purpose upon the same ground. This doctrine, though not clearly settled by the authorities, has been a rule of practice in our own courts, and it is believed to be consistent with a due observance of other settled principles of evidence and practice. A party is not permitted to trifle with the conscience of a witness when he has other proof that will exclude him, or after having resorted to evidence to impeach or disqualify him, nor can he raise collateral issues for that purpose. The examination of a witness, in respect to his interest, may be either upon the *voire dire*, or after he has been sworn in chief. But after an unsuccessful attempt to exclude the witness on this account, his testimony in chief may be stricken out of the case upon a discovery of his interest."

1. *Com. v. Waite*, 5 Mass. 261; *Peirce v. Chase*, 8 Mass. 487; *Vining v. Wooten*, 1 Cooke (Tenn.) 127; *Jones v. Tevis*, 4 Litt. (Ky.) 25; 14 Am. Dec. 98; *Freeman v. Luckett*, 2 J. J. Marsh. (Ky.) 390; *Davis v. Whiteside*, 4 J. J. Marsh. (Ky.) 116; *Pollock v. Gillespie*, 2 Yeates (Pa.) 129; *Fernsler v. Carlin*, 3 S. & R. (Pa.) 130; *Cotchet v. Dixon*, 4 McCord (S. Car.) 311; *Stimmel v. Underwood*, 3 Gill & J. (Md.) 282; *Doe v. Watkins*, 1 Dev. & B. (N. Car.) 442; *Young v.*

Garland, 18 Me. 409; *Stuart v. Lake*, 33 Me. 87; *Rich v. Eldredge*, 42 N. H. 153; *Dunn v. Cronise*, 9 Ohio 82; *Nichols v. Holgate*, 2 Aik. (Vt.) 138; *Densler v. Edwards*, 5 Ala. 31; *Waug-hop v. Weeks*, 22 Ill. 356.

In *Young v. Garland*, 18 Me. 412, the court said: "One matter of exception against the decision of the court of common pleas is the exclusion of evidence as to the declarations of a proposed witness as to his interest. If a witness is sought to be excluded by proof of his declarations, the attempt will be unavailing. It will go only to his credibility. Were it otherwise, anyone might deprive a party of the benefit of his testimony by a simple declaration that he was interested. In *North Carolina*, it has been ruled that a witness conceiving himself interested when, in fact, he is not, will not render him incompetent. *Harrison v. Harrison*, 2 Hayw. (N. Car.) 355. As to proof of admissions of declarations of witnesses respecting matters of religious opinion, in order for the court to determine whether the excepted witness be an atheist, it is adopted from the necessity of the case, as a man's mind can only be known from his declarations in conversation or writing. Yet it is considered as an entirely different affair in regard to the declaration by a proposed witness as to his pecuniary interest."

In *Doe v. Watkins*, 1 Dev. & B. (N. Car.) 445, *Gaston, J.*, said: "The fact of interest might have been established by the witness's own oath, or by the testimony of other witnesses, or by the admission of the plaintiff, but it could be rightfully shown only in the mode in which other controverted facts between the litigant parties are allowed to be shown. The declarations of a third person, whether a witness or not a witness, made not on oath nor in the presence of the party against whom they are offered, cannot be brought forward, by either plaintiff or defendant, as evidence of the truth of the matter so declared. The first great safeguard which the law provides for the ascertainment of truth consists in requiring all the evidence of facts to be given in under the sanction of an oath. We find no exception when the fact to be shown is the interest of a witness in the subject of dispute."

the statements of the party who introduces him, being in the nature of admissions against interest, may be proved in order to exclude the witness.¹

When the competency of a witness has been successfully attacked, the party offering him may introduce evidence to sustain his competency.² But if it is made to appear, by evidence other than the testimony of the witness himself, that he is incompetent, he may not be examined for the purpose of removing the objection.³

In *Stimmel v. Underwood*, 3 Gill & J. (Md.) 282, it was proposed to prove that a witness offered for the plaintiff had been heard to say, some months before the trial, that he felt himself bound to pay the plaintiff the amount in controversy if he should fail to recover. It was held, however, that such evidence was inadmissible. The court said: "The case before the court is not one in which the witness, when called to the stand, swears he believes he has an interest in the event of the suit, or that he is under an honorary obligation to pay, unless there should be a recovery against the party against whom he is called to testify. But evidence is adduced to show that the witness attempted to be excluded had, four months before the trial of the cause, been heard to say that he felt himself bound to pay the plaintiff the amount in litigation in that suit, if the plaintiff did not recover. It is clear he had no interest in the event of the suit, and if he had, it had been formally released. This case then presents the question whether the mere declaration of a witness, as to his obligations, can render him incompetent to testify, although the witness shall palpably have mistaken his legal obligations, or, viewing the declarations of the witness as referring to a mere honorary obligation, whether such declarations will exclude him from testifying. Now, if these declarations when made by the witness on the stand under oath would not and ought not to exclude him, *a fortiori* his statements and declarations not under oath ought not to exclude him; and even if at the trial his belief of his legal or honorary obligations rendered him incompetent, it would not follow that his declarations of such obligations, anterior to the trial, would or ought to have the same effect; for his notions of obligations may have undergone a change between the time of making such declarations and the trial, and at the time of

the trial his mind might be free from all bias which such belief might be calculated to produce; besides, the establishment of such a principle would seem to lead to consequences subversive of justice in many cases, for the doctrine assumes, as has been well observed, the truth of unsworn statements, and enables an unwilling witness *ad libitum* to deprive a party of his testimony."

The contrary was held in *Den v. Jones*, 1 N. J. L. 56, and also in *Colston v. Nicols*, 1 Har. & J. (Md.) 105. But the latter case was expressly overruled in *Stimmel v. Underwood*, 3 Gill & J. (Md.) 282.

1. *Peirce v. Chase*, 8 Mass. 487; *Walker v. Coursin*, 19 Pa. St. 321.

2. *State v. Twitty*, 2 Hawks (N. Car.) 449; 11 Am. Dec. 779.

If, after the examination on the *voire dire*, the witness is *prima facie* interested, the party calling him should satisfy the court that his competency is free from legal exception. If he fails to do so, he has no right to complain if the court excludes the witness. *Story v. Saunders*, 8 Humph. (Tenn.) 665.

3. *Anderson v. Young*, 21 Pa. St. 443; *Banks v. Clegg*, 14 Pa. St. 390; *Evans v. Gray*, 1 Martin N. S. (La.) 709; *Mott v. Hicks*, 1 Cow. (N. Y.) 513; 13 Am. Dec. 550; *Fay v. Green*, 1 Aik. (Vt.) 71; *Murray v. Marsh*, 2 Hayw. (N. Car.) 290; *Carroll v. Pathkiller*, 3 Port. (Ala.) 279; *Hiscox v. Hendree*, 27 Ala. 216; *Robinson v. Turner*, 3 Greene (Iowa) 540; *Diversy v. Will*, 28 Ill. 218.

"If the objection to a witness arises from proof made by the objector, the witness cannot discharge himself of the objection by any matter sworn by himself; it must be removed by proof drawn from some other source." *Murray v. Marsh*, 2 Hayw. (N. Car.) 290.

"The party objecting to a witness may examine him on his *voire dire*, or resort to other evidence to establish the objection; but after electing one of

It may be added that there is always a presumption in favor of the competency of a witness who is neither a party to the action nor the husband or wife of a party, and the burden of establishing the facts which render him incompetent rests on the party who makes the objection.¹

3. Competency a Question for the Court.—In trying the competency of a witness, the court is not only the judge of the law but also of the preliminary questions of fact necessary to be decided in order to determine the question of competency.² And this

these courses he cannot resort to the other. Nor can the witness himself be received at the instance of the party offering him, to repel the objections, on the ground of interest established by other evidence." Lewis, J., in *Anderson v. Young*, 21 Pa. St. 447.

In *Hiscox v. Hendree*, 27 Ala. 221, Chilton, C. J., said: "It appears upon the face of the papers sued on that G. D. Hiscox is the indorser, through whom the plaintiff derives his title, and he is, *prima facie*, an interested witness. When interrogatories were filed by the plaintiff to take his deposition, the defendant's counsel promptly objected to his examination, on the ground of his interest, and examined him on cross-interrogatories, subject to that objection; and a notice was then filed that he should move to suppress the deposition, for that reason, on the hearing of the cause. The plaintiff then proceeded to propound a question to him to prove his interest, and that he was released. The witness testified to his interest formerly, but stated that the plaintiff had released him, and that he then had no interest. He produced what he called the release, which exempts him from all liability on two notes of \$325 each, payable by J. Hendree, Selma, Alabama, six and twelve months after date. The interest of the witness appearing, and being duly presented by the objection on the part of the counsel for the defendant, the witness was no more competent to disprove his interest or to prove his release, than any other fact in the case. The case of *Dent v. Portwood*, 17 Ala. 242, shows very clearly that the court properly excluded the testimony."

In *Fay v. Green*, 1 Aik. (Vt.) 71, Boyce, J., said: "The court consider that the evidence of Lucinda Stone and her husband, William Stone, by which the defense was principally supported, was improperly admitted. The interest of these witnesses appears up-

on the mere statement of the case, and there was no evidence before the auditors to remove that interest but the testimony of the witnesses themselves. This was but the testimony of interested witnesses and should have been rejected. It is, therefore, the duty of the court to interfere and set aside the report and judgment produced by that evidence."

1. *Marsden v. Stansfield*, 7 B. & C. 815; 14 E. C. L. 137; *Densler v. Edwards*, 5 Ala. 31; *Carrington v. Holabird*, 17 Conn. 530; *State v. Holloway*, 8 Blackf. (Ind.) 45; *Adams v. Barrett*, 3 Ga. 277; *Richardson v. Hoge*, 24 Ga. 203; *Smith v. White*, 5 Dana (Ky.) 376; *Anderson v. Irvine*, 5 B. Mon. (Ky.) 488; *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11; 54 Am. Dec. 509; *Watts v. Garrett*, 3 Gill & J. (Md.) 355; *Hall v. Gittings*, 2 Har. & J. (Md.) 112; *Stoddert v. Manning*, 2 Har. & G. (Md.) 147; *Callis v. Tolson*, 6 Gill & J. (Md.) 80; *Renwick v. Williams*, 2 Md. 356; *Pegg v. Warford*, 7 Md. 582; *Norris v. Hurd*, Walk. (Mich.) 102; *Saxon v. Boyce*, 1 Bailey (S. Car.) 66; *Lott v. Sandifer*, 2 Mill (S. Car.) 167; *Hulshart v. Hart*, 1 N. J. L. 62. See also *Carter v. Pearce*, 1 T. R. 163; *Taylor v. U. S.*, 2 How. (U. S.) 206; *Cox v. Hill*, 3 Ohio 411; *Dudley v. Bolles*, 24 Wend. (N. Y.) 465; *Duel v. Fisher*, 4 Den. (N. Y.) 515; *Howard v. Brown*, 3 Ga. 523.

2. *Doe v. Webster*, 12 Ad. & El. 442; 40 E. C. L. 88; *Bartlett v. Smith*, 11 M. & W. 483; *Doe v. Pearce*, 5 M. & W. 506; *Wakefield v. Ross*, 5 Mason (U. S.) 16; *Cook v. Mix*, 11 Conn. 432; *Amory v. Fellows*, 5 Mass. 219; *Tucker v. Welsh*, 17 Mass. 160; 9 Am. Dec. 137; *Dole v. Thurlow*, 12 Met. (Mass.) 157; *Chouteau v. Searcy*, 8 Mo. 733; *Reynolds v. Lounsbury*, 6 Hill (N. Y.) 534; *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466; *People v. Matteson*, 2 Cow. (N. Y.) 433;

rule applies as well to expert witnesses as to ordinary witnesses.¹

V. INCOMPETENCY REMOVED BY STATUTE—1. In Civil Cases.—The injustice and hardship which frequently resulted from the rigid enforcement of the common-law rules governing the competency of witnesses were long felt and deplored by eminent jurists and legal writers before legislatures could be induced to make any material changes in this branch of the law.² In *England*, the first considerable measure of relief came in the year 1833, when a statute was passed making competent, persons who were incompetent on the ground that the record might be used as evidence for or against them in a subsequent action, and providing that in the event of their examination their names should be indorsed on the record, which should not, thereafter, be used as evidence for or against them.³ Ten years later a much more sweeping change was effected by the enactment of the statute since known as Lord Denman's Act,⁴ which, with a few exceptions, rendered competent, persons who had theretofore been incapable of testifying on account of their interest in the event of the action.⁵ In 1846, it was enacted that all parties to actions, their wives, and all other persons, might be examined either on behalf of the plaintiff or defendant,⁶ and, by a series of amendments following this act, the common-law incompetency of parties and persons interested in the event of civil actions has been swept away; the former grounds of incompetency going now only to the credibility of the witness.⁷

So, too, in the *United States*, the common law has been superseded by statutes more consistent with reason and justice. In July, 1864, it was provided by act of Congress that in the courts

Jackson v. Gridley, 18 Johns. (N. Y.) 99; *Rohrer v. Morningstar*, 18 Ohio 579; *City Council v. Haywood*, 2 Nott & M. (S. Car.) 308.

1. *Fairbank v. Hughson*, 58 Cal. 314; *Ives v. Leonard*, 50 Mich. 296; *Jones v. Tucker*, 41 N. H. 546; *Flynt v. Bodenhamer*, 80 N. Car. 205; *State v. Sanders*, 84 N. Car. 728; *State v. Eßer*, 85 N. Car. 585; *State v. Burgwyn*, 87 N. Car. 572; *State v. Cole*, 94 N. Car. 959.

2. See *Phil. Ev.* (5th Am. ed.) 24 *et seq.*; 2 *Taylor Ev.*, § 1344; 1 *Benth. Ev.* 6.

3. *Stat.* 3 & 4 Wm. IV., ch. 42, §§ 26, 27, repealed by 37 & 38 Vict., ch. 35.

4. *Stat.* 6 & 7 Vict., ch. 85.

5. The persons whose competency was not restored by this act were as follows: First, any party to any suit, action or proceeding individually named in the record; second, any lessor of the plaintiff in ejectment; third, any ten-

ant of the premises sought to be recovered in ejectment; fourth, the landlord or other person in whose right any defendant in replevin may make cognizance; fifth, any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part; sixth, the husband or wife of any such persons respectively. Of this act, Mr. Phillips remarks: "It may be truly said that of all the acts in our statute book, it contains in the smallest compass the greatest amount of good. It settles the law upon an intelligible, reasonable and satisfactory basis, puts an end to some of the most intricate perplexities of the law, and rejects a principle which was unsound in theory, and in practice often led to results most unfavorable to the due administration of justice."

1 *Phil. Ev.* (5th Am. ed.), pp. 26, 27.

6. *Stat.* 9 & 10 Vict., ch. 95.

7. See *Stats.* 14 & 15 Vict., ch. 99; 16

of the *United States* no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried, provided that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other or to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court.¹ This act applies to the courts of the *District of Columbia*,² but does not apply to territorial courts, as they are not courts of the *United States* within the meaning of the statute.³ In the various states and territories, substantially similar statutes have been enacted which are too numerous to find a place in this article.⁴ These statutes control all trials which take place after they go into effect. Being laws which change the rules of evidence only, their retrospective operation does not affect the vested rights of litigants in such manner as to be open to constitutional objection.⁵ According to the weight of authority, the statutory removal of the disability of parties to testify in their own behalf does not, by implication, render husband and wife competent to testify for each other,⁶ though there is authority to the contrary,

& 17 Vict., ch. 85; 32 & 33 Vict., ch. 68; 37 & 38 Vict., ch. 35; 2 Taylor Ev., § 1348 *et seq.*

1. Rev. Stats. *United States*, § 858.

2. *Page v. Burnstine*, 102 U. S. 664.

3. *Good v. Martin*, 95 U. S. 90.

4. Consult the statutes of the several states and territories. The provisos concerning transactions and communications with persons since deceased or insane are the subject of investigation in another part of this chapter.

5. *Montgomery, etc., R. Co. v. Edmonds*, 41 Ala. 667; *Tabor v. Ward*, 83 N. Car. 291; *Wilkerson v. Buchanan*, 83 N. Car. 296; *Ralston v. Lothain*, 18 Ind. 306; *West v. Creditors*, 1 La. Ann. 365; *Southwick v. Southwick*, 49 N. Y. 510; *Comins v. Hetfield*, 80 N. Y. 261.

In *Walthall v. Walthall*, 42 Ala. 451, the court said: "The objections to the competency of Thomas M. Walthall and the guardian as witnesses were correctly overruled. Under the act approved February 14, 1867 (Pamph. Acts, p. 435), they were competent to testify at the trial. In this case, though the witness and guardian were incompetent to testify about the transactions mentioned in their evidence prior to the act of 1867, yet it is no violation of any legal or constitutional right of the appellants for the legislature to remove

the disability then existing. Such an act is not an *ex post facto* law. It operates only as a removal of a present disability and does not affect any vested right of appellants or impair the obligation of any contract. It has been decided that a law is *ex post facto* which authorizes less evidence to convict on a criminal prosecution than was required by law at the time of the commission of the offense. But I know of no decision or principle of law which would exclude a witness from testifying, even in a criminal case, because he was incompetent from some disability existing at the commission of the offense, but which, before the trial, has been removed by law or by a pardon."

6. *Breed v. Gove*, 41 N. H. 452; *Wheeler v. Towns*, 43 N. H. 56; *Smith v. Boston, etc., R. Co.*, 44 N. H. 325; *Mitchinson v. Cross*, 58 Ill. 366; *Eichengreen v. Appel*, 44 Ill. App. 19; *People v. Reagle*, 60 Barb. (N. Y.) 537.

In *Kelley v. Proctor*, 41 N. H. 142, the court said: "We believe there are as sound and as sufficient reasons, founded upon considerations of public policy, why a wife should not be allowed to testify for her husband as there are why she should not testify against him. We believe that the true reason why a wife should not be allowed to testify either for or against her husband at

based on the ground that the purpose and object of the statute were to remove all incompetency resulting from interest.¹

Under the act of Congress above referred to, it has been held that the term "civil action" includes suits in chancery as well as actions at law;² and also includes proceedings in admiralty and all other judicial controversies in which the rights of property are

common law has always been a sort of compound reason, founded partly in interest, to be sure, and the identity of the persons, but partly also upon considerations of public policy, and that where the disqualification of interest has been removed by statute, as in this state, there still remains a good and sufficient objection to the husband or wife (not being the party to the suit) as a witness for as well as against the other who is the party. We think that considerations of public policy—the fear of sowing dissensions between man and wife and of occasioning perjury, which Starkie alludes to as the reasons why a wife may not testify against her husband, and *vice versa*—are equally satisfactory reasons why they should not be allowed to testify in each other's favor."

In *Lucas v. Brooks*, 18 Wall. (U. S.) 436, the court said: "The court refused to admit in evidence the deposition of Catharine Lucas, the wife of the defendant. That it is a rule of common law, a wife cannot be received as a witness for or against her husband, except in suits between them or in criminal cases where he is prosecuted for wrong done to her, is not controverted. But it is argued, because Congress has enacted that in civil actions in the courts of the *United States* there shall be no exclusion of any witness because he is a party to or interested in the issue tried, the wife is competent to testify for her husband. Undoubtedly, the act of Congress has cut up by the roots all objections to the competency of a witness on account of interest. But the objection to a wife's testifying on behalf of her husband is not and never has been that she has any interest in the issue to which he is a party. It rests solely upon public policy. To that the statute has no application."

1. In *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 362; 52 Am. Dec. 344, the court said: "We are of opinion that by a just construction of the 141st section of the act for the regulation of civil actions (Stat. 86) the wife of the plaintiff was a competent witness in

his behalf. It was the express object of that section to remove the common-law disqualification of persons as witnesses in all civil suits by reason of their having an interest in the event of the same. In legal contemplation, the husband and wife are one person. Their interests are, therefore, identical. This is the ground of their exclusion by the common law as witnesses for each other. The reason given by Blackstone why they are not to be admitted to be witnesses for each other is that it would contradict the maxim of law *nemo in propria causa testis esse debet*.

1 Bl. Com. 443. And Phillips says they cannot be witnesses for each other because their interests are absolutely the same. It is said, however, that the reason for this exclusion is not founded wholly upon their identity of interest, but partly on a principle of public policy which deems it necessary to guard the confidence of married life, and that the statute by its terms applies only to cases where the interest of the party was the sole ground of exclusion. This argument, however, entirely fails, because that reason applies only where the husband and wife are called to testify against each other. And in such cases, we admit that it has very great weight. But were it otherwise, we think that this would be too narrow a view of the statute and of the intention of the legislature in making it. Its language is substantially like that of the statute making all interested persons competent as witnesses in the action of book debt, and its object, although broader, is the same. The latter statute has been in existence since the earliest settlement of the state. Under it, the wife in that action has always been admitted as a witness for the husband, and this construction of that law was sanctioned by the case of *Stanton v. Willson*, 3 Day (Conn.) 37; 3 Am. Dec. 255. The law now in question should receive a similar construction. Compare *Lucas v. State*, 23 Conn. 19; *Fortune v. Buck*, 23 Conn. 2.

2. *Rison v. Cribbs*, 1 Dill. (U. S.) 181.

involved, though the government be a party thereto; the term being used in contradistinction to criminal proceedings.¹

2. In Criminal Cases—*a.* IN GENERAL.—A statute rendering parties to civil actions competent witnesses in their own behalf does not, by implication, make defendants in criminal prosecutions competent.² So, also, a statute permitting defendants to testify in prosecutions for misdemeanors, does not open the door to the testimony of persons prosecuted for crimes of a higher degree.³ Nor do the enabling acts in the several states apply to prosecutions in the federal courts for crimes against the *United States*. It is only in civil actions or proceedings that the laws of evidence of the states are applied by the federal courts sitting therein.⁴

It is provided by act of Congress that "in the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the *United States* courts, territorial courts, and courts-martial and courts of inquiry in any state or territory, including the *District of Columbia*, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him."⁵ Under this statute it has been held that the competency of the defendant is to be determined by the same rules as in the case of other witnesses. Therefore, where it appeared that the defendant had previously been under sentence of conviction for the commission of a crime which rendered him legally infamous, the court refused to permit him to testify in his

1. *Green v. U. S.*, 9 Wall. (U. S.) 655; *U. S. v. Ten Thousand Cigars*, 1 Woolw. (U. S.) 123.

But an action to recover a penalty under the act prohibiting the importation of foreign laborers under contract, though a civil action in form, is criminal in its nature, and the defendant cannot be compelled to testify against himself. *Lees v. U. S.*, 150 U. S. 476.

2. *Williams v. People*, 33 N. Y. 688; *Patterson v. People*, 46 Barb. (N. Y.) 625; *State v. Laffer*, 38 Iowa 422; *State v. Bixby*, 39 Iowa 465; *State v. Darrington*, 47 Iowa 518; *State v. Connell*, 38 N. H. 81; *State v. Flanders*, 38 N. H. 334; *Hoagland v. State*, 17 Ind. 488; *Deloohery v. State*, 27 Ind. 521. Compare *Lucas v. State*, 23 Conn. 18.

Neither does a statute which authorizes a defendant to make an unsworn statement to the court or jury authorize him to testify as a witness in his own behalf. *People v. Thomas*, 9 Mich. 314.

3. *Stevick v. Com.*, 78 Pa. St. 460; *Hunter v. Com.*, 79 Pa. St. 503; 21

Am. Rep. 83; *Com. v. Lenox*, 12 Phila. (Pa.) 601.

4. *U. S. v. Hawthorne*, 1 Dill. (U. S.) 422; *U. S. v. Brown*, 1 Sawy. (U. S.) 531; *U. S. v. Black*, 12 Nat. Bankr. Reg. 340; *Logan v. U. S.*, 144 U. S. 263. See also *U. S. v. Reid*, 12 How. (U. S.) 361.

In *U. S. v. Hawthorne*, 1 Dill. (U. S.) 422, the court said: "Crimes against the *United States* are wholly withdrawn from the domain of state legislation. They are created solely by Congress, and Congress has provided for their prosecution and the mode of procedure. Under section 34 of the Judiciary Act as construed by the supreme court (*U. S. v. Reid*, 12 How. (U. S.) 361), and under the act of July 6, 1862 (12 Stat. at L. 588), and of July 2, 1864 (13 Stat. at L. 351), it is clear that the right of a defendant, in a criminal case, to testify in his own favor, does not exist. On the contrary, the language used manifests an evident intention on the part of Congress to exclude such evidence."

5. Act of March 16, 1878, ch. 37; 20

own behalf.¹ But under similar statutes, it is held in the state courts that the prisoner may testify notwithstanding he has previously been convicted of an infamous crime and served his time in the state prison without receiving a pardon.²

Stat. at L. 30; U. S. Rev. Stats. (2d ed.), First Sup., p. 155.

1. In *U. S. v. Hollis*, 43 Fed. Rep. 248, Simonton, J., said: "The act of 16th of March, 1878 (20 Stat. at L. 30), provides that a defendant charged with crime shall at his own request, but not otherwise, be a competent witness; that is to say, he shall not labor under disability because he is a party in interest, and, notwithstanding this, may testify. But when a party offers himself as a witness in his own behalf, he must be treated as any other witness and is subject to any exception which would apply to any other witness; in other words, the act frees him from a disability. It does not confer on him any peculiar exemption. So when a defendant is put on the stand as a witness, his general character for truth may be attacked, and if he, by his conduct, has lost the privilege of testifying in courts of justice, by the commission of an infamous crime, this will attach to him and prevent him from testifying in his own behalf."

2. *Morgan v. State*, 86 Tenn. 472. In *Delamater v. People*, 5 Lans. (N. Y.) 333, the court said: "The Revised Statutes provide that no person sentenced upon a conviction for felony shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the governor or by the legislature, except in the cases specially provided by law." And after quoting the statute which renders prisoners on trial for criminal offenses competent witnesses in their own behalf, the court continued: "This statute is broad and comprehensive in its terms, and its phraseology embraces any person charged with the commission of a criminal offense, which includes those who are disqualified by the provision of the Revised Statutes before referred to, as well as all others on trial who may request to be examined as witnesses. It makes another exception in favor of the criminal, from the effect of the disqualification which the Revised Statutes imposed. It specially provides for an examination in all cases of trial by indictment, etc., against persons charged with any crim-

inal offense, and its manifest intention was that the person thus charged, no matter how infamous or to what extent branded by a judgment of conviction, should be permitted to testify and to speak on his own behalf. We think that the legislature intended to remove all disabilities in such cases and to permit the alleged offender to present such a statement as he could make on his own behalf, and in exoneration of the crime with the commission of which he was charged. If he had been convicted previously of a felony, of course it might seriously detract from the truthfulness of his story before the court and jury, but the credit to which he would be entitled under such circumstances was a matter affecting the credibility of the witness and not the right to be sworn as such. So long as criminals are permitted to testify, no evil could result from extending the privilege to all who might be charged with crime, and the scope and object of the act evidently was to open wide the door to all this class of persons who might desire to avail themselves of the privilege or the right which it conferred. Since the adoption of the Code of Procedure in this state, great innovations have been made upon the rules of the common law in regard to the admission of parties as witnesses. And in conformity with this progressive spirit, the act of 1869, which admits a felon to testify, on a trial for his life or liberty, on his own behalf, was adopted. It was designed to remove all disabilities in such cases, and it would be doing violence to its plain import and intention to circumscribe or restrict its operation."

Again, in *Newman v. People*, 6 Lans. (N. Y.) 460, more fully reported in 63 Barb. (N. Y.) 630, the court said: "On the trial of this case in the court of general sessions, the prisoner was put on the stand and examined as a witness in his own behalf, under the provisions of act of May 7, 1869, Laws of 1869, ch. 678, which provides that a party accused of crime shall, at his own request, and not otherwise, be deemed a competent witness in his own behalf. He was examined at

In nearly all American jurisdictions, the prisoner is now permitted to take the stand and testify in his own behalf if he choose to do so, though he is nowhere compelled to do so. In a few states, however, he has only the privilege of going upon the witness stand and making a statement to the court and jury which, though not technically evidence, is, nevertheless, in the nature of evidence and is to be considered by the jury and given such weight as, in their judgment, it merits.¹ When the defendant takes the witness stand in his own behalf, he has the right to make any statement he can in explanation or mitigation of the offense with which he stands charged, and it is reversible error to refuse him the privilege of doing so.² One of the most valuable features of these statutes is that innocent parties may frequently break the chain of circumstantial evidence with which they are fettered by an ingenious prosecution, by giving a rational and reasonable account of their acts and motives. It is, therefore, error to exclude a defendant's testimony concerning his motives in doing a particular act in cases where the question of intent is material.³

Thus, in a trial for murder, where the plea of self-defense is relied

length by the counsel for the prisoner and by the district attorney. On the cross-examination, he was asked if he had been in the state prison. He said he had and served out his term. On this proof, the district attorney asked the court to charge the jury to disregard his testimony, on the ground that having served as a felon, being civilly dead in law, he was not competent as a witness. The court instructed the jury to wholly disregard the testimony of the prisoner. We think this was an error. The law intended to allow a prisoner the benefit and privilege of stating to the jury any matter which was calculated to explain the charge against him. This privilege was to be enjoyed irrespective of any matter which could disqualify a witness under ordinary circumstances. The degree of credit to which he was entitled was to be decided by the jury, and not the court. And yet the court refused him the privilege given to him by the law, because he was not worthy of belief."

1. For statements to the jury, see *supra*, this title, *In Criminal Proceedings*—(a) *Defendants*; for statutes enabling defendants to testify, consult the statutes of the various states.

2. *People v. Quick*, 51 Mich. 547; *Delamater v. People*, 5 Lans. (N. Y.) 332; *Morrow v. State*, 48 Ind. 432; *Donohue v. People*, 56 N. Y. 208.

3. *People v. Quick*, 51 Mich. 547; *White v. State*, 53 Ind. 595; *Greer v. State*, 53 Ind. 420 (*overruling* *Zimmermann v. Marchland*, 23 Ind. 474); *State v. Banks*, 73 Mo. 592; *State v. Brown*, 104 Mo. 373; *Babcock v. People*, 15 Hun (N. Y.) 347; *State v. Maynard*, 19 Nev. 284.

In *People v. Farrell*, 31 Cal. 583, the court, after reviewing the old law and changes therein made by statute, said: "The object of the recent changes, as we conceive, was not merely to enable parties to disclose facts wholly within their own knowledge, but to do in addition what theretofore had been impossible, explain their acts and the motives with which they were performed, and to explain, if need be, what they meant, or intended to be understood as meaning, by what they may have said in regard to any material fact. It is presumed that there are but few members of the legal profession who have not, at one time or another, felt the harshness, if not the injustice, of the rule which excluded parties from the witness stand and closed the door to explanations which otherwise could have been made and would have given a very different color to the transaction. Actions and words are liable to misconstruction, as all human experience proves. Actions apparently suspicious become innocent when the

on, the defendant may state to the jury whether, at the moment of the killing, he did or did not believe that he was in danger of losing his own life, or of receiving great bodily harm.¹ And where the offense charged is assault with a deadly weapon with intent to kill, the prisoner may state for what purpose the weapon was in his possession at the time of the commission of the alleged offense.² So, also, in a prosecution for criminal libel, where the defense is that the statements in the alleged libelous publication

motive with which they were performed is understood; words are of a very different import when spoken in earnest and when spoken in jest, when imperfectly understood and when fully explained. If, under the new rule, parties are to be kept in harness and not allowed to explain their actions and words when they admit of explanation and when explanation is needed in order to exhibit the whole truth, but half the evil which was felt under the old rule has been removed. It is no answer to say that this enables a party to substitute a false motive for the true one or to convert words spoken in one sense into another. If the argument proves anything, it proves too much, and shows that the radical change which has been made is, in all respects, founded in folly rather than wisdom. For the truthfulness of parties when upon the witness stand, we must depend, as in the case of other witnesses, upon the obligations of their oath and their reputation for truth and veracity. If these can be relied upon for the truth of statements made in reference to acts and words of which the eye and ear may take notice, they may, for the same reason, be accepted as guaranties for the truth of statements made in respect to motives and intents of which the mind or inner man alone can take cognizance. Nor is there, in our judgment, any well grounded reason for apprehending that this rule will obstruct rather than advance the ends of justice. There is no more danger of imposing upon the jury falsehood or pretense in respect to motives and intents than there is of doing the like in respect to visible or external circumstances. The jury can as readily distinguish between the false and true in respect to the former as the latter. If the motive or intent assigned is inconsistent with the external circumstances, it must be discarded as false. If, on the contrary, they are consistent, there is no reason why they may not be true."

In *Alabama*, a different rule obtains. In *Stewart v. State*, 78 Ala. 436, the court said: "It is well settled in this state, whatever the rule may be elsewhere, that witnesses are not permitted to testify to their motive, belief, intention, or state of mind, when secret and uncommunicated. Such mental *status*, when relevant, is a matter of inference to be determined by the jury from the facts in evidence, both in civil and criminal cases." Citing *McCormick v. Joseph*, 77 Ala. 236; *Burke v. State*, 71 Ala. 383.

1. *State v. Harrington*, 12 Nev. 125.

2. In *Kerrains v. People*, 60 N. Y. 228; 19 Am. Rep. 158, Church, C. J., said: "It appears that the prisoner was absent at work when the prosecutor went with his men to the house to remove the furniture, etc., but soon returned and went to the woodhouse and came back with the ax in his hand with which afterward the blow was inflicted. When the prisoner was upon the stand as a witness, his counsel asked him the question, 'What was your intention in taking the ax from the shed to the house?' to which there was an objection which was sustained, and an exception taken. The general term sustained this ruling upon the ground that it was too remote, and that the prisoner could only speak as to his intent at the time of striking the blow. I cannot concur with this view as applied to the question involved. The intent to kill was indispensable to be established by the prosecution. It constituted the vital element of the offense, and, although it is true that the time when that intent must exist was when the blow was struck, yet it was competent for the defendant to testify to any fact tending to disprove such intent. It is a fact to be established, and, of course, may be repelled. The prisoner having inflicted the injury with the ax, his previously going to the shed after it was a circumstance bearing upon his intent in striking the blow, and from

are true, the defendant's interpretation of the publication is material and admissible in evidence on the question of actual malice.¹

b. EXAMINATION OF THE DEFENDANT—(1) *Direct Examination*.—When a defendant takes the stand as a witness in his own behalf, he has the right to the advantage of being interrogated by his counsel, as in the case of other witnesses² and the same rules

which an inference that he procured it for that purpose might be claimed to result. It was a legitimate circumstance to prove the fact of intent. If his taking the ax was not for that purpose, but for an innocent purpose, while it would not conclusively disprove the intent at the time of striking the blow, it would tend to destroy a material circumstance bearing upon that question against him. If he could disprove the intent at the time of the act by a general denial, it follows that he might disprove any fact tending to establish it. His going to the shed for the ax would be immaterial, except for the purpose of showing that he brought it to be used as it was used, and if that purpose is disproved it renders the circumstance of no moment." *Compare* *Burdick v. People*, 58 Barb. (N. Y.) 51.

In *State v. Montgomery*, 65 Iowa 486, it was held that the defendant might not testify as to his purpose in putting a revolver into his pocket before he left home, the assault having been made some time afterward. The court said: "The defendant testified that he had no intention of using the revolver to assail the prosecuting witness, unless it became necessary. He was then asked what intention he had in taking the revolver with him other than to defend himself. He was not permitted to answer the question. We think the court ruled rightly in rejecting the evidence. Whatever may have been defendant's intentions in arming himself, if they did not relate to the assault they were irrelevant. If the defendant had the weapon in his hand for a proper and innocent purpose, this would not excuse him in pointing it in a threatening manner at the prosecuting witness."

In *Bolen v. State*, 26 Ohio St. 371, it was held that it was not error to refuse to permit the prisoner to testify with what intent he made the assault charged, unless it were shown that the expected answer was material and that the defendant was prejudiced by such refusal. The court said: "This was an indictment for assault with intent to murder.

The prisoner offered himself as a witness in his own behalf, and on his examination was asked by his counsel to state with what intent he made the assault in question. On objection by the prosecuting attorney, the court held the question to be incompetent and refused to permit it to be answered by the prisoner. But the record does not show what answer to this question was expected by the defense, or that the prisoner was prejudiced by excluding the evidence. The case falls within the principle established in *Gandolfo v. State*, 11 Ohio St. 114; *Hollister v. Reznor*, 9 Ohio St. 6, and *Scovern v. State*, 6 Ohio St. 294. There is no error shown to the prejudice of the prisoner."

1. In *Com. v. Damon*, 136 Mass. 449, the court said: "The questions put to the defendant, who offered himself as a witness, if put to any other witness might, perhaps, be held incompetent as calling for an opinion upon the character of articles published in a newspaper, when, so far as appears, the articles themselves could be obtained and were the best evidence of what they contained. But the intention or state of mind of the defendant towards Hart, in making the publication with which he was charged, was material; and for this purpose his opinion or understanding of the articles published by him in his newspaper as friendly or unfriendly towards Hart, would be relevant upon the question of good or ill will towards Hart with which he made the publication."

2. In *Clark v. State*, 50 Ind. 514, it appeared that the trial court denied the prisoner the right of being interrogated by his counsel. The court said: "On the trial of the cause, the defendant went upon the witness stand to testify in his own behalf, and, after answering a few preliminary questions asked by his counsel, was interrupted by the judge and instructed to give a general statement of the whole affair; the judge stating that he would not permit the witness to be questioned by his attorneys. The counsel for the

of evidence govern his examination in chief as apply to the examination of other witnesses.¹

(2) *Cross-Examination*.—In view of the fact that it is provided by the constitution of the *United States*, and by the constitutions of the states, that no person shall be compelled in any criminal case to give evidence against himself, the question frequently arises as to what is the constitutional limit of the cross-examination of the prisoner by counsel for the prosecution.² It may be stated as a general rule that when the accused takes the stand in his own behalf, he voluntarily changes his status from that of defendant to that of a witness, and is subject to examination and cross-examination within the limits of the rules governing the examination of other witnesses, consequently he waives his privilege of refusing to give evidence against himself concerning all matters touched upon in his direct examination, and upon such other matters as are so related to his direct testimony as to bring them within the scope of proper cross-examination of witnesses generally.³ The extent, however, to which cross-examination may be permitted is largely within the discretion of the trial court, and appellate courts will rarely disturb a verdict on this ground unless there has been a manifest abuse of discretion.⁴

Where the accused, on his direct examination, has undertaken to give a full account of his doings during a certain period of time,

prisoner then inquired of the court if that would exclude them from asking such questions of the defendant as might be necessary to bring out any important points which he might omit to state, to which the court replied that he could not permit the attorneys for the defendant to ask the defendant any questions. Thereupon, the prisoner left the stand and did not further testify. Exception was taken, and this was one of the causes stated in the motion for a new trial. The state has not furnished us any brief, and we cannot imagine on what ground this ruling was made. By the statute the defendant is allowed, at his option, to testify in his own behalf. Acts 1873, p. 228. We think he must be allowed to testify as other witnesses, and that his counsel should be allowed to interrogate him as in case of other witnesses." *Citing Fletcher v. State*, 49 Ind. 124; 19 Am. Rep. 673. *Compare Com. v. Mullen*, 150 Mass. 394.

1. *State v. Clinton*, 67 Mo. 380; 29 Am. Rep. 506; *Brandon v. People*, 42 N. Y. 268; *Burdick v. People*, 58 Barb. (N. Y.) 51; *Fralich v. People*, 65 Barb. (N. Y.) 48; *State v. Kelly*, 57 Iowa 644; *People v. Sutherland* (Mich. 1895), 62 N. W. Rep. 566.

2. See fifth amendment to the constitution of the *United States*, and constitutions of the several states.

3. *Boyle v. State*, 105 Ind. 469; 55 Am. Rep. 218; *Thomas v. State*, 103 Ind. 419; *People v. Dennis*, 39 Cal. 634; *People v. Reinhart*, 39 Cal. 449; *People v. McGungill*, 41 Cal. 431; *People v. Russell*, 46 Cal. 121; *People v. Rozelle*, 78 Cal. 84; *State v. Wentworth*, 65 Me. 234; 20 Am. Rep. 688; *State v. Witham*, 72 Me. 533; *State v. Fay*, 43 Iowa 651; *State v. Huff*, 11 Nev. 17; *State v. Harrington*, 12 Nev. 125; *Marx v. People*, 63 Barb. (N. Y.) 618; *Fralich v. People*, 65 Barb. (N. Y.) 48; *Pontius v. People*, 82 N. Y. 339; *People v. Noelke*, 94 N. Y. 143; 46 Am. Rep. 128; *State v. Clinton*, 67 Mo. 380; 29 Am. Rep. 506; *Yanke v. State*, 51 Wis. 464; *Rains v. State*, 88 Ala. 91; *State v. Pritchett*, 106 N. Car. 667; *State v. Allen*, 107 N. Car. 805; *People v. Howard*, 73 Mich. 10.

The court may permit the defendant to be recalled for further cross-examination. *State v. Cohn*, 9 Nev. 179; *State v. Horne*, 9 Kan. 119.

4. In *People v. Oyer & Terminer Ct.*, 83 N. Y. 460, the court said: "Objection is made to the range of cross-examination allowed to the prosecution,

he may be cross-examined as to any of his acts done within such period, though they have not been inquired of on the direct examination. In such case the true scope of the direct examination within the meaning of the rule is the prisoner's whole conduct between the two points of time designated, so far as it is pertinent to the issue.¹

as it respected the evidence of both Scallon and Genet. In both cases, it was searching and severe, and extended over a wide area of subjects and circumstances, and is claimed to have wandered far away from the precise issues involved, and to have seriously and unjustly prejudiced the case of the defendant. Our control over such an alleged error is not absolute. As a general rule, the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue or to specific facts which tend to discredit the witness or impeach his moral character. *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183; *Ryan v. People*, 79 N. Y. 594; *People v. Crapo*, 76 N. Y. 290; 32 Am. Rep. 302. If this limitation is not disregarded we can only interfere where there has been an abuse of discretion. *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127; 88 Am. Dec. 311; *La Beau v. People*, 34 N. Y. 230; *People v. Casey*, 72 N. Y. 393. Our only inquiry, therefore, in the present case, is whether the cross-examinations, especially of Genet, went beyond the prescribed limit, or, if not, were pushed so far as to amount to an abuse of discretion." To the same effect are *Hanoff v. State*, 37 Ohio St. 178; 41 Am. Rep. 496; *Wroe v. State*, 20 Ohio St. 460; *People v. Tice*, 131 N. Y. 651.

1. In *People v. Russell*, 46 Cal. 123, the court said: "On the trial the defendant testified as a witness on his own behalf, and on his examination in chief stated that he left the saloon, where the homicide subsequently occurred, about six o'clock in the evening, and returned about nine o'clock, when the killing took place. He also detailed what he did and how he was occupied during the interval between the time when he left and when he returned to the saloon; but no reference was made to the time or manner of procuring the pistol with which the homicide was committed. On his cross-examination he was asked where he got the pistol,

and the question was objected to as not pertinent to anything brought out on the examination in chief; but the court overruled the objection, and the witness answered, 'I cannot say where I did get it.' This ruling was excepted to and is assigned as error. It further appears that in his argument to the jury the district attorney commented on the fact that the defendant failed to remember where he got the pistol, as a circumstance tending to impeach his credibility. But we think there was no error in the ruling of the court. The inquiry made in the first instance of the prisoner, as to where he got the pistol, may well be considered as limited to something occurring between the time of his departure from the saloon and his subsequent return to it. The ground upon which the objection was overruled, that the matter inquired of was part of the *res gestæ*, was in effect a determination by the court that the inquiry was to be confined to the period of time covered by the evidence in chief. It is apparent that the court would have so instructed the witness had it been called upon to do so by the counsel for the defense. The subsequent and more specific questions as to how the pistol was obtained, each refer to some place which the witness had already, upon his examination in chief, represented that he visited between the time of his first struggle with the deceased in the saloon and his subsequent return to the same place. On his cross-examination, it was certainly competent to inquire of the witness concerning any matter which was embraced in his examination in chief. The witness, undertaking in his own behalf to state all that had transpired within two given points of time, may be properly asked on cross-examination if he has omitted anything pertinent to the case, and his attention may be directed to the precise point of inquiry by asking him if some specified thing did not occur during the interval, as, for instance, whether or not he had procured a pistol." Compare *People v. Gallagher*, 100 Cal. 466.

There is eminent authority to the effect that the accused may, in his direct examination, stop at any point he chooses, and that his constitutional privilege protects him from cross-examination on any point not touched upon in his examination in chief.¹ And in a number of jurisdictions, it has been provided by statute, or settled by judicial determination, that the cross-examination of the accused shall be confined to the matters concerning which he testified in his direct examination.²

In *Boyle v. State*, 105 Ind. 475; 55 Am. Rep. 218, the court said: "The cross-examination of a witness must be confined to the subject opened by direct examination. This settled rule does not, however, restrict the cross-examination to the specific facts developed by the direct examination, but does confine it to the subject of that examination. Where a subject is opened by the direct examination, the cross-examining counsel may go fully into the details of the subject, and is not confined to the particular part of it embraced within the questions asked upon the direct examination. A subject cannot be so partitioned by a direct examination as to cut down the cross-examination to the specific matters developed by the questions of the counsel who conducts the examination in chief, for, once a subject is entered upon, it is opened to a full and detailed investigation on cross-examination. *Bessette v. State*, 101 Ind. 85; *Wachstetter v. State*, 99 Ind. 290; 50 Am. Rep. 94; *Hyland v. Milner*, 99 Ind. 308; *De Haven v. De Haven*, 77 Ind. 236. In this instance, the accused, when on the witness stand, had given an account of his movements upon a day named, and it was proper to go fully into the subject upon cross-examination, and the state was not confined to the particular period of time designated in the questions asked on direct examination."

1. Judge Cooley says: "If he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement which he declines to make a full one such weight as under the circumstances they think it entitled to, otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger." Const. Lim. (6th ed.) 384-386.

This rule has been adopted in *Ore-*

gon. See *State v. Lurch*, 12 Oregon 99; *State v. Bacon*, 13 Oregon 143; 57 Am. Rep. 8; *State v. Gallo*, 18 Oregon 425. Compare *People v. Thomas*, 9 Mich. 321; *Gale v. People*, 26 Mich. 157.

2. *State v. McGraw*, 74 Mo. 573; *State v. Porter*, 75 Mo. 171; *State v. McLaughlin*, 76 Mo. 320; *State v. Turner*, 76 Mo. 351; *State v. Douglass*, 81 Mo. 231; *State v. Patterson*, 88 Mo. 88; 57 Am. Rep. 374; *State v. Chamberlain*, 89 Mo. 133; *State v. Graves*, 95 Mo. 516; *State v. Underwood*, 44 La. Ann. 852; *State v. Baker*, 43 La. Ann. 1168.

But if the defendant be cross-examined as to trivial and unimportant matters which were not embraced in his direct testimony, it is harmless error and affords no ground for reversing the judgment. *State v. Beaucleigh*, 92 Mo. 490.

In *State v. Brooks*, 92 Mo. 581, the court said: "It is provided by statute (Rev. Stats., § 1918), when a defendant in a criminal case offers himself as a witness, that he shall be liable to cross-examination as to any matter referred to in his examination in chief and may be contradicted and impeached as any other witness. In the case of *State v. Palmer*, 88 Mo. 568, it is held that, while a defendant can only be cross-examined as to the matters referred to in his examination in chief, the same rules and tests, with that exception, applicable to the contradiction and impeachment of other witnesses, also apply to him. And in the case of *State v. Beaucleigh*, 92 Mo. 490, it is held that even though a defendant may be cross-examined as to a matter not referred to in his examination in chief, if such cross-examination relates to matters of no importance and which could not affect the verdict, such error affords no ground for reversing the judgment. Guided by these rules, we have reached the conclusion that they have not been violated in the cross-examination of the defendant, inasmuch as he had either

In some jurisdictions, the defendant's cross-examination is not confined to matters inquired of in his direct examination. Where this rule obtains, it is held that the defendant, by taking the witness stand and testifying in his own behalf, completely waives his constitutional privilege of refusing to give evidence against himself and that he may be cross-examined concerning any matter pertinent to the issue on trial, regardless of the extent of the direct examination.¹

referred to the matter inquired about in his examination in chief, or the matter inquired about was contradictory of what he had stated in his examination in chief, or the matter inquired about was trivial and unimportant and having no prejudicial bearing on the case."

The *California* cases heretofore cited give the common-law rule as it existed in that state. This rule has been somewhat modified by section 1323 of the Penal Code, for the construction of which, see *People v. Johnson*, 57 Cal. 571; *People v. Beck*, 58 Cal. 212; *People v. O'Brien*, 66 Cal. 602; *People v. Brown*, 76 Cal. 573; *People v. Rozelle*, 78 Cal. 84; *People v. Gallagher*, 100 Cal. 475; *People v. Mullings*, 83 Cal. 138.

In *People v. Crowley*, 100 Cal. 481, the court said: "The proper construction of section 1323, as it now stands, has not been definitely settled. In *People v. Rozelle*, 78 Cal. 84, there is some general language in the opinion of the majority of the court to the effect that the same rule applies to a defendant as to other witnesses, but that language is immediately qualified in the next sentence. The only thing decided there was that, after a defendant, as a witness, had denied in general terms that he aided, abetted, counseled or encouraged the commission of the offense charged, he might be asked on cross-examination if he had written a certain letter showing that he had so aided, etc. Of the cases cited in the opinion, *People v. McGungill*, 41 Cal. 431; *People v. Dennis*, 39 Cal. 634; *People v. Reinhart*, 39 Cal. 449, and *People v. Russell*, 46 Cal. 121, were all decided before section 1323 was enacted, and, therefore, afford no aid in its construction. In *People v. Beck*, 58 Cal. 212, there was no question as to the cross-examination of a defendant; the only thing there decided being that he could be impeached as a witness by showing his bad character for truth. *People v.*

Johnson, 57 Cal. 571, which will be noticed hereafter, is in point as to one phase of the question. We have been referred to no case, decided since the present condition of the statutory law on the subject, which holds that the cross-examination of a defendant may be as wide as that of any other witness. On the other hand, in *People v. O'Brien*, 66 Cal. 602, *Morrison, C. J.*, delivering the opinion of the court, after quoting section 1323 as it now stands, says of a defendant in a criminal action, that when he is called on his own behalf and examined respecting a particular fact or matter in the case, the right of cross-examination is confined to the fact or matter testified to on the examination in chief, and that such is the express language of the statute. It is not correct to say that section 1323 merely states the common-law rule as to the cross-examination of witnesses generally, for witnesses, under the general rule, can, for various purposes, be asked concerning matters about which they had not been examined in chief. 2 Phil. Ev., p. 895 *et seq.* And in *People v. O'Brien*, 96 Cal. 171, the court say that, so far as the defendant is concerned, the court is not allowed that discretion as to the extent of the scope of the cross-examination which it is permitted to exercise in the examination of the other witnesses."

In *People v. Wong Ah Leong*, 99 Cal. 440, the defendant took the stand and testified as to what happened at the time of the assault for which he was on trial and to his arrest therefor. It was held that he should not be cross-examined as to what occurred after his arrest.

In *Washington* the rule is otherwise. *State v. Duncan*, 7 Wash. 336, *Stiles, J.*, dissenting.

1. *Com. v. Mullen*, 97 Mass. 545; *Com. v. Lannan*, 13 Allen (Mass.) 563; *Com. v. Bonner*, 97 Mass. 587; *Com. v. Curtis*, 97 Mass. 574; *Com. v. Morgan*, 107 Mass. 205; *Com. v. Tolliver*, 119

The accused should not be compelled, upon cross-examination,

Mass. 315; *Com. v. Reynolds*, 122 Mass. 454; *Com. v. Smith* (Mass. 1895), 40 N. E. Rep. 189; *McGarry v. People*, 2 Lans. (N. Y.) 227; *State v. Witham*, 72 Me. 533; *State v. Ober*, 52 N. H. 459; 13 Am. Rep. 88.

In *Com. v. Nichols*, 114 Mass. 287; 19 Am. Rep. 346, the court said: "The 12th article of the declaration of rights prefixed to the constitution of the commonwealth declares that no subject shall be compelled to answer or furnish evidence against himself. The recent statutes allowing a person accused of crime to testify upon his trial, which he could not do at common law, provide, in order to secure this constitutional privilege, that he shall, at his own request, but not otherwise, be deemed a competent witness, and that his neglect or refusal to testify shall not create any presumption against him. Stats. 1866, ch. 260; 1870, ch. 393, § 1, cl. 3. The object of these statutes is not to protect or assist criminals, but to promote the discovery of truth so far as can be done without infringing the constitutional rights of the subject. If the accused chooses not to be a witness, he cannot be compelled to testify, and no inference prejudicial to him is to be drawn from his silence. *Com. v. Harlow*, 110 Mass. 411. But if he puts himself on the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he thereby waives his constitutional privilege and renders himself liable to be cross-examined upon all facts relevant and material to that issue, and cannot refuse to testify to any facts which would be competent evidence in the case if proved by other witnesses."

In *State v. Wentworth*, 65 Me. 240; 20 Am. Rep. 688, the court said: "The defendant might go on the stand as a witness or not. By the constitution he could not be compelled to furnish or give evidence against himself. The privilege of exemption from criminative interrogation or cross-interrogation was guaranteed to him, but this privilege may be waived. By Rev. Stats., ch. 134, § 19, in all criminal trials the accused shall, at his own request, but not otherwise, be a competent witness. The defendant, at his own request, became a competent witness, and thereby waived his constitutional privilege. He then subjected himself to the

peril consequent upon a cross-examination as to all matters pertinent to the issue. *State v. Ober*, 52 N. H. 459; 13 Am. Rep. 88; *Com. v. Bonner*, 97 Mass. 587; *Com. v. Morgan*, 107 Mass. 199; *Connors v. People*, 50 N. Y. 240. Claiming to be a witness in his own behalf at his own request, he cannot have the privilege of self-exonerative testimony without incurring the dangers incident to discreditive or criminative cross-interrogation."

In *Spies v. People*, 122 Ill. 235, the court said: "It is also objected that the cross-examination of those of the defendants who took the stand compelled them to give evidence against themselves. After a careful examination of the testimony of these defendants as set out in the record, we cannot see that they were cross-examined upon any subject not connected with the direct examination. If a defendant offers himself as a witness to disprove a criminal charge, he cannot excuse himself from answering on the ground that by so doing he may criminate himself."

In *New York*, the rule, as stated by the court, is that an accused person who becomes a witness in his own behalf, thereby places himself in the attitude of any other witness in respect to the right of cross-examination, and, according to the court's own construction of the rule, the extent of such examination is a matter within the sound discretion of the trial judge, subject to the limitation that it must relate to matters pertinent to the issue, or to matters which tend to impair the credibility of the witness. *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *Stover v. People*, 56 N. Y. 315; *People v. Casey*, 72 N. Y. 394; *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183; *People v. Crapo*, 76 N. Y. 290; 32 Am. Rep. 303; *Ryan v. People*, 79 N. Y. 594; *People v. Oyer & Terminer Ct.*, 83 N. Y. 460; *People v. Webster*, 139 N. Y. 84; *People v. Tice*, 131 N. Y. 651.

The case last above cited approves *Com. v. Mullen*, 97 Mass. 545; *State v. Witham*, 72 Me. 531; *State v. Ober*, 52 N. H. 459; 13 Am. Rep. 88, and declares the rule laid down by Judge Cooley to be out of harmony with the decisions of that state and unsound upon principle.

to disclose confidential communications made by him to his counsel.¹

(3) *Impeachment of the Witness*.—The prisoner's general character may not be attacked by the prosecution unless he first opens the line of inquiry by giving evidence of good character.² When, however, the defendant becomes a witness in his own behalf, he thereby puts in issue his reputation for truth and veracity and is subject to impeachment the same as any other witness.³

The accused should not be compelled, on cross-examination, to admit that he has committed other crimes. *Saylor v. Com.* (Ky. 1895), 30 S. W. Rep. 390.

1. *Duttenhofer v. State*, 34 Ohio St. 94; 32 Am. Rep. 362; *Alderman v. People*, 4 Mich. 414; 69 Am. Dec. 321.

In *State v. White*, 19 Kan. 446; 27 Am. Rep. 137, the court said: "The statute provides that an attorney shall be incompetent to testify concerning communications made to him by his client in that relation, or his advice thereon, without the client's consent. This statute would be of no utility or benefit if the client could be compelled against his consent to make such disclosures. It would be absurd to protect by legislative enactment professional communications, and to leave them unprotected at the examination of the client. In such an event in all civil actions the confidential statements of client and counsel would be exposed, and likewise the same would occur in all criminal actions where the defendant should testify. The authorities are otherwise. The true view seems to be that communications which the lawyer is precluded from disclosing, the client cannot be compelled to disclose. This privilege is essential to public justice, for, did it not exist, no man would dare to consult a professional adviser with a view to his defense or to the enforcement of his rights."

But in *Woburn v. Henshaw*, 101 Mass. 193; 3 Am. Rep. 333, a civil case, it was held that a party who takes the stand in his own behalf may be cross-examined in relation to communications between himself and his counsel. And there is a *dictum* in *Com. v. Nichols*, 114 Mass. 286; 19 Am. Rep. 346, to the effect that the same rule applies to the defendant in a criminal prosecution.

The general rule is that a party to a civil action may not be cross-examined concerning his consultations with his

attorney. See *PRIVILEGED COMMUNICATIONS*, vol. 19, p. 134.

2. *Com. v. Webster*, 5 Cush. (Mass.) 295; 52 Am. Dec. 711; *People v. White*, 14 Wend. (N. Y.) 111; *State v. Thurtell*, 29 Kan. 148; *State v. Furbeck*, 29 Kan. 535; *State v. Hare*, 74 N. Car. 591.

Neither may the prosecution introduce evidence of other distinct offenses committed by the accused, though they be of a nature similar to that for which he is on trial. *State v. Lapage*, 57 N. H. 245; 24 Am. Rep. 69; *Shaffner v. Com.*, 72 Pa. St. 60; 13 Am. Rep. 649; *People v. Corbin*, 56 N. Y. 363; 15 Am. Rep. 427.

Except where such former offenses are material evidence to prove the prisoner's guilty motive in doing the act for which he is being tried. *Rex v. Clewes*, 4 C. & P. 221; 19 E. C. L. 354; *State v. Dearborn*, 59 N. H. 348; *State v. Palmer*, 65 N. H. 218; *State v. Lapage*, 57 N. H. 288; 24 Am. Rep. 69; *State v. Watkins*, 9 Conn. 47; 21 Am. Dec. 712.

3. When the defendant testifies in his own behalf, he may be impeached by showing that his general reputation for truth and veracity is bad. *Keyes v. State*, 122 Ind. 527; *Mershon v. State*, 51 Ind. 14; *Fletcher v. State*, 49 Ind. 124; 19 Am. Rep. 673; *State v. Beal*, 68 Ind. 345; *Morrison v. State*, 76 Ind. 335; *Peck v. State*, 86 Tenn. 263; *Morgan v. State*, 86 Tenn. 473; *U. S. v. Brown*, 40 Fed. Rep. 457.

In *Burdick v. People*, 58 Barb. (N. Y.) 58, the court said: "While the common law, in its humanity and high regard for the rights of life and liberty, gives every person on trial for crime the benefit of the presumption of previous good character, and does not in the first instance allow an inquiry into his previous character, yet, if the prisoner himself brings his character into question on the trial and undertakes to show as matter of fact that his previous

The proper limit to the inquiry into the defendant's general reputation, for the purpose of discrediting his testimony, is a matter upon which the authorities are not in harmony.¹ In some jurisdictions, his general moral character is subject to attack.² It is, however, difficult to conceive of any good reason why the defendant who avails himself of the statutory privilege of being a witness for himself should thus be compelled to run the gauntlet of his whole life, and have dragged to light every immorality, vice or crime of which he may have been guilty, or suspected of being guilty. As the result of such a rule a defendant who is so unfortunate as to have a bad reputation may be convicted on evidence a large part of which is entirely irrelevant to the main

character has been good, the people may then attack it in reply and show, if they can, that it has been bad. Whenever the prisoner on trial puts his general character in issue by his own act, he takes the risk of its being proved bad and of every presumption which such proof legitimately raises against him. And so, where a prisoner upon trial on an indictment for a felony avails himself of the privilege granted by the recent statute of testifying as a witness in his own favor, he necessarily puts his general character and credibility as a witness in issue and makes it the proper subject of evidence on that question. When he makes himself a witness, he becomes subject to all the rules applicable to other witnesses, notwithstanding his other character of a party on trial for felony. The statute which allows a prisoner upon trial for crime to become a witness in his own behalf at his own election, does not protect him from being impeached the same as any other witness. If it did it would be most dangerous and pernicious in its tendency, opening a ready and inviting door to the escape of everyone charged with the commission of crime. It is not for the courts to question the policy of this statute, but only to see that it is fairly interpreted and faithfully administered. We cannot fail to see, however, that it must and will inevitably tend to make the previous character of the accused on trial a subject of inquiry and evidence much more than formerly and more in accordance with the rule and practice of the civil than of the common law. The temptation to the accused to become a witness in his own behalf, in order to ward off inculpatory testimony or to mitigate its force, must almost always be very great if not absolutely

irresistible, and his becoming a witness must necessarily bring his previous character in question as a witness if not as a party. If he is so unfortunate as to have a bad character, even as a witness, it will be exceedingly difficult to prevent its telling against him in the scale as a party, in the minds of the jury, notwithstanding the most careful caution by the court that it is not to be regarded as evidence in chief."

Religious Belief.—For the purpose of discrediting him as a witness it is allowable to interrogate him concerning his religious belief. *State v. Turner*, 36 S. Car. 534.

1. See *infra*, this title, *Credibility of Witnesses*.

2. *State v. Bulla*, 89 Mo. 598; *State v. Clinton*, 67 Mo. 380; 29 Am. Rep. 506; *State v. Palmer*, 88 Mo. 568; *State v. Grant*, 79 Mo. 113; 49 Am. Rep. 218; *Peck v. State*, 86 Tenn. 260; *McDaniel v. State*, 97 Ala. 14; *Mitchell v. State*, 94 Ala. 68; *Crump v. Com.* (Ky. 1892), 20 S. W. Rep. 390.

In *Iowa*, it is provided by statute that the general moral character of a witness may be proved for the purpose of testing his credibility. This is held to apply to the accused when he takes the stand in his own behalf. *State v. Hardin*, 46 Iowa 623; 26 Am. Rep. 174; *State v. Kirkpatrick*, 63 Iowa 554.

In *Indiana*, where a similar statute exists, it has been held that it applies only to witnesses in civil causes, and does not apply to the defendant when he becomes a witness for himself. *Fletcher v. State*, 49 Ind. 124; 19 Am. Rep. 673. This case was followed and said to be good law in *State v. Beal*, 68 Ind. 346.

But in *Morrison v. State*, 76 Ind. 337, the contrary is apparently decided, though the court cited both *Fletcher*

issue upon trial. Upon principle, the inquiry should be confined to such matters as fairly tend to impair the defendant's credibility as a witness.¹

Conviction of an infamous crime was an absolute disqualification at common law, and it is generally provided by the statutes removing this disability that such conviction may be proved and left to the consideration of the jury in determining the credibility of the witness.² It is accordingly proper, on the cross-examination of the defendant in a criminal case, to ask him if he has ever been in prison or convicted of a crime, unless it is objected that the record is the best evidence.³ It is also permissible to cross-examine the

v. State, 49 Ind. 124; 19 Am. Rep. 673, and *State v. Beal*, 68 Ind. 345, in support of the decision.

1. *Fletcher v. State*, 49 Ind. 124; 19 Am. Rep. 673; *State v. Beal*, 68 Ind. 345; *People v. Fair*, 43 Cal. 137; *Gifford v. People*, 87 Ill. 210; *Gifford v. People*, 148 Ill. 173.

In *Atwood v. Impson*, 20 N. J. Eq. 157, the foundation principles seem to be fairly stated. The court said: "With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling, roystering, or making close bargains. With others, lying is the habit or principle, and if elevated to be senators or legislators, or made church members or deacons, it does not always reform them. The object of the law is to show the character of the witness as to telling the truth. General reputation in the community where he is known is the test and the only test which the law allows as to character. If a man is a common liar, he is not to be believed when under oath."

In *U. S. v. Vansickle*, 2 McLean (U. S.) 219, the court said: "The witness must be impeached, not by proving particular facts, for these he is not supposed to be prepared to meet, but by showing his general character in the public estimation. Facts are not to be proved from which the jury may infer a bad character, but it is the inference drawn by the public which is evidence. An inference already drawn and embodied in the public opinion and which as a fact is susceptible of proof. Now what is the fact thus to be proved? Is it as to the bad character of the witness generally, or his bad character as to veracity? The object of the examination would seem to be a sufficient answer to this inquiry. It is

to shake and overthrow the credit of the witness. Now this is effectually done by showing that in the neighborhood in which he lives, and where his character is best known, he is not considered worthy of credit. Shall a public opinion which does not reach his credibility be proved as a fact from which the jury may infer a want of credibility? This would be an inference from public opinion which had not been drawn by the public. And would it not be a most dangerous species of evidence? It would be a conclusion inferred not from original facts but from an opinion formed on those facts by the public. It would be an inference on an inference. This would be a new rule not yet incorporated, it is believed, into the law of evidence."

2. *State v. McGuire*, 15 R. I. 23; *People v. Satterlee*, 5 Hun (N. Y.) 167. See also *INFAMY*, vol. 10, p. 612.

But the indictment is not admissible without proof of conviction and judgment. *Com. v. Gorham*, 99 Mass. 420. Neither is a plea of guilty admissible unless followed by a judgment of conviction. *Marion v. State*, 16 Neb. 349.

3. *Imprisonment*.—*Com. v. Bonner*, 97 Mass. 587; *State v. Bacon*, 13 Oregon 143; 57 Am. Rep. 8; *People v. Courtney*, 31 Hun (N. Y.) 199; *affirmed* 94 N. Y. 490; *People v. Hovey*, 29 Hun (N. Y.) 382; *affirmed* 92 N. Y. 554; *Baker v. State*, 58 Ark. 513; *Holder v. State*, 58 Ark. 473; *Territory v. O'Hare*, 1 N. Dak. 30.

Conviction of Felony.—*People v. Johnson*, 57 Cal. 571; *People v. Crowley*, 100 Cal. 478; *State v. Alexis*, 45 La. Ann. 973; *Burdette v. Com.*, 93 Ky. 76; *Thompson v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 198; *Hargrove v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 993; *Clayton v. State* (Tex. Crim. App. 1893), 22 S. W. Rep. 404;

defendant concerning his commission of particular offenses which are relevant on the question of credibility.¹ But it is not proper to interrogate him concerning offenses which in their nature are not inconsistent with the veracity of the offender.² It is not proper to ask him if he has been indicted for a particular offense, because an indictment is merely an accusation and the accused is always presumed to be innocent until he is legally convicted.³ Neither should he be compelled to state how many times he has been arrested, if it be objected that such evidence is not material on the question of veracity, because an arrest proves nothing and no inference of guilt can be drawn therefrom.⁴ Authority is not

Childs v. State (Tex. Crim. App. 1893), 22 S. W. Rep. 1039.

But where the judgment of conviction has been reversed and a new trial ordered, a defendant may not, at the second trial, be asked if he was convicted of the offense on the first trial. *Richardson v. State* (Tex. Crim. App. 1894), 27 S. W. Rep. 139.

In *Missouri*, it is reversible error to compel the defendant to state whether he has previously been convicted of a crime. *State v. Brent*, 100 Mo. 531, citing *State v. McGraw*, 74 Mo. 573; *State v. Rugan*, 68 Mo. 214; *State v. Turner*, 76 Mo. 350; *State v. McLaughlin*, 76 Mo. 320; *State v. Porter*, 75 Mo. 171; *State v. Douglass*, 81 Mo. 231; *State v. Lewis*, 80 Mo. 110; *State v. Patterson*, 88 Mo. 88; 57 Am. Rep. 374; *State v. Chamberlain*, 89 Mo. 133.

Record of Conviction.—The record of the defendant's conviction of an infamous offense may always be introduced in evidence, to affect his credibility as a witness where he testifies in his own behalf. *Prior v. State*, 99 Ala. 196; *Com. v. Sullivan*, 150 Mass. 315; *Com. v. Morgan*, 107 Mass. 199; *State v. Minor*, 117 Mo. 302; *State v. Farmer*, 84 Me. 436; *People v. Paschal*, 68 Hun (N. Y.) 344; *State v. McGuire*, 15 R. I. 23; *Com. v. Barry*, 8 Pa. Co. Ct. Rep. 216.

And a defendant may be asked questions tending to identify him with the record. *Com. v. Sullivan*, 150 Mass. 315.

1. *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 128, affirming 29 Hun (N. Y.) 461; *People v. Irving*, 95 N. Y. 541; *People v. Hooghkerk*, 96 N. Y. 149; *People v. Eckert*, 2 N. Y. Crim. Rep. 470; *People v. Reavey*, 38 Hun (N. Y.) 418; *People v. Webster*, 139 N. Y. 73.

2. *People v. O'Brien*, 96 Cal. 180;

People v. Hamblin, 68 Cal. 101; *People v. Iams*, 57 Cal. 115; *Strong v. State*, 86 Ind. 214; 44 Am. Rep. 292; *State v. Carson*, 66 Me. 116.

It is reversible error to permit the prosecuting officer to ask the defendant if he did not belong to the Jesse James gang, *Clarke v. State*, 78 Ala. 474; or, in a prosecution for stealing a horse, to ask the defendant if he had not previously stolen another horse, *Elliott v. State*, 34 Neb. 48.

The disparaging questions put to the defendant must either be relevant to the issue on trial, or such as tend to affect his credibility as a witness. *People v. Crapo*, 76 N. Y. 288; 32 Am. Rep. 302; *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183; *Ryan v. People*, 79 N. Y. 594; *People v. Oyer & Terminer Ct.*, 83 N. Y. 460; *People v. Casey*, 72 N. Y. 393; *People v. Noelke*, 94 N. Y. 143; 46 Am. Rep. 128.

It is not permissible to ask the defendant if he had not left another state to escape payment of his debts. *Holder v. State*, 58 Ark. 473.

3. *Ryan v. People*, 79 N. Y. 594, affirming 19 Hun (N. Y.) 188; *Smith v. State*, 79 Ala. 21. And the same rule obtains in civil cases. *Van Bokkelen v. Berdell*, 130 N. Y. 145.

In some jurisdictions, however, the rule is otherwise. *Warren v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 1082; *Hutchins v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 399. Compare *People v. Foote*, 93 Mich. 40.

4. *People v. Brown*, 72 N. Y. 571; 28 Am. Dec. 183; *State v. Huff*, 11 Nev. 26.

In *People v. Crapo*, 76 N. Y. 288; 32 Am. Rep. 302, the prisoner was on trial for breaking into an outbuilding and stealing wheat. The prosecuting attorney was permitted to ask the defendant if he had been arrested for

wanting, however, that such questions are permissible in the face of other forms of objection.¹

In the absence of statutory restriction, a defendant may be cross-examined concerning any material fact, or a previous statement of his own which is inconsistent with his testimony at the trial, for the purpose of laying a foundation for impeaching him

bigamy, and the defendant was compelled to answer over his objection. This was held error on the ground that the matter inquired of did not tend to discredit the witness. The court said: "It did not legitimately tend to impair the credibility of the prisoner as a witness and was not competent for any purpose. The discretion which courts possess to permit questions of particular acts to be put to witnesses, for the purpose of impairing credibility, should be exercised with great caution when an accused person is a witness on his own trial. He goes upon the stand under a cloud; he stands charged with a criminal offense not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is, therefore, looked upon with suspicion and distrust, and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict upon evidence which otherwise would be deemed insufficient. It is not legitimate to bolster up a weak case by probabilities based upon other transactions. An accused person is required to meet the specific charge made against him and is not called upon to defend himself against every act of his life. Neither in *Brandon v. People*, 42 N. Y. 265, nor in *People v. Connors*, 50 N. Y. 240, was the point of relevancy upon the question of credibility presented. In each case, the ground of objection was specific and did not involve that point."

In *People v. McCauley*, 45 Cal. 146, the objection was that an arrest for a former offense did not prove the prisoner guilty of the offense for which she was then being tried, and the court overruled the objection made on this ground. This decision was affirmed by the supreme court, saying: "The nature of the objection taken does not present the question of the latitude al-

lowed in cross-examination of a witness, in order to show the degree of credit to which such a witness is entitled, and it is not necessary to consider that point here." But when the question did come before the court, upon the objection that it did not tend to discredit the witness, it was held that the objection should be sustained. *People v. Elster* (Cal. 1884), 3 Pac. Rep. 888.

In *People v. Hamblin*, 68 Cal. 103, the court said: "In the case at bar, there was no effort whatever made to show that the defendant, the witness, had ever been convicted of a felony. The object of the questions seems to have been to make evident that on divers occasions he had been arrested for shooting at individuals. There the effort to discredit him stopped. The effect of this may have been to create a prejudice in the minds of the jury against the defendant, as a man ready with a pistol to shoot at those who had incurred his displeasure. Hence, to allow the questions to be asked and to compel their answer was error prejudicial to the defendant."

Hanoff v. State, 37 Ohio St. 178; 41 Am. Rep. 496, appears to be an authority to the contrary, though it does not appear upon what ground the objection to the question in that case was based. See also *State v. Bacon*, 13 Oregon 143; 57 Am. Rep. 8.

And in *Taylor v. Com.* (Ky. 1892), 18 S. W. Rep. 852, the witness voluntarily said to the jury that he was a peaceable man and did not intend to shoot the prosecuting witness, whereupon the prosecuting attorney asked him if he had not had similar difficulties with a number of his neighbors. This, the court said, was not proper cross-examination; but refused to reverse the judgment as he had put his own character as a peaceable and inoffensive man in issue. See also *State v. Merriman*, 34 S. Car. 16.

1. *People v. Larsen* (Utah, 1894), 37 Pac. Rep. 258; *Parker v. State* (Ind. 1894), 35 N. E. Rep. 1105; *Jackson v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 194, 622; *State v. Murphy*,

by giving proof of such fact or statement.¹ But here the rule is the same as in the impeachment of other witnesses, and the prosecution is bound by his answer to any question which is not material to the issue on trial and will not be permitted to call other witnesses to contradict him as to such matter.² In such case, if the question, were it put to a witness for the prosecution on his direct examination, would be objectionable as being no part of the state's case, it is collateral and the prosecution is bound by the defendant's answer.³

c. INSTRUCTIONS ON CREDIBILITY OF THE DEFENDANT.—It is proper for the court to instruct the jury that they may consider the fact that the defendant is a witness testifying in his own behalf, and the interest which he has at stake in the event of the trial, when they are determining the credibility of his testimony.⁴

45 La. Ann. 958; *People v. Foote*, 93 Mich. 38.

1. *State v. Red*, 53 Iowa 69; *State v. Abrams*, 11 Oregon 169; *People v. Eckert*, 2 N. Y. Crim. Rep. 482; *Weyman v. People*, 4 Hun (N. Y.) 511; *affirmed* 62 N. Y. 623; *Greenfield v. People*, 13 Hun (N. Y.) 242; *reversed*, on other grounds, 74 N. Y. 277; *Com. v. Tolliver*, 119 Mass. 315; *State v. Phelps* (S. Dak. 1894), 59 N. W. Rep. 471; *State v. Kennade*, 121 Mo. 405; *May v. State* (Tex. Crim. App. 1894), 24 S. W. Rep. 910; *Huffman v. State*, 28 Tex. App. 174; *Bell v. State*, 31 Tex. Crim. Rep. 276; *Hicks v. State*, 99 Ala. 169; *State v. Walsh*, 44 La. Ann. 1122; *State v. Crane*, 110 N. Car. 530. See also *State v. Avery*, 113 Mo. 475.

Where a defendant does not testify, his testimony at a former trial of the case may not be contradicted for the purpose of discrediting him. *State v. Brownson*, 42 La. Ann. 186.

And where he does testify, it is error to permit him, over his objection, to be cross-examined as to whether, at a former trial for a similar offense, he raised a somewhat similar issue by his testimony and was contradicted by other witnesses. *Com. v. Lannan*, 155 Mass. 169.

Where the question is not permissible except for the purpose of impeaching the witness, the prosecuting attorney should announce its purpose when it is asked. *State v. Kennon*, 45 La. Ann. 1192.

2. *People v. Ware*, 29 Hun (N. Y.) 473; *affirmed*, without opinion, 92 N. Y. 653; *Rosenweig v. People*, 63 Barb. (N. Y.) 639; *People v. Webster*, 68 Hun (N. Y.) 19; *affirmed* 139 N. Y.

73; *McKeone v. People*, 6 Colo. 346; *George v. State*, 16 Neb. 318; *Hill v. State*, 91 Tenn. 521.

In *Marx v. People*, 63 Barb. (N. Y.) 619, the court said: "The same rules of evidence must govern the examination of a prisoner when he avails himself of his privilege to become a witness as apply to any other witness. One of these is that a party cannot, upon cross-examination of a witness for the adverse party, draw out collateral statements not material to the issue on trial and then contradict such statements. He is concluded by the answer of the witness."

For the rule as to witnesses generally, see *Stokes v. People*, 53 N. Y. 175; 19 Am. Rep. 492; *Carpenter v. Ward*, 30 N. Y. 243; *Chapman v. Brooks*, 31 N. Y. 87; *Kirkpatrick v. New York Cent., etc., R. Co.*, 79 N. Y. 243; *Hooper v. Browning*, 19 Neb. 428; *Frederick v. Ballard*, 16 Neb. 565; *Farmers' L. & T. Co. v. Montgomery*, 30 Neb. 39; *Hildeburn v. Curran*, 65 Pa. St. 59; *Schuster v. State*, 80 Wis. 107.

3. *George v. State*, 16 Neb. 321.

4. *State v. Maguire*, 113 Mo. 670; *State v. Young*, 105 Mo. 634; *State v. Cook*, 84 Mo. 40; *State v. Noeninger*, 108 Mo. 166; *State v. Ihrig*, 106 Mo. 267; *State v. Brooks*, 99 Mo. 142; *State v. Maguire*, 69 Mo. 197; *State v. Zorn*, 71 Mo. 415; *State v. McGinnis*, 76 Mo. 328; *State v. Brent*, 104 Mo. 531; *State v. Morrison*, 104 Mo. 638; *Faulkner v. Territory* (N. Mex. 1892), 30 Pac. Rep. 905; *Territory v. Romine*, 2 N. Mex. 114; *Davis v. State*, 31 Neb. 247; *St. Louis v. State*, 8 Neb. 405; *Com. v. Orr*, 138 Pa. St. 276.

But it is error to instruct the jury that they are not bound to believe him or treat his testimony the same as that of other witnesses.¹ It is error for the court to tell the jury, or even intimate to them, that they are at liberty to disregard the defendant's testimony. He has a right to have his testimony go before the jury without any suggestion from the bench that they may disregard it.² Thus, an instruction that the defendant is a competent witness in his own behalf, and his evidence should not be disregarded by the jury for the reason alone that he is the defendant on trial, is erroneous in that it tells the jury, by implication, to discard the defendant's testimony on some ground.³ So, also, it is improper to instruct the jury that they may believe the testimony of the defendant if it is corroborated, and disbelieve it if it is contradicted.⁴

An instruction that the jury should regard the defendant as every other witness is regarded, taking into consideration his appearance, his manner, the reasonableness of his story, and, above all, the fact that he is the accused, is not erroneous, as the accused is not entitled to have his testimony considered as that of a disinterested witness. *State v. Fiske*, 63 Conn. 388; *People v. Cronin*, 34 Cal. 191; *People v. Morrow*, 60 Cal. 142; *People v. Nichols*, 62 Cal. 518.

1. *Sullivan v. People*, 114 Ill. 24; *Chambers v. People*, 105 Ill. 409. Compare *People v. Cowgill*, 93 Cal. 598.

It is error to instruct the jury that the defendant's interest in the result of the prosecution tends to discredit him. *Pratt v. State*, 56 Ind. 179; *Greer v. State*, 53 Ind. 420; *Bradley v. State*, 31 Ind. 492.

2. *Buckley v. State*, 62 Miss. 705; *Woods v. State*, 67 Miss. 575; *Townsend v. State* (Miss. 1892), 12 So. Rep. 209; *Lambert v. People*, 34 Ill. App. 637; *Andrews v. State*, 21 Fla. 598.

3. *State v. Austin*, 113 Mo. 538; *State v. Hobbs*, 117 Mo. 620.

In *Purdy v. People*, 140 Ill. 46, the trial judge instructed the jury that they had a right to consider the conduct of the defendant during the trial as well as when he was on the witness stand. For this error the judgment was reversed. The supreme court said: "A person charged with crime can be examined as a witness only at his own request, and so when he voluntarily assumes the character of a witness, it is proper to apply to him the rules which apply to other witnesses. But we are not advised that it has ever been adjudicated or held that the conduct and de-

meanor of a defendant during his trial for crime when he is not examined as a witness, or while he is not being examined as a witness, is to be regarded in the light of evidence, or that it can be taken into consideration by the jury in arriving at a verdict. In two instances within the knowledge and recollection of the writer of this opinion, men on trial for grave crimes have made assaults upon witnesses who testified against them, and this during the trials and in the presence of the jury. Assuming that in such cases the defendants were examined as witnesses in their own behalf, it would have been unjust, and highly detrimental to the rights of said defendants, if the trial judge had instructed that in determining the degree of credibility that should be accorded to the testimony of such defendants, the jury had the right to take into consideration the demeanor and conduct of said defendants during their trials. We think that it is improper to authorize a jury to consider, in arriving at a verdict, anything that is other than the law or the evidence in the case."

4. *State v. Seaton*, 106 Mo. 108.

In *Hicks v. U. S.*, 150 U. S. 450, the defendant went on the stand and testified as a witness in his own behalf. The trial court gave the following instruction concerning his credibility: "The defendant has gone upon the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and, above all, you consider it in the light of the other evidence, in the light of the other facts. If he is contradicted by other reliable facts, that goes against him, goes against his evidence. You

d. COMMENT ON DEFENDANT'S FAILURE TO TESTIFY—(1) By the Court.—Statutes making defendants in criminal cases competent to testify in their own behalf, very generally provide that the fact that the prisoner prefers not to go upon the witness stand shall raise no presumption against him, and many of them forbid all allusion to the fact by the court or counsel. In the absence of the latter provision, the court may instruct the jury that the accused may be a witness if he chooses to do so, but that the fact that he does not testify creates no presumption against him and should not be considered by them.¹ The court, however, is

may explain it, perhaps, on the theory of an honest mistake or a case of forgetfulness. But if there is a conflict as to material facts between his statements and the statements of the other witnesses, who are telling the truth, then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses. You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest, in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest, consequently, as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth. We might be led away from the truth because of our desire. Therefore, it is but right and it is your duty to view the statements of such a witness in the light of his attitude, and in the light of other evidence." This charge was held erroneous. The Supreme Court of the *United States* said: "The learned judge therein suggests to the jury that there was or might be a conflict as to material facts between the statements of the accused and the statements of the other witnesses, who are telling the truth, and that then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses. The obvious objection to this suggestion is in its assumption that the other witnesses, whose statements contradicted those of the accused, were telling the truth. The learned judge further, in his instruction, argued to the jury that in considering the personal testimony of the accused they should consider his interest in this

case." And after quoting that part of the charge which bears on this subject, the court continued: "It is not easy to say what effect this instruction had upon the jury. If this were the only objectionable language contained in the charge, we might hesitate in saying that it amounted to reversible error. It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices, and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury properly enough give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that the person charged shall, at his own request, but not otherwise, be a competent witness. The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law."

1. *Ruloff v. People*, 45 N. Y. 213; *State v. Cameron*, 40 Vt. 555.

In *People v. Hayes*, 140 N. Y. 496, the trial court instructed the jury that the defendant was not bound to go on the stand, that he could say to the prosecution, "Prove your case against me. It is my judgment that the situation is such that I am not bound to take the witness stand, and the law gives me that right and the law gives me that privilege," and, further, charged that the law says there is no presumption to be taken against a defendant by reason

not bound to give this instruction in the absence of a request from the defendant.¹ In giving the instruction, the court should be careful to use no language which may suggest to the minds of the jurors that they are at liberty to consider the defendant's failure to take the witness stand. Thus, it is reversible error to instruct the jury that nothing is to be presumed against the defendant himself for not testifying in his own behalf, but that the failure of the defendant to produce evidence which it is in his power to produce is a proper matter for their consideration,² unless it be made plain to the minds of the jurors that the latter statement refers to the defendant's failure to produce other witnesses and does not impliedly authorize them to consider his own failure to testify.³ Where the statute expressly forbids any allusion to the defendant's silence by the court or counsel, the court

of the fact that he does not take the witness stand. The charge was criticised on the ground that the language which the judge put into the mouth of the defendant amounted to a covert insinuation that the situation was such that it would be disastrous to the defendant if he took the stand. Peckham, J., delivering the opinion of the court, said: "I think the criticism ill-founded. The jury were plainly instructed as to the law and the rights of the defendant. The insinuation suggested would be unwarranted from the language used. On the contrary, the natural interpretation would be that the defendant regarded the situation as one wholly lacking in proof of guilt, and he was under no obligation to go on the stand and explain what as yet required no explanation. The case of *Ruloff v. People*, 45 N. Y. 222, is authority for the correctness of the course pursued by the learned judge."

1. In *State v. Stevens*, 67 Iowa 559, the court said: "The defendant did not testify in his own behalf. His counsel now urge that the court erred in not instructing the jury that this fact was not to be considered to his prejudice. Had such instruction been requested, it doubtless would have been given. In the absence of this request, we do not think it was the duty of the court to allude to the matter. It cannot be presumed that defendant's case was prejudiced by his silence, in the absence of any allusion thereto by the state, the court, or any person connected with the case."

2. In *Com. v. Harlow*, 110 Mass. 411, the court said: "The Statute of 1870, ch. 393, § 1, which makes defendants who are charged with crimes and of-

fenses competent witnesses, provides that their neglect or refusal to testify shall not create any presumption against them. This provision conforms to article 12 of the declaration of rights, which declares that no subject shall be compelled to furnish evidence against himself. Since this class of defendants are allowed to testify, if they will, there is some danger that if one exercises his right of silence, a jury will look upon it as a proper matter to weigh against him in considering the question of his guilt. It is important that courts should carefully guard his constitutional right. There is reason to apprehend that it was not guarded as it should have been in this case. For though the jury were told that nothing was to be presumed against the defendant herself for not testifying in her own behalf, they were also told that the failure of a defendant to produce evidence which it was in his power to produce to meet the evidence adduced by the commonwealth, was a competent and proper matter for them to weigh in considering the question of his guilt. They were not told that this last remark did not apply to his own testimony, but merely to his failure to produce other witnesses; nor was it otherwise qualified. The omission of every qualification might lead the jury to understand that though his neglect to testify did not raise a presumption against him, yet they might weigh the fact, and allow it to have such influence as they thought it deserved. The instruction was at least equivocal in a matter where it ought to have been clear, and we fear it operated unfavorably to the defendant."

3. In *State v. O'Grady*, 65 Vt. 69, the trial court instructed the jury as

is not authorized to instruct the jury on this subject even when requested to do so by the defendant himself.¹ And, under such a statute, it is, of course, reversible error for the court, *sua sponte* to call the attention of the jury to the defendant's silence.²

(2) *By Counsel for the Prosecution.*—As it is the defendant's constitutional privilege to remain silent, if he prefers to do so, it is highly improper, and, indeed, unprofessional, for the prosecuting attorney to comment on his failure to testify; and it is fatal error for the court to permit such comments in the face of the defendant's objection,³ and the fact that the prisoner's own counsel alludes to the matter and enlarges on the defendant's legal

follows: "The evidence of the state is uncontradicted by any evidence introduced on the part of the respondent. The respondent has not testified. The mere fact that he has not testified is not to be taken against him. You have no right to consider that fact, but you have a right to consider the fact that the evidence introduced by the state has not been contradicted only so far as it may be contradicted in and of itself." This instruction was excepted to on the ground that it impliedly authorized the jury to consider the defendant's silence, but it was held that the exception was not well taken. The appellate court said: "The court pointedly told the jury they had no right to consider the fact of his neglect or refusal to testify against him. In coupling the right to consider the fact that the evidence introduced by the state had not been contradicted with this announcement, the court did not commit any legal error. If it impliedly told the jury that they might consider the fact that the respondent had not called other witnesses who were present, to contradict the witnesses of the state as bearing upon the credibility of the latter, this was only adapting its charge to the facts and circumstances of the case. The court should always adapt its charge to the facts and testimony of the case. We do not think the jury could thereby have obtained the impression that they could consider the fact that the respondent had not testified as any evidence against him."

1. In Gen. Stats. of *Minnesota*, tit. 1, ch. 73, § 7, it is provided that on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his request, but not otherwise, be deemed

a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant; nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the court. Under this section it has been held that the court has no authority to instruct the jury concerning the prisoner's silence, even when expressly requested to do so by the defendant himself. *State v. Pearce*, 56 Minn. 226.

In *State v. Robinson*, 117 Mo. 663, the court said: "Another instruction it is said the court ought to have given, and that was to the effect that if a party accused fail to testify, such failure shall not create any presumption against him. There was no error in refusing such an instruction. Section 4219, Rev. Stats. 1889, is the one relied on to sustain this view, but the concluding words of that section provide that such failure to testify shall not be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place. If the court had given such an instruction, it would have disobeyed the spirit if not the letter of the law."

2. *Baker v. People*, 105 Ill. 452.

3. *Wilson v. U. S.*, 149 U. S. 60; *People v. Tyler*, 36 Cal. 522; *Austin v. People*, 102 Ill. 261; *Angelo v. People*, 96 Ill. 209; 36 Am. Rep. 132; *Quinn v. People*, 123 Ill. 333; *Watt v. People*, 126 Ill. 9; *McDonald v. People*, 126 Ill. 155; *Jackson v. People*, 18 Ill. App. 519; *Long v. State*, 56 Ind. 182; 26 Am. Rep. 19; *Knight v. State*, 70 Ind. 375; *Morrison v. State*, 76 Ind. 338; *Showalter v. State*, 84 Ind. 563; *Coleman v. State*, 111 Ind. 563; *State v. Graham*, 62 Iowa 111; *State v. Ryan*, 70 Iowa 154; *State v. Balch*, 31 Kan. 465; *State v. Mosley*, 31 Kan. 355; *State v. Tennon*, 42 Kan. 330; *Com. v. Scott*, 123

right to refrain from testifying, does not change the rule so far as the prosecution is concerned.¹ In jurisdictions where the statute merely provides that the defendant's silence shall raise no presumption against him, the court may repair the injury by rebuking the prosecuting attorney, advising the jury of the defendant's legal rights, and promptly instructing them to disregard the objectionable remarks.² But in other jurisdictions, where all comment on the silence of the accused is forbidden by statute, it is held that prejudicial comments on the defendant's failure to testify cannot be cured by the interposition of the trial court.³

Mass. 239; 25 Am. Rep. 87; Com. v. Worcester, 141 Mass. 58; Yarbrough v. State, 70 Miss. 593; Eubanks v. State (Miss. 1890), 7 So. Rep. 462; State v. Moxley, 102 Mo. 374; State v. Jackson, 95 Mo. 623; State v. Martin, 74 Mo. 547; State v. Brownfield, 15 Mo. App. 593; Stover v. People, 56 N. Y. 315; Crandall v. People, 2 Lans. (N. Y.) 309; People v. Forbes, 52 Hun (N. Y.) 30; People v. Doyle, 58 Hun (N. Y.) 535; State v. Hull (R. I. 1893), 26 Atl. Rep. 191; State v. Howard, 35 S. Car. 197; Staples v. State, 89 Tenn. 231; Hunt v. State, 28 Tex. App. 149; McPherson v. State (Tex. App. 1890), 15 S. W. Rep. 174; Reed v. State, 29 Tex. App. 449; Johnson v. State, 31 Tex. Crim. Rep. 464; Alvilla v. State, 32 Tex. Crim. Rep. 136; State v. Chisnell, 36 W. Va. 659; Martin v. State, 79 Wis. 165.

And where the defendant has testified, it is error to permit the prosecuting attorney to comment on the fact that he did not testify at a former trial of the same case. Richardson v. State (Tex. Crim. App. 1894), 27 S. W. Rep. 139.

In *Maine*, it was formerly held that the defendant's failure to testify was a proper subject for comment by the prosecuting attorney. State v. Lawrence, 57 Me. 574; State v. Bartlett, 55 Me. 220; State v. Cleaves, 59 Me. 299; 8 Am. Rep. 422. But it is held that the Statute of 1879, ch. 92, § 1; Rev. Stats., ch. 134, § 19, now prohibits such comment in that state. State v. Banks, 78 Me. 490.

1. In Com. v. Scott, 123 Mass. 241; 25 Am. Rep. 87, Gray, C. J., said: "As there is danger that the jury, knowing that the law now permits a defendant to testify, may draw inferences against him from his omission so to do, his counsel may properly, in addressing the jury, insist and enlarge upon his

constitutional and legal right in this respect. . . . The course of the closing argument for the prosecution tended to persuade the jury that the omission of the defendants to testify implied an admission or a consciousness of the crime charged, and the presiding judge, in permitting such a course of argument against the objection of the defendants, and in ruling that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not going upon the stand and testifying in their behalf, and, also, to give the reasons which the government contended really existed for their not testifying, committed an error which was manifestly prejudicial to the defendants, and which obliges this court to set aside the verdict and order a new trial."

2. State v. Howard, 35 S. Car. 197; Com. v. Worcester, 141 Mass. 58; Calkins v. State, 18 Ohio St. 366; 98 Am. Dec. 121; Crandall v. People, 2 Lans. (N. Y.) 309; State v. Chisnell, 36 W. Va. 659; People v. Hess, 85 Mich. 132; Nicholls v. State, 68 Wis. 416; Martin v. State, 79 Wis. 165; State v. Hull (R. I. 1893), 26 Atl. Rep. 191; U. S. v. Kuntze, 2 Idaho 446.

It is error for the court to refuse a proper instruction on this subject, even though the prosecuting attorney admitted in the presence of the jury that he had transgressed the bounds of propriety in commenting on the defendant's failure to testify. People v. Rose (Supreme Ct.), 4 N. Y. Supp. 787; Staples v. State, 89 Tenn. 231; Wilson v. U. S., 149 U. S. 65.

3. Quinn v. People, 123 Ill. 333; Angelo v. People, 96 Ill. 209; 36 Am. Rep. 132; Jackson v. People, 18 Ill. App. 519; Long v. State, 56 Ind. 182; 29 Am. Rep. 19; Knight v. State, 70 Ind. 375; State v. Graham, 62 Iowa

It seems that an incidental allusion to the defendant's right to testify, made in good faith by counsel for the prosecution, in his argument to the court on the admissibility of evidence, and not intended to be heard by the jury, is not a fatal violation of the statute.¹ But if it is evident that the attorney adopts this course as an adroit method of doing indirectly what the law prohibits his doing directly, it is as much a violation of the rights of the accused as if the remarks had been addressed directly to the jury.²

108; *Hunt v. State*, 28 Tex. App. 149; *Alwill v. State*, 32 Tex. Crim. Rep. 136; *State v. Ahern*, 54 Minn. 195.

In *Brazell v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 723, counsel for the state referred to evidence adduced by the prosecution concerning the prisoner's whereabouts at the time the offense was committed, and then, facing the defendant, said: "Now where does he say he was if he was not there?" Upon objection being made, the court admonished the counsel to refrain from remarks on that subject, and instructed the jury not to consider them. The judgment of conviction was, nevertheless, reversed, the court saying that the interposition of the trial court did not cure the vice.

1. *State v. Mosley*, 31 Kan. 355; *Diebel v. State* (Tex. Crim. App. 1893), 24 S. W. Rep. 26.

Remark Addressed to the Prisoner's Counsel.—Where counsel for the prisoner was cross-examining a witness for the state, and the prosecuting attorney suggested to him that he could prove a certain matter by his own parties when he put them on the stand, it was held that this suggestion, though made in the hearing of the jury, could not be considered as a comment on the defendant's failure to testify, or as coming within the inhibition of the statute. *State v. Ice*, 34 W. Va. 244.

2. In *State v. Ryan*, 70 Iowa 156, the court said: "Counsel for the defendant insists that the reference made by the district attorney to the fact that defendant had not testified as a witness in his own behalf entitles the defendant to a new trial. If the remark had been made by the attorney for the state in an argument to the jury, we think it is perfectly clear that the defendant would have been entitled to a new trial. But does this make any difference? It was made to the court during the trial and in the presence of the jury. The statute prohibits such remarks during the trial in the presence of either the

court or jury. Under the statute, we are not permitted to inquire whether the defendant was prejudiced. This must be conclusively presumed. The attorney general insists that the statute should be so construed as to apply to a case where the attention of the jury is directly called to such a fact, or that such a direct reference thereto is made as in all probability would create a prejudice in the minds of the persons composing the jury. It seems to us that if such had been the legislative thought, apt words would have been used to express it. If reference can be made to the fact that the defendant has not testified in his own behalf in arguments to the court, then such a reference may be made in every case and thereby the statute will be nullified. It is clearly implied, if not expressly stated, in the statute, that the attention of either the court or jury shall not be called to the fact that the defendant has failed to testify in his own behalf, and if the attorney for the state does so, the defendant is entitled to a new trial."

In *State v. Baldoser*, 88 Iowa 55, the prosecuting attorney, in his argument to the court, alluded to the defendant's right to testify before the time had arrived for him to take the stand if he chose to do so, and it was held that this was improper. The court said: "Now it may be conceded that the reference by counsel in the words used could not have been to the fact that defendant had not testified in the case, because up to that time he had no opportunity so to do. The state's case had not been closed. So while the case is technically not within the statutory inhibition, it seems to us it is clearly contrary to the spirit and object of the statute. If the contention of the attorney general is correct, then counsel for the state may, at all times during a trial, prior to the time the defendant has an opportunity to go upon the stand, comment upon the fact that the

It is also improper for the prosecuting attorney, in his opening statement to the jury, to direct their attention to the fact that the defendant has the legal right to testify, and to caution them to observe his conduct in that respect.¹

Where the evidence of the defendant's guilt is so overwhelming that the court is able to say affirmatively that the jury could not have returned a verdict in his favor without a willful disregard of their duty, unwarranted remarks of counsel which might otherwise be fatal to the verdict may be deemed harmless error.²

It is not of itself a good answer to this objection to the comments of counsel that the jury were not invited in terms to consider the defendant's failure to testify, as a circumstance against him. A cunningly devised insinuation is often as well understood as plain positive language and is frequently more damaging. It follows that the court should carefully protect the accused from damaging insinuations of this sort, and if indirect and covert allusion be made to the defendant's silence, the judgment should be

law permits him to testify in his own behalf; and draw inferences as to the effect of his failing to do so. Such a construction of the statute would deprive the defendant of every benefit which the legislature, by its enactment, intended to confer upon him. The law-makers certainly never intended that counsel for the state might comment on and refer to the fact that defendant might testify in his own behalf at all times prior to the closing of the state's case in chief, but must not afterwards refer to the fact that he had failed to take advantage of his privilege to testify. The mischief is done by directing the minds of the jurors to the fact that a defendant may testify, in advance of the time when he may be called as a witness as well as if the comment be made after he has elected not to testify."

1. In *Coleman v. State*, 111 Ind. 563, the prosecuting attorney, in his opening statement to the jury, said: "You should watch the evidence closely. We do not know that the defendant will go upon the stand. He has not been sworn; I noticed that. If he should go upon the stand, you should watch him." Upon the propriety of this language, the court said: "The objectionable remarks of the prosecuting attorney, although made in his opening statement to the jury, and, therefore, not directly controlled by the rulings in *Long v. State*, 56 Ind. 182; 26 Am. Rep. 19, and *Showalter v. State*, 84 Ind. 562, and although not within the literal prohibition of the statute, were,

nevertheless, in palpable violation of its spirit and purpose. Surely, if the failure of the defendant to testify is not to be a subject of comment, or may not be referred to in the argument of the cause, nor commented upon or referred to or considered by the jury, the prosecutor may not evade the statute by ingeniously injecting into his opening statement remarks which do all the mischief which the prohibitory part of the statute was intended to prevent. The effect of the remarks must have been either to coerce the defendant to testify, as has been said, with a halter about his neck, or to induce him to remain silent with knowledge that the jury had been challenged in the outset to observe whether or not he would go upon the stand under the goad of the prosecutor's statement."

2. *State v. Ahern*, 54 Minn. 195; *Nicholls v. State*, 68 Wis. 416.

In *Austin v. People*, 102 Ill. 264, the court said: "We do not see that this statute can well be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded good ground for a new trial in all cases where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause."

But in *Iowa*, it is held that under the strict terms of the statute of that state, the court cannot inquire whether the defendant was prejudiced or not. It is

set aside and a new trial awarded.¹ An incidental allusion to the statute, however, which is neither intended nor calculated to draw

conclusively presumed that he was prejudiced. *State v. Ryan*, 70 Iowa 154.

1. Where counsel for the state rehearsed a conversation which it was claimed had taken place between the defendant and a witness who had testified thereto for the prosecution, and then exclaimed, "Who has denied it?" the judgment was reversed on the ground that this was an allusion to the defendant's failure to testify, since he was the only person who could deny it. *Dawson v. State* (Tex. Crim. App. 1893), 24 S. W. Rep. 414.

But the prosecuting attorney may comment on the fact that material evidence for the prosecution has not been contradicted, where it does not appear that the defendant is the only person who can contradict it. *State v. Weddington*, 103 N. Car. 372.

In *Austin v. People*, 102 Ill. 261, a conviction for rape was reversed because the prosecuting attorney was permitted, over the defendant's objection, to say to the jury: "Since the legislature passed a statute giving the defendant in criminal cases the right to testify in his own behalf, it can no longer be said, as a maxim of law, that rape is a crime hard to be defended."

In *Wilson v. U. S.*, 149 U. S. 66, the court, after quoting the statute which makes accused persons competent witnesses in their own behalf, said: "In this case, this provision of the statute was plainly disregarded. When the district attorney, referring to the fact that the defendant did not ask to be a witness, said to the jury, 'I want to say to you that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high heaven and testify to my innocence of the crime,' he intimated to them, as plainly as if he had said in so many words, that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which, by the law, he was entitled, and which, by the statute, he could not lose by a failure to offer himself as a witness. And when counsel for defendant called the attention of

the court to this language of the district attorney, it was not met by any direct prohibition or emphatic condemnation of the court, which only said, 'I suppose the counsel should not comment upon the defendant not taking the stand.' It should have said that the counsel is forbidden by the statute to make any comment which would create, or tend to create, a presumption against the defendant from his failure to testify. Instead of stating, after mentioning that the United States court is not governed by the states' statutes, 'I do not know that it ought to be the subject of comment by counsel,' the court should have said that any such comment would tend necessarily to defeat the very prohibition of the statute. And the reply of the district attorney to the mild observation of the court only intensified the fact to which he had already called the attention of the jury: 'I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf,' which was equivalent to saying, 'You, gentlemen of the jury, know full well that an innocent man would have gone on the stand and have testified to his innocence, but I do not mean to refer to the fact that he did not, for it is a circumstance which you will take into consideration without it.' By this action of the court in refusing to condemn the language of the district attorney, and to express to the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the minds of the jury that if he were an innocent man he would have gone on the stand as the district attorney stated he himself would have done. This language of the district attorney, and this action, or rather want of action, of the court, are set forth in the bill of exceptions, and although exceptions are generally taken to some ruling or want of ruling by the court, in the progress of the trial, in the admission or rejection of evidence or the interpretation of instruments, yet they can be taken to its action or want of proper action upon any proceeding in the progress of the trial, from its commencement to its conclusion, and when properly presented

the attention of the jury to the defendant's failure to testify, is not necessarily fatal to the judgment,¹ and the rule does not prohibit the prosecuting attorney's making reasonable comment on the absence of evidence for the defense, provided he makes no allusion to the defendant's privilege of testifying.²

As a general rule, if the defendant avails himself of his privilege of testifying, his attitude on the witness stand is open to the comments of counsel the same as that of any other witness, and the prosecuting attorney may animadvert upon his failure to explain matters peculiarly within his knowledge or to deny or explain criminating facts proved against him by other witnesses.³

can be considered by the court on writ of error. The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness, tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial."

In *Hunt v. State*, 28 Tex. App. 149, the district attorney exclaimed: "It is the same old story—defendant's mouth is closed;" and then took up the acts of the legislature and commenced to read the act allowing a defendant to testify. The court rebuked him and compelled him to cease reading the statute. The judgment was reversed on account of the district attorney's violation of the law.

1. In *Watt v. People*, 126 Ill. 31, the court said: "Indirect and covert references to the neglect of the defendant to go upon the witness stand may be as prejudicial to his rights as a direct comment upon such neglect. But it does not necessarily follow that every reference to the law on that subject is prohibited. The true test would seem to be, was the reference intended or calculated to direct the attention of the jury to the defendant's neglect to avail himself of his legal right to testify?"

In *Bradshaw v. People*, 153 Ill. 156, which was a prosecution for abduction, the state's attorney remarked that the enticing and taking away of the prosecuting witness was not denied by the defendant. The court promptly rebuked him, saying, in the presence of the jury, "that the defendant had, by his plea of not guilty, denied everything." It was held that the language of the attorney was not such a comment on the defendant's silence as would vitiate the verdict.

So, where the prosecuting attorney said, though he had no right to swear any man accused of crime, he had the right to prove his statements, it was held that the statute had not been violated. *Sawyers v. Com.*, 88 Va. 356.

2. *State v. Ward*, 61 Vt. 153; *Jackson v. State*, 31 Tex. Crim. Rep. 342. See also *Crumes v. State*, 28 Tex. App. 516; *People v. McGrath*, 5 Utah 525; *State v. Toombs*, 79 Iowa 741; *People v. Mills*, 94 Mich. 630; *Sutton v. Com.*, 85 Va. 128.

In *Frazier v. State*, 135 Ind. 38, the prosecuting attorney said, in his closing address: "Not a particle of evidence has come to you from the defendant, from his side of the case." It was held that this remark was not obnoxious as being a comment on the defendant's failure to testify.

In *Jordan v. State*, 29 Tex. App. 595, the prosecuting attorney remarked: "The law allows the defendant to testify for himself; but, if he fails to do so, the law says that I shall not comment on his failure to testify in his own behalf; but it does not preclude me from commenting upon the failure of the defendant to put Florence Hamilton on the stand as a witness." For this allusion to the defendant, the judgment was reversed.

3. *Clarke v. State*, 87 Ala. 71; *Cotton v. State*, 87 Ala. 103; *Hodge v. State*, 97 Ala. 37; *Lee v. State*, 56 Ark. 4; *McCoy v. State*, 46 Ark. 144; *State v. Tatman*, 59 Iowa 471; *Brashears v. State*, 58 Md. 568; *State v. Harrington*, 12 Nev. 125; *Stover v. People*, 56 N. Y. 315; *State v. Phillips*, 70 N. Car. 462; *McFadden v. State*, 28 Tex. App. 241; *Lienburger v. State* (Tex. Crim. App. 1893), 21 S. W. Rep. 603; *Solander v. People*, 2 Colo. 48.

In *State v. Tatman*, 59 Iowa 474, the court said: "Upon the final trial on

It has been held, however, that where, by statute, the cross-examination of the accused is restricted to matters referred to in the examination in chief, the same rule of limitation should be applied to the prosecutor's comments upon his testimony.¹

the plea of not guilty, the defendant offered himself as a witness, and was examined as to certain matters material to his defense. The district attorney, in his argument to the jury, commented upon the fact that the defendant testified to a part only of his defense, and omitted to testify upon other material facts in the case within his knowledge, and urged that such omission should be considered by the jury. It is contended that because of this conduct of the district attorney, the judgment should be reversed. Section 3636 of Miller's Code provides that defendants in criminal proceedings shall be competent witnesses in their own behalf, but if a defendant should elect not to become a witness, that fact shall not have any weight against him on the trial, and shall not be referred to by counsel for the state, and if counsel should do so, defendant shall be entitled to a new trial. It is conceded that it was the right of the district attorney to comment on such testimony as the defendant gave, but it is urged that he had no right to comment upon the defendant's failure to testify as to matters regarding which he preferred to keep his mouth closed. The exemption from unfavorable comment extends only to such defendants as choose not to avail themselves of the privilege of testifying in their own behalf. Here the defendant put himself upon the stand as a witness, and we can see no reason why the counsel for the state should not comment on his testimony as fully as on that of any other witness."

In *Brashears v. State*, 58 Md. 567, the court, after quoting the provisions of the statute allowing defendants to testify in their own behalf, said: "Here the traverser did not neglect or refuse to testify. On the contrary, he voluntarily became a witness on his own behalf. His testimony thus given was open to observation by the attorney for the state and by the jury. He knew that he was upon trial for uttering a forged note, and he certainly knew whether he had or had not uttered it, and, if he had done so, whether he had so uttered it with intent to defraud. But he confined himself in testifying to

the simple statement that he could not write, though he must have known that this circumstance was entirely consistent with the guilty uttering by him of the note in question. His conduct on the witness stand, and his silence, when testifying, as to matters involved in the pending inquiry, which were certainly within his knowledge, were circumstances which the jury had a right to consider in deciding upon the credit due to the witness in connection with the other facts proved in the case, and they were, therefore, necessarily circumstances upon which the state's attorney had a right to comment in addressing the jury."

1. In *State v. Graves*, 95 Mo. 514, the court said: "The statute having conferred the right upon such a defendant when he takes the stand to testify only in regard to such matters as he may choose, this right of choice would, in effect, be taken away by a ruling which would justify comments to be made, and unfavorable inferences to be drawn from what he might have testified about but about which he did not testify. Under this statute, the defendant has two options, the first of which is, that he may elect either to go on the stand or not, as a witness; and, second, when he elects to go on the stand, he may testify only to such matters as he may choose. It is clear that under the statute, if he elects not to go on the stand, the fact that he did not testify at all could neither be construed to affect his innocence nor guilt, nor be referred to by any attorney in the case. If the statute forbids comment upon what he might have sworn to when he elects not to go on the stand, why does it not, in its essence and spirit, when he elects to testify, also forbid comment upon what he might have sworn to while on the stand and which he elected, as under the statute he had a right to do, not to testify about? . . . If it is reversible error to inquire on cross-examination about a matter not referred to in the examination in chief, why is it not reversible error if the prosecuting attorney comment upon a matter concerning which if the defendant had been required to testify the

In order to bring the matter before the appellate court for review a defendant should make his objection to the remarks of the prosecuting attorney at the time of their utterance.¹ The objection comes too late after verdict, if the court can see that under all the circumstances a proper verdict has been rendered.² In jurisdictions where the mischief may be cured by the interposition of the trial court, the proper course to pursue is to make prompt objection to the obnoxious comments and ask the judge to instruct the jury not to consider them to the prejudice of the defendant.³

3. Effect of Death or Disability of Opposing Party—*a*. IN GENERAL.—While the common-law disability of parties and persons interested in the event of the suit has been almost entirely swept away by modern statutes, yet it has been considered wise to except from their operation parties to contracts and causes of action

judgment would be reversed? Any other ruling or construction of the statute would necessarily have the effect of compelling a defendant in a criminal case either to elect not to go on the stand at all as a witness, or, if he elected to go on the stand, to compel him to testify fully in regard to all matters connected with the charge, even though he might thereby criminate himself."

In *State v. Elmer*, 115 Mo. 404, the doctrine of *State v. Graves*, 95 Mo. 510, was restated and followed, and *State v. Jackson*, 95 Mo. 623; *State v. Anderson*, 89 Mo. 312, so far as they decide to the contrary, were overruled. The rule, however, does not prevent the prosecuting attorney from commenting upon the testimony actually given by the defendant and drawing all proper inferences therefrom. *State v. Walker*, 98 Mo. 95.

1. *Com. v. Worcester*, 141 Mass. 58; *Price v. Com.*, 77 Va. 393.

In *Martin v. State*, 79 Wis. 176, the court, though admitting that the remarks made by the prosecuting attorney were grossly improper and erroneous, said: "There is nothing in the bill of exceptions, or even in the affidavit of the counsel for the defendant upon which he asked to set aside the verdict and for a new trial, which shows that such remarks were objected to by the defendant, or that the attention of the court was drawn to the fact that such remarks were being made to the jury, or any ruling of the court in regard to the propriety or impropriety of the same. Upon this state of the record, the question as to the propriety of the attorney's

remarks is in no way in the case for the consideration of this court."

In *State v. Ward*, 61 Vt. 180, the court said: "Exception was taken to a part of the closing argument made by Mr. Ide for the prosecution. No objection was made to it at the time of its delivery, and we think, judging from the length and nature of the statements claimed to have been illegal and the well-known vigilant character of the respondent's counsel, that none was intended. Where counsel sit still during an argument which they claim is illegal and make no objection thereto, an objection afterwards is too late. The exception is waived by their silence. This court sits in revision of errors made in the ruling, and the refusal to rule, of the court below. Upon this question, the court made no ruling, did not refuse to make one, and therefore there is nothing for us to revise."

2. *Price v. Com.*, 77 Va. 395.

3. In *Com. v. Worcester*, 141 Mass. 60, the defendant's counsel objected to the remarks of the prosecuting attorney, and at the close of the argument requested the judge to take the case from the jury on account of the objectionable remarks, which request was refused. The supreme judicial court said: "The court was not required, as matter of law, to take the case from the jury because the district attorney, in closing for the government, commented upon the fact that the defendant did not testify as a witness. If any objectionable comments of this character were made, the defendant's remedy was to object to them at the time and to ask the judge to instruct the jury

where other parties thereto have since died or have become incompetent to testify. These provisions, being merely exceptions to enabling statutes, create no new disabilities and render no one incompetent to testify as to matters concerning which he would have been competent before their enactment.¹ The purpose of these exceptions is to protect the estates of deceased and insane persons from the apprehended danger of permitting the surviving or sane party to a contract or transaction to testify in respect to it after the lips of the other party have been closed by death or insanity.²

To state the rule in general terms, a party to an action who is interested in the event thereof may not, on his own motion, testify to personal transactions or conversations with a person since deceased to whose interest the opposing party has succeeded.³

that they should not be considered by them to his prejudice. The judge was not required to treat the whole trial as a nullity by taking the case from the jury."

1. *Page v. Whidden*, 59 N. H. 507; *Moore v. Taylor*, 44 N. H. 374; *Clements v. Marston*, 52 N. H. 31; *Shober v. Jack*, 3 Mont. 351; *Reynolds v. Callaway*, 31 Gratt. (Va.) 436; *Angell v. Hester*, 64 Mo. 142; *Fuchs v. Fuchs*, 48 Mo. App. 18; *Sheetz v. Hanbest*, 81 Pa. St. 100; *Pratt v. Patterson*, 81 Pa. St. 114; *Packer v. Noble*, 103 Pa. St. 196; *Krumrine v. Grenoble* (Pa. 1895), 30 Atl. Rep. 824; *Keech v. Cowles*, 34 Iowa 259; *Rinehart v. Buckingham*, 34 Iowa 409; *Goddard v. Leffingwell*, 40 Iowa 249; *Dudley v. Steele*, 71 Ala. 423; *Mobile Sav. Bank v. McDonnell*, 87 Ala. 740; *King v. Worthington*, 73 Ill. 164.

Thus, in *New Hampshire*, it is held that the statute does not abrogate the former rule that in equity the surviving party may testify to matters of account in the discretion of the master, subject to revision by the chancellor. *Peirce v. Burroughs*, 59 N. H. 512; *Snell v. Parsons*, 59 N. H. 521.

The surviving party may be examined as to the facts required to be shown preliminary to his introduction of a book account against the estate of a deceased person. *Dysart v. Furrow* (Iowa, 1894), 57 N. W. Rep. 644; *Cargill v. Atwood* (R. I. 1893), 27 Atl. Rep. 214; *Wyman v. Wilcox*, 66 Vt. 26.

2. *Durham v. Shannon*, 116 Ind. 405; *Chapman v. Dougherty*, 87 Mo. 617; 56 Am. Rep. 469; *Horner v. Frazier*, 65 Md. 2; *Wright v. Gilbert*, 51 Md. 157; *Robertson v. Mowell*, 66 Md. 530;

Chamberlin v. Chamberlin, 4 Allen (Mass.) 184; *Brown v. Brightman*, 11 Allen (Mass.) 226; *Ela v. Edwards*, 97 Mass. 319; *Karns v. Fanner*, 66 Pa. St. 297; *Hess v. Gourley*, 89 Pa. St. 195; *Austin v. Bean* (Ala. 1894), 16 So. Rep. 41; *Edwards v. Rives* (Fla. 1895), 17 So. Rep. 416; *Woolverton v. Van Syckel* (N. J. 1895), 31 Atl. Rep. 603; *McCartin v. Traphagen*, 43 N. J. Eq. 328; 45 N. J. Eq. 265.

A man over seventy years old who, through softening of the brain, has so far lost his mental faculties as to be entirely incapable of giving testimony in court, or any coherent statement of past events, is insane within the meaning of the statute. *Whitney v. Traynor*, 74 Wis. 289.

But a mere excitable condition of mind which renders a party's appearance in court inadvisable, is not insanity within the meaning of the statute. *McCormick v. Hickey*, 24 Mo. App. 362.

3. *Marcy v. Howard*, 91 Ala. 133; *Glover v. Gentry* (Ala. 1894), 16 So. Rep. 38; *Johnson v. Champion*, 88 Ga. 527; *Harrison v. Perry*, 86 Ga. 813; *McBride v. McBride*, 82 Ga. 714; *Frizzell v. Reed*, 77 Ga. 724; *Medlock v. Miller* (Ga. 1894), 19 S. E. Rep. 978; *Rakes v. Brown*, 34 Neb. 304; *Ripley v. Seligman*, 88 Mich. 177; *Chapman v. Smoot*, 66 Md. 8; *Ley v. Edwards*, 21 Fla. 333; *Crothers v. Crothers*, 149 Pa. St. 201; *Morrison v. Morrison*, 140 Ill. 560; *Murray v. Smith*, 42 Ill. App. 548; *Johnston v. Johnston*, 138 Ill. 385; *Stewart v. Fellows*, 128 Ill. 480; *Reed v. Reed*, 30 Ind. 313; *Abshire v. Williams*, 76 Ind. 97; *Charles v. Malott*, 65 Ind. 184; *Luetchford v. Lord*, 132 N. Y. 465; *Hard v. Ashley* (Supreme

b. NATURE OF DISQUALIFYING INTEREST.—Persons who are neither parties to the action nor interested in the event thereof, and through whom neither party claims, are competent to testify as to personal transactions and conversations with a person since deceased whose representative is a party to the record.¹

Ct.), 18 N. Y. Supp. 413; *Mason v. Prendergast*, 120 N. Y. 536; *Doolittle v. Stone* (Supreme Ct.), 8 N. Y. Supp. 605; *Hall v. Roberts*, 63 Hun (N. Y.) 473; *Barbee v. Barbee*, 108 N. Car. 581; *Buie v. Scott*, 107 N. Car. 181; *Rathvon v. White*, 16 Colo. 41; *Clark v. Clough*, 65 N. H. 43; *Berry v. McArdle*, 62 N. H. 354; *Cochran v. Langmaid*, 60 N. H. 571; *Richards v. Munro*, 30 S. Car. 284; *Blakely v. Frazier*, 11 S. Car. 122; *Harper v. McVeigh*, 82 Va. 751; *Ellis v. Harris*, 32 Gratt. (Va.) 684; *Rushing v. Rushing*, 52 Miss. 329; *Jacks v. Bridewell*, 51 Miss. 881; *Rothschild v. Hatch*, 54 Miss. 554; *Green v. Mizelle*, 54 Miss. 220; *Blair v. Ellsworth*, 55 Vt. 415; *Walker v. Taylor*, 43 Vt. 612; *McMullen v. Ritchie*, 64 Fed. Rep. 253; *Gurley v. Clarkson* (Tex. Civ. App. 1895), 30 S. W. Rep. 360.

The deposition of a party will not be received if the opposing party is dead at the time it is offered, although he was living when it was taken. *Zane v. Fink*, 18 W. Va. 603; *Hewlett v. George*, 68 Miss. 703; *Park v. Lock*, 48 Ark. 133.

Neither will his testimony at a former trial of the cause during the lifetime of the other party be received, even if an offer is made to admit the evidence given by the deceased at said former trial. *Barker v. Hebbard*, 81 Mich. 267.

The death of one of the original parties to an action closes the mouth of the other after the action is revived. *Osborn v. O'Reilly*, 42 N. J. Eq. 467; *Walker v. Hill*, 21 N. J. Eq. 191; *Oram v. Rothermel*, 98 Pa. St. 300.

In *New Hampshire*, if one party is an executor or an administrator, the court may, in its discretion, permit the other party to testify, where it is made clearly to appear that injustice would otherwise be done, and the proposed testimony does not relate to matters which were within the knowledge of the deceased. *Stearns v. Wright*, 51 N. H. 600; *Harvey v. Hilliard*, 47 N. H. 551; *Fosgate v. Thompson*, 54 N. H. 455; *Hoit v. Russell*, 56 N. H. 559; *Burns v. Madigan*, 60 N. H. 197; *Weich*

v. Adams, 63 N. H. 348; 56 Am. Rep. 521; *Berry v. McArdle*, 62 N. H. 354.

1. *Espalla v. Richard*, 94 Ala. 159; *Huckaba v. Abbott*, 87 Ala. 409; *Mason v. Prendergast*, 120 N. Y. 536; *Connelly v. O'Connor*, 117 N. Y. 91; *Rank v. Grote*, 110 N. Y. 12; *Harrington v. Samples*, 36 Minn. 200; *Ford v. O'Donnell*, 40 Mo. App. 51; *Scott v. Harris*, 127 Ind. 520; *Works v. State*, 120 Ind. 119; *Wilson v. Wilson*, 80 Mich. 472; *Krause v. U. S. Equitable L. Assur. Soc.* (Mich. 1895), 63 N. W. Rep. 440; *Waterman Real Estate Exchange v. Stephens*, 71 Mich. 104; *Wilson v. Russell*, 61 N. H. 354; *Wood v. Crawford*, 75 Ga. 733; *Brown v. Cave*, 23 S. Car. 251; *Swartz v. Chickering*, 58 Md. 290; *Allen v. Gilkey*, 86 N. Car. 64; *Cade v. Davis*, 96 N. Car. 139; *Watts v. Warren*, 108 N. Car. 514; *Crothers v. Crothers*, 149 Pa. St. 201; *Curtis v. Hoxie*, 88 Wis. 41. See also *Jones v. Emory* (N. Car. 1894), 20 S. E. Rep. 206; *Jones v. Carrollton Bank* (Miss. 1894), 16 So. Rep. 344.

Thus a grantor of land, who took a lease back from the grantee, and subsequently assigned all his interest therein and was released from liability to pay rent, was held competent for his assignee in an action to have the transaction adjudged a mortgage, after the death of the grantee. *Grand United Order, etc. v. Merklin*, 65 Md. 579.

In an action by a mortgagee against the widow of the deceased mortgagor, payment of the mortgage debt being pleaded, it was held that the plaintiff's son, who was in his employment as a clerk when the mortgage was given, and held himself out to the public as a partner, though he had no interest in the business, might testify to transactions with the deceased mortgagor in reference to the mortgage debt, not being within the statutory disqualification either as a party or as an interested person. *Huckaba v. Abbott*, 87 Ala. 409.

In *Connelly v. O'Connor*, 117 N. Y. 93, the court, speaking of section 829 of the Code of Civil Procedure, said: "In construing that section it has been held that the test of interest, where the witness is not a party, is that the witness

And interested parties are competent when they are called to testify against interest,¹ or when their interest is not opposed to that of the representative of the deceased person concerning whose doings or sayings they are called to testify.² To exclude

will either gain or lose by the direct legal operation of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent." *Citing* Hobart v. Hobart, 62 N. Y. 81; Wallace v. Straus, 113 N. Y. 238. *Compare* Williams v. Johnston, 82 N. Car. 288.

Where a husband in his own right sues the representative of a deceased person for the wages of his wife, she is competent to prove the contract of hire, since the husband is merely asserting his common-law right in which the wife has personally no beneficial interest. *Porter v. Dunn*, 131 N. Y. 315.

The payee of a check is competent to prove that the maker, since deceased, made it payable to the witness, in order to enable him to collect the money and pay it to a third person to whom the maker intended to present it as a gift. *Taylor's Estate*, 154 Pa. St. 183.

On a bill by the devisee of a deceased testator, to enforce specific performance of a contract to convey the land devised, against the husband and infant child of the other party to the contract, after her death, a child of the testator, who is not entitled to the land under the will, is a competent witness for the complainant to prove the contract under which relief is sought. *McClure v. Ottrich*, 118 Ill. 320.

1. *Shell v. Boyd*, 32 S. Car. 359; *Lasseter v. Simpson*, 78 Ga. 61; *Harrison v. Perry*, 86 Ga. 813; *Parcell v. McReynolds*, 71 Iowa 623; *Burkholder v. Ludlam*, 30 Gratt. (Va.) 255; 32 Am. Rep. 668; *Bowers v. Schuler*, 54 Minn. 99; *Tredwell v. Graham*, 88 N. Car. 208; *Roberts v. Preston*, 100 N. Car. 243; *Crowe v. Colbeth*, 63 Wis. 643; *Beall v. Shaul*, 18 W. Va. 262; *Crothers v. Crothers* (W. Va. 1895), 20 S. E. Rep. 927.

Under section 399 of the *New York Code of Procedure*, it was held otherwise by the supreme court of that state. See *Gifford v. Sackett*, 15 Hun (N. Y.) 79, *citing* *LeClare v. Stewart*, 8 Hun (N. Y.) 127; *Howell v. Taylor*, 11 Hun (N. Y.) 214; *Cornell v. Cornell*, 12 Hun (N. Y.) 312.

But under section 829 of the *Code of Civil Procedure*, the law is as stated in the text. *Pursell v. Fry*, 19 Hun (N. Y.) 595; *Brown v. Brown*, 29 Hun (N. Y.) 498; *Davis v. Gallagher*, 55 Hun (N. Y.) 593; *Carpenter v. Soule*, 88 N. Y. 251; 42 Am. Rep. 248.

Thus a residuary legatee is competent to prove declarations of the testator tending to sustain a gift made by him. *Carpenter v. Soule*, 88 N. Y. 251; 42 Am. Rep. 248.

But it has been held that he is not competent, though called to testify against interest, if his testimony will injuriously affect the rights of other parties to the action. *Weinstein v. Patrick*, 75 N. Car. 344.

In *New Ebenezer Assoc. v. Gress Lumber Co.*, 89 Ga. 125, it was held that one sued jointly with the representative of a deceased person was competent as a witness for the plaintiff, though he might have an interest in charging the personal representative.

2. *Hoyt v. Davis*, 30 Mo. App. 309; *VanHorne v. Clark*, 126 Pa. St. 411; *Palmer v. Farrell*, 129 Pa. St. 172; *Walling v. Newton*, 59 Vt. 684; *Baker v. Kellogg*, 29 Ohio St. 663; *White v. Ross*, 147 Ill. 427.

To exclude the witness, it should be made to appear that there is a direct immediate conflict between his rights and those of the estate of the deceased person with whom it is proposed to prove a transaction. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566; *Hill v. Helton*, 80 Ala. 532; *Campbell v. Campbell*, 130 Ill. 466; *Snell v. Fewell*, 64 Miss. 655. See also *Dismukes v. Tolson*, 67 Ala. 386; *Howle v. Edwards*, 97 Ala. 654; *Gerz v. Weber*, 151 Pa. St. 396; *In re Brose's Estate*, 155 Pa. St. 619; *Bowers v. Schuler*, 54 Minn. 99.

Thus, where a life estate in land was conveyed with remainder over in fee to certain of the life tenant's grandchildren by name, and a bill to establish a resulting trust was brought after the death of the life tenant by one who claimed to have advanced the purchase-money, it was held that the plaintiff might testify to communications between the deceased and himself,

the witness, it must appear that his testimony will tend to benefit him pecuniarily,¹ and his interest must be present, certain, and fixed.² It is not sufficient that he has an interest in the question or thing in controversy; to disqualify him, he must have an interest in the event of the action or proceeding,³ or the record

because the defendants claimed under the deed and not as heirs of the deceased. *Bibb v. Hunter*, 79 Ala. 351.

When his interest is opposed to that of the estate, he will be excluded, although the representative of the deceased is a party on the same side of the suit with the witness. *Apperson v. Gogin*, 3 Ill. App. 48.

Thus, when he is a defendant in form, but his interests are identified with those of the plaintiff, he will not be allowed to testify against defendants entitled to the protection of the statute against the plaintiff's testimony. *Weinstein v. Patrick*, 75 N. Car. 346; *Mason v. McCormick*, 75 N. Car. 263; 80 N. Car. 244; *Gulley v. Macy*, 84 N. Car. 434; *Owens v. Phelps*, 92 N. Car. 231; *Corderey v. Hughes*, 6 Ill. App. 401; *McCartin v. Traphagen*, 43 N. J. Eq. 323; *Trabue v. Turner*, 10 Heisk. (Tenn.) 447; *Aymett v. Butler*, 8 Lea (Tenn.) 453; *Hill v. McLean*, 10 Lea (Tenn.) 115; *Hubbell v. Hubbell*, 22 Ohio St. 208.

A defendant is competent for the administration of one who, while living, was his co-defendant. *Sublett v. Hodges*, 88 Ala. 491.

A defendant in execution is a competent witness for an intervenor, in a contest between the latter and the personal representative of the deceased plaintiff in execution; his interest being balanced. *Smith v. Rishel*, 164 Pa. St. 181.

1. *Apperson v. Exchange Bank* (Ky. 1888), 10 S. W. Rep. 801; *Hill v. Helton*, 80 Ala. 528; *Robinson v. Robinson*, 20 S. Car. 572; *Dixon v. McGraw*, 151 Pa. St. 98; *Marvin v. Dutcher*, 26 Minn. 391; *Darwin v. Keigher*, 45 Minn. 64; *McClure v. Otrich*, 118 Ill. 320.

If the testimony of the witness does not tend to promote his interest, he is competent whether he is a party or not. *Moffatt v. Hardin*, 22 S. Car. 25.

Where the principal obligor in a promissory note had suffered judgment by default, it was held that he was competent to testify to personal transactions with one of the sureties, who had died, as the witness had no

further interest in the event, his liability being fixed. *Hoskinson v. Miller*, 104 Pa. St. 175; *Peebles v. Stanley*, 77 N. Car. 243.

2. *Matter of Hanley*, 44 Hun (N. Y.) 559; *Hobart v. Hobart*, 62 N. Y. 80; *Wallace v. Straus*, 113 N. Y. 242; *Nearpass v. Gilman*, 104 N. Y. 507; *Connelly v. O'Connor*, 117 N. Y. 93; *Eisenlord v. Clum*, 126 N. Y. 558; *Williams v. Johnston*, 82 N. Car. 288. *Compare Payne v. Kerr* (Supreme Ct.), 21 N. Y. Supp. 880; *Wormley v. Hamburg*, 40 Iowa 22; *Zerbe v. Reigart*, 42 Iowa 229; *Shaeffer v. Geary*, 3 Pa. Dist. Rep. 418. *In re Spotts' Estate*, 156 Pa. St. 281; *Blount v. Beall* (Ga. 1894), 22 S. E. Rep. 52.

The fact that the husband of a devisee will be tenant by the curtesy of the land devised, in case his wife dies intestate before his death, does not disqualify him on the ground of interest; such interest is too remote and contingent. *Bowen v. Sweeney* (Supreme Ct.), 17 N. Y. Supp. 752; *Matter of Clark's Will*, 40 Hun (N. Y.) 233; *Cooper v. Monroe*, 77 Hun (N. Y.) 1.

But it has been held that the rule is otherwise in respect to the wife's inchoate right of dower, of which she cannot be divested by her husband, her interest being deemed certain as well as vested. *Steele v. Ward*, 30 Hun (N. Y.) 555; *Matter of Clark's Will*, 40 Hun (N. Y.) 237; although it was held in *Scherrer v. Kaufman*, 1 Dem. (N. Y.) 39, that this interest was not sufficient to disqualify the wife of a contestant of a will.

3. *Mull v. Martin*, 85 N. Car. 406; *Mason v. McCormick*, 75 N. Car. 263; *Bunn v. Todd*, 107 N. Car. 266; *Ducker v. Whitson*, 112 N. Car. 44; *Twitty v. Houser*, 7 S. Car. 153; *Markham v. Carothers*, 47 Tex. 21; *Dickson v. McGraw*, 151 Pa. St. 98; *Gerz v. Weber*, 151 Pa. St. 396; *Smith v. Hay*, 152 Pa. St. 377; *Tarr v. Robinson*, 158 Pa. St. 64; *Eisenlord v. Clum*, 126 N. Y. 552.

Where one heir at law brings an action to have a deed made by his ancestor set aside as to him, on account of the mental incapacity of the grantor,

must be competent evidence for or against him in another action or proceeding.¹

A party who has no interest in the transaction proposed to be proved is competent to prove it;² and a witness whose interest is balanced between the parties is competent, notwithstanding the death of one of them.³ But if his interest is opposed, even in a slight degree, to that of the party entitled to the protection of the statute, his testimony should be excluded.⁴ And it has been

other heirs, who are not parties, are competent generally, because, if the plaintiff succeeds, the deed will stand as to them, and their interest is only in the question and not in the event of the suit. *Hobart v. Hobart*, 62 N. Y. 80.

Where the plaintiff's father had deeded him certain real estate, and delivered the deed in escrow to be delivered to the plaintiff after the grantor's death, the grantee brought an action, after the death of the grantor, to compel the delivery of the deed to him, and it was held that the plaintiff's brother, who was similarly interested in another deed, was competent for the plaintiff to prove declarations of the grantor. *Lyon v. Ricker*, 141 N. Y. 225.

1. *Perine v. Grand Lodge*, 48 Minn. 82; *Marvin v. Dutcher*, 26 Minn. 391; *Bunn v. Todd*, 107 N. Car. 266; *Nearpass v. Gilman*, 104 N. Y. 507; *Wallace v. Straus*, 113 N. Y. 242; *Hobart v. Hobart*, 62 N. Y. 81; *Connelly v. O'Connor*, 117 N. Y. 93; *Eisenlord v. Clum*, 126 N. Y. 558.

Where, in a suit to compel an executor to deliver a deed executed by his testator, a decree for the plaintiff would establish the validity of a lease of the premises, the lessee is disqualified by reason of interest. *Miller v. Meers* (Ill. 1895), 40 N. E. Rep. 577.

2. *Hooper v. Howell*, 52 Ga. 315; *Williams v. Davis*, 69 Pa. St. 21; *Murray v. Fox*, 104 N. Y. 382; *Robertson v. Mowell*, 66 Md. 530; *Townsend v. Rackham*, 68 Hun (N. Y.) 235.

3. *Baker v. Updike* (Ill. 1895), 39 N. E. Rep. 587. Thus, in a contest as to which of two parties was the grantee in a lost deed, the grantor, standing indifferent between them, is competent to prove that a person dead at the time of the trial was the grantee. *Gregg v. Hill*, 80 N. Car. 255.

The sureties in a note, who are distributees of the deceased principal's estate, are competent to prove the exe-

cution of the note. *Robinson v. Robinson*, 20 S. Car. 567.

A witness who will be liable to the plaintiff if the action fails, and will be equally liable to the defendant if it succeeds, is competent to testify in behalf of either party. *Hidell v. Dwinell*, 89 Ga. 532; *Allen v. Davis*, 65 Ga. 179. See also *Smith v. Rishel*, 164 Pa. St. 181; *In re Kuhns' Estate* (Pa. 1894), 30 Atl. Rep. 215.

4. Thus, a surety on the bond of a non-resident executor has such an interest in the account of his principal as will disqualify him to testify to personal transactions or conversations with the testator. *Miller v. Montgomery*, 78 N. Y. 282.

An assignor of a lease, remaining liable on his covenants, is not competent in an action by the executor of his lessor against his assignee for a breach of the covenants. *Whitney v. Shippen*, 89 Pa. St. 22.

In *Williams v. Johnston*, 82 N. Car. 288, it appeared that a father deeded land to his son, who in turn deeded it to the plaintiff, who was to pay the son a certain amount therefor in case he succeeded in an action to recover possession of the land; the defendant claimed under a purchaser at an execution sale against the father, who was dead at the time of the trial. It was held that the plaintiff's grantor was not competent for the plaintiff.

Costs.—Where the opposing party is an executor or administrator, a party liable for costs only is incompetent. *Ransom v. Schmela*, 13 Neb. 73; *Mason v. McCormick*, 75 N. Car. 263; *Poucher v. Scott*, 33 Hun (N. Y.) 230; *affirmed* 98 N. Y. 422.

But a contingent liability for costs as a nominal plaintiff is not such a claim against an estate as will exclude the witness. *Hedges v. Aydelott*, 46 Miss. 99.

In an action by an administrator against a sheriff, for selling the property of the estate under an execution against another person, a surety on the sheriff's

held that his testimony should be excluded if he ever had such an interest, even though he may be disinterested at the time of the trial.¹

To exclude transactions and declarations of a deceased person, those who have succeeded to his rights must also be interested in the event of the suit.²

c. PERSONS EXCLUDED—(1) Parties to the Issue.—The rule in the *United States* courts is that "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."³ This section excludes only parties to the action.⁴

indemnity bond is not a competent witness for him. *Kyte v. Foran* (Pa. 1895), 31 Atl. Rep. 575.

An attorney whose fee is contingent upon success in the suit is not competent for his client when the opposing party is an executor or administrator. *Tretheway v. Carey* (Minn. 1895), 62 N. W. Rep. 815.

1. *Mason v. McCormick*, 80 N. Car. 244; *Peebles v. Stanley*, 77 N. Car. 245.

This rule is now limited to persons through or under whom parties to the action, or persons interested in the event thereof, derive their title or interest. *Bunn v. Todd*, 107 N. Car. 266.

A discharge in bankruptcy will not render competent one who would otherwise be incompetent under the rule. *Oatis v. Harrison*, 60 Ga. 535.

Suffering judgment to go by default will not render a defendant competent for his co-defendants. *Good v. Martin*, 2 Colo. 218.

An original party to a contract cannot, the other party being dead, render himself competent by transferring his interest to another. *Drew v. Simmons*, 58 Ala. 463.

But in *Rothschild v. Hatch*, 54 Miss. 555, it was held that a witness who had before suit transferred his interest by deed of gift, the action being brought by the grantee, was competent.

2. *Hendricks v. Kelly*, 64 Ala. 388; *Butler v. Jones*, 80 Ala. 436; *Brown v. Carey* (Pa. 1892), 23 Atl. Rep. 1103; *Firemen's Ins. Co. v. Peck*, 126 Ill. 493; *Hankey v. Downey*, 10 Ind. App. 500; *Gunn v. Pettygrew*, 93 Ga. 327; *Latourette v. McKeon* (Mich. 1895), 62 N. W. Rep. 153.

That the estate may be affected in

another suit is not sufficient. *Fennell v. McGowan*, 58 Miss. 261; *Leffler v. Watson* (Ind. App. 1895), 40 N. E. Rep. 1107.

A widow who brings a suit to set aside a conveyance of her own land, made during coverture, is competent to prove that the deed was executed under duress of threats from her husband, since deceased. *Washington City First Nat. Bank v. Eccleston*, 48 Md. 145.

Where the estate of a deceased person will be liable to the defendant for the amount recovered by the plaintiff, plaintiff is not competent to testify as to a conversation with the deceased concerning the matter in controversy. *Jackson v. Clopton*, 66 Ala. 34.

In a contest among the creditors of an estate, as to the priority of their respective claims, the parties thereto may testify, as the rights of the estate are not involved in the issues. *Gordon v. Kennedy*, 36 Iowa 167.

3. Rev. Stats. of *United States*, § 858.

Under this section an "opposite party" is construed to be one against whose interests the evidence is sought to be used. And an *ex parte* order obtained by a complainant before process issued for his own examination will not qualify him as a witness on the ground that he is required by the court to testify. *Eslava v. Mazange*, 1 Woods (U. S.) 623.

This section applies to the courts of the *District of Columbia* as fully as to the courts of the *United States*. *Page v. Burnstine*, 102 U. S. 664; *Meguire v. Corwine*, 3 McArthur (D. C.) 81.

4. *Potter v. Chicago Third Nat. Bank*, 102 U. S. 163; *Goodwin v. Fox*, 129 U. S. 631; *Berry v. Sawyer*, 19 Fed. Rep. 286.

And the same is true of similar statutes in a number of the states.¹

In other jurisdictions, the term "party to the action" is construed to include a party to the issue on trial or the real party in interest, whether he is a party of record or not.² In a few cases, it has been held that parties to the record should be excluded

And it is then confined to proceedings in which a judgment or decree may be rendered. *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275. See *Briggs v. Spaulding*, 141 U. S. 153.

An administratrix who has resigned after commencing an action is a competent witness for her successor, who has been substituted as plaintiff, to prove a transaction with, or a statement by, the defendant's intestate. *Snyder v. Fiedler*, 139 U. S. 478.

1. *McRae v. Holcomb*, 46 Ark. 306; *Haskell v. Hervey*, 74 Me. 192; *Rawson v. Knight*, 73 Me. 340; *Alden v. Goddard*, 73 Me. 345.

The maker of a note for the accommodation of the deceased indorser is not incompetent in an action thereon against the administrator of the latter, to which the maker is not a party. *Morris v. Birmingham Nat. Bank*, 93 Ala. 511.

The *Tennessee* statute is said to be strictly construed, being applied only to parties to the action and not to persons interested. *Grange Warehouse Assoc. v. Owen*, 86 Tenn. 355; *Fuqua v. Dinwiddie*, 6 Lea (Tenn.) 645.

But neither party to the record may testify as to transactions or communications with the deceased. *McDonald v. Allen*, 8 Baxt. (Tenn.) 446; *Taylor v. Mayhew*, 11 Heisk. (Tenn.) 596.

In a suit by a creditor against the executor of an attorney, to recover money collected for him, the debtor is competent to prove that he paid the money to the attorney. *McBrien v. Martin*, 87 Tenn. 13.

The surviving party is not excluded where it is sought to charge the defendant as executor *de son tort*. *Alexander v. Kelso*, 1 Baxt. (Tenn.) 5.

The statute does not exclude the surviving party's vendor of personal property; he not being a party to the action. *Rielly v. English*, 9 Lea (Tenn.) 16.

Upon *scire facias* to revive a judgment against the stayor, the original judgment debtor, who is not a party to the proceedings, is competent to prove

the judgment paid. *Kelton v. Jacobs*, 5 Baxt. (Tenn.) 574.

An executor is a competent witness except as to transactions with, or statements made by, the testator. *Key v. Holloway*, 7 Baxt. (Tenn.) 575.

Where an administrator sued two defendants, but discontinued as to one of them on account of his insolvency, it was held that the latter was a competent witness for the other defendant. *Segar v. Lufkin*, 77 Me. 142.

One jointly bound with the decedent may testify against the latter's representative, in an action to which the witness is not a party, although the effect of his testimony is to throw the whole liability on the estate. *Gilmer v. Baker*, 24 W. Va. 72.

In an action affecting the title to land, one claiming under a deed from a defendant which was not recorded when the notice of *lis pendens* was filed, being bound by the judgment, is a party within the meaning of the statute and is incompetent as to personal transactions and communications with a deceased person under whom the plaintiff claims title. *Wright v. Jackson*, 59 Wis. 569.

In *California*, the exception is strictly construed, and, as the code provides that parties in whose favor an action is prosecuted against an estate may not be witnesses in their own behalf, it is held not to exclude the testimony of a person against whom an action is prosecuted by the personal representative. *Sedgwick v. Sedgwick*, 52 Cal. 336; *McPherson v. Weston*, 85 Cal. 97; *Moore v. Schofield*, 96 Cal. 488.

One who is interested in the event and is a necessary party should be excluded from the witness box, though he is not joined as a party. *Alexander v. Hoffman*, 70 Ill. 114.

In *Texas*, mere interest in the event of the suit does not disqualify one who is not a party to the issue on trial. *Howard v. Galbraith* (Tex. Civ. App. 1894), 30 S. W. Rep. 689.

2. *Morris v. Grubb*, 30 Gratt. (Va.) 286; *Drew v. Simmons*, 58 Ala. 463;

even though they have no interest in the event of the suit,¹ but this does not appear to be within the spirit and reason of such statutes, and it would seem that only parties to the issue and persons interested in the event of the action or proceeding should be excluded.²

(2) *Parties to Contracts*—(a) *In General*.—Where one party to a contract or transaction, out of which the cause of action arose, is dead and his rights have passed to another, who represents his interests in the matter in controversy, a surviving party to such contract or transaction may not, on his own motion, testify to

Messimer v. McCray, 113 Mo. 382; *Wootters v. Hale*, 83 Tex. 564; *Bowers v. Schuler*, 54 Minn. 99; *Campbell Banking Co. v. Cole* (Iowa, 1893), 56 N. W. Rep. 441.

Thus a *cestui que trust* for whose benefit an action is brought in the name of the trustee, is excluded. *Gabbett v. Sparks*, 60 Ga. 582.

Introvers by an administrator to recover the value of notes alleged to have been the property of the intestate, it was held that the maker, though not a party to the action, was incompetent for the defendant, where his liability over for certain payments of interest made since the alleged conversion of the notes, depended on the event of the action. *Morrison First Nat. Bank v. Bressler*, 38 Ill. App. 499.

And if the real party in interest, for whose benefit an action is brought in the name of another, be dead at the time of the trial, the opposing party may not testify as to transactions with him. *Boynton v. Phelps*, 52 Ill. 210.

1. *Williams v. Barrett*, 52 Iowa 637; *Patterson v. Martin*, 33 W. Va. 494; *Blood v. Fairbanks*, 50 Cal. 420; *Guild v. Warne*, 149 Ill. 105.

In *Illinois*, it is held that the statute does not abolish the rule of chancery courts making a defendant competent to testify on behalf of a co-defendant on any question in the decision of which he has no interest, even if the adverse party does sue as the personal representative of a deceased person. *White v. Ross*, 147 Ill. 427.

2. In *Bowers v. Schuler*, 54 Minn. 103, *Mitchell, J.*, said: "The principal point is whether the term 'any party to an action' is meant to include everyone who is a party to the record, or only those who are parties to the issue to which the testimony relates. In view of the last clause of the section, limiting the incompetency of the witness to

matters relative to the issue between the parties, we are of opinion that the statute refers only to those who are parties to the issue. The word 'parties,' as there used, we think, evidently refers to the party prohibited from testifying, and the party against whom the testimony would operate if admitted. This construction is in harmony with the spirit and purpose of the statute, for no good reason can be suggested for excluding the testimony of one who, although a party to the action for some other purpose, is not a party to or interested in the issue to which his testimony relates." To the same effect are *Upton v. Adams*, 27 Ind. 432; *Starret v. Burkhalter*, 86 Ind. 439; *Spencer v. Robbins*, 106 Ind. 580; *Scherer v. Ingerman*, 110 Ind. 443.

One who acts as next friend to a party under disability, is not such a party to the action as is excluded under this rule. *Kilpatrick v. Strozier*, 67 Ga. 247; *Murphy v. Murphy*, 24 Mo. 526; *Trahern v. Colburn*, 63 Md. 99.

But it has been held that a primary liability of the next friend for the costs of the action renders him incompetent. *Mason v. McCormick*, 75 N. Car. 263.

Persons interested in the event of the action or proceeding should be excluded, although not parties to the action. *Earle v. Harrison*, 18 S. Car. 329.

Thus, the death of an original party to a contract excludes the other party's testimony when he is directly interested, even though he is not a party to the action. *Thiemann v. Meier*, 25 Mo. App. 306; *Tunstall v. Withers*, 86 Va. 892.

And a person from whom the plaintiff has acquired his cause of action against the estate of the testator, is not competent for the plaintiff respecting transactions with the deceased. *Shields v. Smith*, 104 N. Car. 57; *Carey v.*

matters relating thereto which occurred in the lifetime of the adverse party, whose lips are closed in death.¹

Carey, 104 N. Car. 171; Sublett v. Hodges, 88 Ala. 491.

1. *Karns v. Tanner*, 66 Pa. St. 305; *Murray v. New York, etc., R. Co.*, 103 Pa. St. 37; *Carey v. Fairchild* (Pa. 1887), 9 Atl. Rep. 328; *Sutherland v. Ross*, 160 Pa. St. 29; *Pattison v. Armstrong*, 74 Pa. St. 476; *Warren v. Steer*, 112 Pa. St. 634; *In re Irwin's Estate*, 160 Pa. St. 82; *Arthurs v. King*, 84 Pa. St. 525; *Taylor v. Duesterberg*, 109 Ind. 165; *Scherer v. Ingerman*, 110 Ind. 442; *Hanlon v. Doherty*, 199 Ind. 37; *Sanborn v. Lang*, 41 Md. 107; *Robertson v. Mowell*, 66 Md. 530; *Wright v. Gilbert*, 51 Md. 147; *Amonett v. Montague*, 63 Mo. 201; *Capman v. Dougherty*, 87 Mo. 617; *Emmel v. Hayes*, 102 Mo. 186; *Anderson v. Hance*, 49 Mo. 159; *Granger v. Bassett*, 98 Mass. 462; *Downs v. Belden*, 46 Vt. 674; *Pember v. Congdon*, 55 Vt. 58; *Randall v. Randall*, 64 Vt. 419; *Barnes v. Dow*, 59 Vt. 530; *Pendill v. Neuberger*, 67 Mich. 562; *Hart v. Carpenter*, 36 Mich. 402; *Byars v. Curry*, 75 Ga. 515; *Hays v. Callaway*, 58 Ga. 288; *Carter v. Hale*, 32 Gratt. (Va.) 115; *Grigsby v. Simpson*, 28 Gratt. (Va.) 348; *Mason v. Wood*, 27 Gratt. (Va.) 783; *Parent v. Spittler*, 30 Gratt. (Va.) 819; *Smith v. Ullman*, 26 Hun (N. Y.) 386; *Mosner v. Raulain*, 66 Barb. (N. Y.) 213; *Chaffee v. Goddard*, 42 Hun (N. Y.) 147; *McC Campbell v. Henderson*, 50 Tex. 601; *Heard v. Busby*, 61 Tex. 13; *Moore v. Taylor*, 44 N. H. 374; *Chandler v. Davis*, 47 N. H. 462; *Brown v. Brown*, 48 N. H. 90; *True v. Shepard*, 51 N. H. 502.

The children of the surviving party are not excluded. *Anderson v. Hance*, 49 Mo. 159.

Where one party to a contract is dead, the other, being a party to the suit and liable for costs, is not competent to testify, though a discharged bankrupt. *Tunstall v. Withers*, 86 Va. 892.

Where a grantee sues the estate of his deceased grantor for a breach of covenant, he is not competent to prove that he served notice on the grantor of the pendency of the action in which he was adjudged to have no title, and requested him to defend. *Finton v. Egelston*, 61 Hun (N. Y.) 246.

In *Granger v. Bassett*, 98 Mass. 462, the court said: "The statute admits parties to testify, except where one of

the original parties to the contract or cause of action in issue and on trial is dead, etc. Gen. Stats., ch. 131, § 14. The test of competency is the contract or cause of action in issue and on trial, not the fact to which the party is called to testify. If the cause of action was a matter transacted with a person who has deceased, the other party to that transaction, being also a party to the suit, is not admitted as a witness at all, and cannot testify to any fact in the case. Otherwise he is admitted as a witness, and being so admitted, the statute contains no restriction nor limitation as to the facts to which his testimony may or may not be directed. His competency must be determined in advance, by the nature of the controversy and the questions in issue. If, upon that test, he is admitted as a witness in the case, his testimony is competent for all purposes, although it may relate to transactions with a person since deceased, which prove to be involved in or to affect the matter in dispute."

The above interpretation of the law is approved in *Angell v. Hester*, 64 Mo. 144; *Ring v. Jamison*, 66 Mo. 429; *Ashbrook v. Letcher*, 41 Mo. App. 374.

In an action to foreclose a mechanic's lien on the property of a deceased person, the lienor is not competent to prove his contract with the decedent. *Gunther v. Bennett*, 72 Md. 384; *Ca-hill v. Elliott*, 54 Mo. App. 387. And where the lienor is dead, the contractor who employed him, and who is a party defendant, is not competent for the owner of the property. *Hommel v. Lewis*, 104 Pa. St. 465.

In an action upon a bond against an executor, where the defense was the alteration of the instrument after its execution, it was held that the plaintiff might not testify that he saw it in the hands of his attorney shortly before its execution by the deceased, and that it then contained the clause claimed to have been interpolated. *Pease v. Barnett*, 30 Hun (N. Y.) 525.

In an action against the sureties in a bond, the principal obligor being dead, the plaintiff is not competent as to any conversation with the deceased, in the absence of the sureties. *Henry v. Tiffany*, 5 Ill. App. 548.

Where a grantor has conveyed the

In an action by an executor or administrator, an intervenor who bases his claim to the fund or property in controversy upon a contract with the deceased, is not competent to prove it, as he is in effect seeking a judgment against the decedent's estate.¹ But in a contest between a judgment creditor of a deceased person and the claimant of property sought to be taken on execution against the estate, both plaintiff and the claimant are competent witnesses because the issue is between them.²

Where a contract or transaction, one of the parties to which is

same land twice to different grantees, and the former of his grantees is dead, he is not a competent witness for the other in an action against the heirs of the deceased grantee to avoid the prior conveyance. *McCann v. Atherton*, 106 Ill. 31.

In an action by a widow against her deceased husband's administrator, to recover the proceeds of her property disposed of by the deceased, she is not competent to prove the agreement between her and her husband under which she brings her action. *Palmer v. Hanna*, 6 Colo. 55.

In a suit against executors and devisees, to set aside a deed alleged to have been procured by the testator, by fraud, the plaintiff is not a competent witness for himself. *Montgomery v. Simpson*, 31 N. J. Eq. 1.

In *Virginia*, a witness who is interested in the event of the action is not disqualified if he was not a party to the contract or other transaction which is the subject of investigation, though one of the original parties thereto be dead, insane, or otherwise rendered incompetent. *Simmons v. Simmons*, 33 Gratt. (Va.) 461; *Wager v. Barbour*, 84 Va. 419; *Hall v. Rixey*, 84 Va. 790; *Knick v. Knick*, 75 Va. 12. Compare *Boyd v. Jennings*, 46 Ill. App. 290.

In *Carter v. Hale*, 32 Gratt. (Va.) 115, which was an action by the obligee in a bond against the obligor and one of his sureties, the other being dead, it was held that the obligor was incompetent to prove that he had himself paid it. The court rested its decision on the ground that the plaintiff was disqualified in his own behalf by reason of the death of one of the sureties, and, that being true, no party to the contract should be permitted to testify in the case. If this is a correct interpretation of the statute, it is difficult to understand the reason for its enactment.

The transaction proposed to be proved was strictly between parties who were living at the time of the trial, and the deceased surety had taken no part in it; and, besides, it is difficult to see why the plaintiff should be prohibited from testifying in rebuttal of the obligor's testimony, even if he were incompetent in his own behalf in the first instance. The case is cited as law in *Hall v. Rixey*, 84 Va. 792. Compare *Grigsby v. Simpson*, 28 Gratt. (Va.) 348.

The assignee of the contract or other cause of action is, after the death of his assignor, protected from the testimony of the other party thereto as to transactions and conversations with the deceased. *Hollister v. Young*, 41 Vt. 156; *DeCoursey v. Johnston*, 134 Pa. St. 328.

A party to a contract is not competent for himself in a contest with the representative of a deceased assignee thereof. *Gamble v. Hepburn*, 90 Pa. St. 439.

But in *Parker v. Maxwell*, 45 Minn. 1, it was held that, in an action by or against the personal representative of the deceased assignee of a contract, the opposing party is competent to prove that the contract was tainted with usury in its inception.

In *New Jersey*, it is held that, where neither party to an action represents a deceased person, though one of the parties to the transaction, out of which the suit grows, is dead, the living party is competent to speak as a witness as to what was said and done by the other. *Lehigh Coal, etc., Co. v. Central R. Co.*, 41 N. J. Eq. 186; *Palmateer v. Tilton*, 40 N. J. Eq. 555. Compare *Hodge v. Coriell*, 44 N. J. L. 456.

1. *Bachelor v. Brown*, 47 Mich. 366; *Lewis v. Oliver*, 22 Mo. App. 203; *Mutual L. Ins. Co. v. Watson*, 30 Fed. Rep. 653.

2. *Anderson v. Wilson*, 45 Ga. 25;

dead, comes incidentally into a suit on another contract, as a matter of evidence, the mouth of the surviving party is not closed concerning it.¹

The words "contract in issue," as used in the statutes, mean the same as "contract in dispute or in question," and relate as well to

Powell v. Watts, 72 Ga. 770; Parrott v. Baker, 82 Ga. 364.

1. Horner v. Frazier, 65 Md. 1; Robertson v. Mowell, 66 Md. 530; Manufacturers' Bank v. Scofield, 39 Vt. 590; Cole v. Shurtleff, 41 Vt. 311; 98 Am. Dec. 587; Morse v. Low, 44 Vt. 561; Adams v. Bleakley, 117 Pa. St. 283.

In trespass *quare clausum fregit*, the plaintiff is competent to prove that her husband purchased the land upon which the trespass is alleged to have been committed from her father, although both of them are dead. The issue on trial is the commission of the alleged trespass. Scott v. Mathis, 72 Ga. 119.

Thus, in an action by the administrator of A, the defendant is competent to prove, in defense, a contract with B made after the death of A, although B himself was dead at the time of the trial, as it is not B's estate which is represented in the action. Weaver v. Roth, 105 Pa. St. 408.

So, a party to an action may testify concerning a contract to which he is not a party, though one of the parties to such contract is dead. Knick v. Knick, 75 Va. 12.

A party is not disqualified to testify to a transaction with a third person who is dead, when the opposing party in no way represents the estates of the deceased. Severn v. National State Bank, 18 Hun (N. Y.) 228; Love v. Stone, 56 Miss. 449; Downs v. Belden, 46 Vt. 674.

The statute excludes only parties to the transaction which is undergoing investigation; that is, which is in issue. Martz v. Martz, 25 Gratt. (Va.) 361; Morse v. Low, 44 Vt. 561; Wright v. Gilbert, 51 Md. 146; Monongahela Nat. Bank v. Jacobus, 109 U. S. 277.

Where a person agrees to work for a devisee on the same terms as he has worked for the deviser, he is competent to prove what those terms were. Titus v. O'Connor, 18 Hun (N. Y.) 373.

In trover for property which the plaintiff had purchased from a person since deceased, the defendant claiming by subsequent purchase from the same

vendor, it was held that the plaintiff was competent to prove the contract between the deceased and himself, as the contract was collateral to the cause of action in which the decedent's estate was not interested; the real cause of action being the unlawful conversion of the property by the defendant. Downs v. Belden, 46 Vt. 674. Compare Banister v. Oviatt, 64 Vt. 580.

Where the defendant, an administrator, traverses the plaintiff's affidavit on which an attachment was granted, the plaintiff is competent on the trial of that issue, although the contract sued on was made with the defendant's intestate. Ouzts v. Seabrook, 47 Ga. 359.

On the trial of a will contest, one who had made a contract with the testator to support him for life, in consideration of certain property conveyed to him, is competent to prove such contract, though it is recited and confirmed by the will, since it is not in issue and on trial. Holman v. Boyce, 65 Vt. 318.

In *Missouri*, the witness is not excluded unless he is both a party to the contract sued on and a party to the issue on trial. Looker v. Davis, 47 Mo. 140; Pritchett v. Reynolds, 21 Mo. App. 674.

But it is not absolutely necessary that the witness be a party to the record where the other original party to the contract is dead. The testimony of the survivor will be excluded, whether he is a party to the record or not, where the result of his testimony will be equally beneficial to him in either case. Meier v. Thieman, 90 Mo. 433.

Where both the original parties to the contract are dead, the heirs of one may testify concerning it against the estate of the other. Martin v. Jones, 72 Mo. 24.

But if the witness is both a party to the suit and to the contract sued on, his mouth is closed as to transactions with the deceased party to the contract. Hughes v. Israel, 73 Mo. 538; Chapman v. Dougherty, 87 Mo. 617; 56 Am. Rep. 469; Angell v. Hester, 64 Mo. 142; Sitton v. Shipp, 65 Mo. 297; Ring

the substantial issues made by the evidence as to the mere formal issues made by the pleadings.¹

In an action to compel the specific performance of a contract made by one since deceased, the plaintiff is not a competent witness to prove such contract.²

v. Jamison, 66 Mo. 429; *Johnson v. Quarles*, 46 Mo. 423.

1. *Hollister v. Young*, 42 Vt. 403; *Pember v. Congdon*, 55 Vt. 58; *Barnes v. Dow*, 59 Vt. 545; *Chapman v. Dougherty*, 87 Mo. 617; 56 Am. Rep. 469, *overruling* *Bradley v. West*, 68 Mo. 69.

Where the plaintiff claims property through a sale by A, and the defendant through a sale by the administrator of A, the alleged contract of sale to the plaintiff comes directly and not collaterally in issue, and the plaintiff is not competent to prove it. *Hall v. Hamblett*, 51 Vt. 589.

In ejectment by one claiming title under a deceased person against one claiming by adverse possession, where the issue was as to whether the defendant held under the deceased and had recognized his title, it was held that the defendant was not competent in his own behalf, as his transactions with the decedent relating to the title were directly in issue. *Hollister v. Young*, 41 Vt. 156.

2. *Mosher v. Butler*, 31 Ohio St. 190.

In *Goodlett v. Kelly*, 74 Ala. 218, the court said: "The complainant, Goodlett, is clearly not a competent witness, in the present suit, as to the trade or exchange of lands alleged to have taken place between himself and Mrs. Hansell during her lifetime. He is excluded by the provisions of section 3058 of the code of 1876 as it has been repeatedly construed by the past decisions of this court. This land trade, for the specific performance of which the bill is filed, was a transaction with the deceased involving many statements made by her as to its terms and conditions. If the suit were one directly against the estate of Mrs. Hansell, the complainant's testimony would be excluded by the very letter of the statute. Code, § 3058. It would be prejudicial to the rights of the decedent, whose estate might be liable to diminution by reason of it. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566. The statute has been uniformly construed to embrace many cases within its spirit and purpose which do not fall within

its letter. Beneficiaries, who are not directly parties of record, have been held to be excluded for incompetency. *Drew v. Simmons*, 58 Ala. 463; *McCrary v. Rash*, 60 Ala. 374; *Keel v. Larkin*, 72 Ala. 493. In a suit by a transferee, the transferor, though not a party to the action, has been excluded. *Louis v. Easton*, 50 Ala. 470. And, generally, the statute is construed to protect not only the estate of a decedent, where the purpose or result of the evidence would be to diminish it, but also the rights of heirs or others who claim in succession under the decedent. *Boykin v. Smith*, 65 Ala. 294; *Key v. Jones*, 52 Ala. 238."

Where the purchaser of land seeks a specific performance of a contract of sale made by an executor under a testamentary power, such executor having died, the purchaser is not competent to prove the contract. *Palmateer v. Tilton*, 39 N. J. Eq. 40.

But in *Campbell v. Mayes*, 38 Iowa 9, the administrator of the deceased grantor was made a party defendant along with the heirs, but, as he was not a necessary party, the action was dismissed as to him and prosecuted against the heirs. It was held that the plaintiff and his wife were both competent to prove the contract, on the ground that the defendants were not parties entitled to the protection of the statute of that state. The court said: "Since the administrator was not a necessary party, the action as against him might properly be dismissed without prejudice as against the others. When it was dismissed as to the administrator he was no longer an adverse party, and that fact then ceased to operate as a reason for excluding the depositions. Nor is this action, in any ordinary legal or practicable sense, a proceeding 'in relation to the settlement of estates of deceased persons,' and, hence, for this reason, the depositions could not be excluded. The depositions, when taken, were competent as against all the present defendants, and hence they are competent now. In this respect they are different from a deposition of an interested witness under

In an action by a third person, for whose benefit an agreement was made to enforce it against the obligor, the plaintiff is competent in his own behalf, although the person who made the agreement for his benefit is dead.¹ But, in such case, the defendant is not a competent witness as to the transaction between himself and the deceased.²

(b) *Parties to Commercial Paper.*—The maker of a promissory note is not, after the death of the payee, competent to testify to any transaction or conversation with the deceased which may tend to extinguish or diminish his own liability on the note.³ Neither is a maker competent for a co-maker,⁴ though no summons was served on him and he is not technically a party to the record.⁵

the common-law rule when interest would disqualify; for then the subsequent removal of interest by release or otherwise would not make the deposition competent; it being incompetent when taken, it would remain so. At the common law, the incompetence inhered in the witness, and he must first be made competent and then testify. Under our statute the witness is competent, and the incompetence of the deposition attaches by reason of the party, and when the party is dismissed, the incompetence is removed. It is true, as argued by appellee's counsel, that the reason underlying the statute applies with equal force when the heirs of a deceased person are defendants, as where the executor is a defendant. But courts do not apply a statute to all cases embraced within the reason of it, but only to those within the language of it."

1. *Creamer v. Sirp*, 91 Ind. 366.

Thus, where a third person had agreed with the maker of a note that he would pay it at maturity, and the payee sued such person to collect the same, it was held that the plaintiff was competent in his own behalf, notwithstanding the previous death of the maker of the note. *Amonett v. Montague*, 63 Mo. 201; 75 Mo. 43.

But it has been held that a widow who is an annuitant under a conveyance made by her husband in his lifetime, which is sought to be impeached by his creditors, is not competent for the defense. *Randall v. Randall*, 64 Vt. 419.

2. *Reddick v. Keesling*, 129 Ind. 128.

3. *Wells v. Avers*, 84 Va. 341; *Hodges v. Denny*, 86 Ala. 226; *Hubbard v. Chapin*, 2 Allen (Mass.) 328; *Angell v. Hester*, 64 Mo. 142; *Rice v. McFarland*, 41 Mo. App. 489; *Ewing v.*

White, 8 Utah 250; *Cake v. Cake*, 162 Pa. St. 584; *Jones v. Henshall*, 3 Colo. App. 448; *Burns v. Ross* (Ky. 1895), 30 S. W. Rep. 641.

The rule is the same where the note was made payable to the deceased guardian of the plaintiff, to whom it was assigned by the deceased upon the ward's coming of age. *Lewis v. Fort*, 75 N. Car. 251.

The maker is not competent in his own behalf where the deceased, with whom the transaction was had, had the note made payable to his wife, who is alive at the time of the trial. *Willcox v. Jackson*, 51 Iowa 208.

The widow of a deceased maker of a note is competent to prove that she paid it as agent for her husband, notwithstanding the payee is also dead. *Rush v. Ross*, 65 Ga. 144.

The writing of a promissory note by the maker is not a personal transaction with the payee, and the writer may testify as to what kind of ink was used, what words he struck out, etc., notwithstanding the payee is dead. *Page v. Danaher*, 43 Wis. 221.

4. *Hisaw v. Sigler*, 68 Mo. 449; *Williams v. Carr*, 4 Colo. App. 363.

But in *Baker v. Kellogg*, 29 Ohio St. 663, it was held that, in an action by an administrator upon a promissory note made by two parties defendant, where only one of them sets up any defense, the other is a competent witness for the party defending.

5. *Jenks v. Opp*, 43 Ind. 108.

In *Church v. Howard*, 79 N. Y. 420, where it appeared that one of the defendants did not answer, it was held that he was, nevertheless, an incompetent witness for his co-defendant. The court said: "The question whether the witness was not a party within this provision, and hence incompetent, is

The maker is not competent in his own behalf in an action on the note by an assignee thereof; the original payee being dead at the time of the trial.¹

not free from difficulty, but however that may be, we think that he was a person interested in the event, and, therefore, incompetent to testify as to any personal transaction between himself and the intestate, and his testimony was improperly received. He was interested in avoiding a judgment against the defendant Howard, the surety, which would entitle such surety to prosecute and obtain a judgment against the defendant Fargo, which he might be compelled to pay. He would be affected by the legal operation and effect of the judgment, and the record would be legal evidence in an action by the surety to recover the amount paid for his principal."

1. *Farmers' Mut. F. Ins. Co. v. Wells*, 53 Vt. 14; *Angell v. Hester*, 64 Mo. 142; *Ashbrook v. Letcher*, 41 Mo. App. 369; *Byrne v. McDonald*, 1 Allen (Mass.) 293.

In *Hurry v. Kline*, 93 Ky. 358, the court said: "If Irvin had died owner of the note, and this was an action by his personal representative to recover judgment thereon, or even if appellant had, by reason of the assignment to him, recourse on decedent's estate, the testimony in question would, we think, be certainly incompetent. But it seems to be conceded that if appellant ever had such recourse, it has been lost; and so the estate of the deceased assignor will not be affected by determination of this action one way or another. Nevertheless, we think there can be, according to the plain language used, no question of cases like this being comprehended by the exceptions to, and modifications of, section 605, that are contained in subsection 2, section 606, for it is there provided, in explicit terms, that no person shall testify for himself concerning any verbal statement of, transaction with, or act done or omitted to be done by, one who is dead when the testimony is offered to be given, except under circumstances and conditions recited, none of which exist in this case. Yet, that is precisely what appellee did do on trial of this action in the lower court, for the statements of, and transactions with, the deceased Irvin, concerning which he was permitted to testify, had a direct and,

without doubt, decisive bearing in his favor upon the only issue involved. Before thus disregarding or restricting the natural and obvious meaning of the words of a statute, the court should be convinced an imperative reason for doing so exists. We do not now perceive any reason for excluding such testimony in an action by the personal representative of one who is dead, that does not exist in full force in a case like this. The issue here presented is one of fact, involving an inquiry for the simple truth, not at all changed or affected by death, but to be sought for according to rules of evidence intended to operate justly, equally, and mutually between the parties, no matter who they may be. It does not, therefore, make any difference whether the personal representative of a deceased payee or the assignee of a note be party plaintiff in an action to recover on it; to permit the defendant to testify for himself concerning what was said or done by the decedent, thereby affecting the issue involved, without the presence or power of anyone to speak for the dead man, would give him an unjust and unfair advantage in one case just as much as, no more than, the other, which the legislature did not intend for him to have, but carefully and particularly framed subsection 2, section 606, to prevent."

The same rule obtains as to the obligor in a bond which has been assigned; the original obligee being dead. *Grigsby v. Simpson*, 28 Gratt. (Va.) 348.

Neither is the original obligee in a bond competent for his assignee, the obligor being dead. *Woodhouse v. Simmons*, 73 N. Car. 30.

The maker of a note is not competent to prove payment to the payee since deceased, the latter having transferred the note to the plaintiff before his death. *Farmers' Mut. F. Ins. Co. v. Wells*, 53 Vt. 14. Compare *Barnes v. Dow*, 59 Vt. 530. Neither is he competent in a suit on a note which has been lawfully sold by the administrator of the deceased payee. *Reynolds v. Linard*, 95 Ind. 48. Nor in a suit brought on a note by a legatee of the deceased payee. *Peacock v. Albin*, 39 Ind. 25.

In an action upon a promissory note, by the indorsee against the maker, the plaintiff is competent to testify to the fact and circumstances of the indorsement, though the indorser is dead, since the defense is not made in the interest of the decedent's estate.¹ And in action by an indorser against a prior indorser, the plaintiff may testify in his own behalf, notwithstanding the death of the maker.² One claiming to be a surety in a note may not, after the death of the principal, testify to transactions with him which show the witness to be a surety and not a principal obligor.³ The survivor of two joint makers may not testify that his deceased co-maker signed the note sued on, in the absence of a showing that the deceased was a surety and that the witness is liable to reimburse the estate in case of a judgment against such surety.⁴

Where the defense to an action on a note was that it was forged, the alleged maker was permitted to testify that the signature was not his, notwithstanding the note had been transferred and the original payee was dead. *Saratoga County Bank v. Leach*, 37 Hun (N. Y.) 336.

When the maker is sued by the administrator of a deceased assignee of a note, he is not competent to prove a want of consideration. *Weatherbee v. Roots* (Miss. 1895), 16 So. Rep. 902.

In *Mississippi*, it has been held that in an action against the maker by an assignee of the deceased payee, the defendant is a competent witness to prove payment to the payee before the transfer. *Cole v. Gardner*, 67 Miss. 670. And the same has been held in *Georgia*, where the note was transferred after maturity. *Woodson v. Jones*, 92 Ga. 662.

But where one partner sold his interest in a note payable to the firm to his co-partner and subsequently died, it was held that the maker was not competent to testify that he had paid the note to the deceased partner. *McWhorter v. Sell*, 66 Ga. 139.

1. *Hillman v. Schwenk*, 68 Mich. 293; 68 Mich. 297; 68 Mich. 301.

2. *Kelly v. Burroughs*, 102 N. Y. 93, *affirming* 33 Hun (N. Y.) 349.

In an action by an indorsee against the survivor of two co-indorsers, the defendant is competent to testify to facts which occurred prior to the death of his co-indorser. *McPherson v. Weston*, 85 Cal. 90.

Where all the original parties to a bond are dead, an assignee thereof is not competent to prove their declarations concerning it, and his disqualification excludes parties opposed to him

in interest. *Ginter v. Breeden* (Va. 1894), 19 S. E. Rep. 656.

3. *Auburn Sav. Bank v. Brinkerhoff*, 44 Hun (N. Y.) 142; *Thornburg v. Allman*, 8 Ind. App. 531.

A surety is not competent to prove that a deceased co-surety orally agreed to hold him harmless. *Overfield v. Overfield* (Ky. 1895), 30 S. W. Rep. 994.

4. *Alcorn v. Cook*, 101 Pa. St. 209. Compare *Hunter v. Herrick*, 26 Hun (N. Y.) 272; *affirmed*, without opinion, 92 N. Y. 626; *Quarrier v. Quarrier*, 36 W. Va. 310.

In *Wilcox v. Corwin*, 117 N. Y. 500, *reversing* 50 Hun (N. Y.) 425, the court said: "The note was an original and direct promise moving from the maker to the payee, and its first inception was when, for a consideration, it reached her hands. There never was a time when Wheeler could have maintained an action upon it, nor had it any validity until the makers passed it over to the payee. *Bullard v. Bell*, 1 Mason (U. S.) 243; *Thompson v. Perrine*, 106 U. S. 589. To the same effect is *Kitchell v. Schenck*, 29 N. Y. 515; and later, *Comstock v. Hier*, 73 N. Y. 269; 29 Am. Rep. 142, where it was held that the maker of a note negotiating his own paper or procuring the same to be discounted, is not an assignor of the note, but by the transaction assumes the ordinary obligation of a party to negotiable paper as maker of a note, and that the transaction is an original transaction with the party taking the note. It was, therefore, decided, under section 399 of the code then in force (corresponding to the present section 829), that the indorser was a competent witness to show the transaction between himself and the makers of the note,

The principal obligor in a note is not competent for his surety to testify to transactions and communications between himself and the payee, who has since died, because the record in the action against the surety would be legal evidence in the surety's action against the witness for reimbursement.¹ In *Illinois*, the distinction between the strict rule of law and the more liberal rule in equity relating to the examination of parties as witnesses is preserved in this class of cases. Accordingly, in assumpsit on a promissory note by the personal representative of the deceased payee, the principal obligor is not a competent witness for his surety, to prove a valid contract for the extension of the time of payment whereby the surety is relieved from liability.² But in a suit in equity by the surety, to enjoin the prosecution of an action at law against him on such note by the personal representative of the deceased payee, the principal debtor is competent to

although one of those makers had in the meantime died. To the same effect, and perhaps more exactly in point, is *Converse v. Cook*, 31 Hun (N. Y.) 417. So far, we agree with the court below, but there is another aspect in which the objection before us is to be viewed. It does not appear that Corwin was a surety for Wheeler, nor but that, as between themselves, each was liable to contribute to the payment of the note. It was, therefore, as the case is now presented, the interest of Wheeler to render his co-defendant liable as well as himself, and his testimony, if admissible, proved that fact, namely, the joint liability of the defendants and consequently the duty of contribution between Corwin and himself. Under these circumstances he was incompetent under the provisions of the code which excludes a person so situated from being examined in his own behalf or interest."

In *Alcorn v. Cook*, 101 Pa. St. 213, the court said: "The admissibility of the evidence of Branthoover for the plaintiff below is the only matter in this case which involves serious debate. The note in question purported to have been executed by Alcorn and Branthoover jointly. The suit was brought against the latter and John G. McCauley, the executor of Alcorn's estate. This case, then, falls within the proviso to the act of 1869, and must be determined by those rules of evidence which were of force previously to the approval of that act. But, under these rules, Branthoover's testimony ought to have been excluded, first, because his oath, as pro-

posed in the offer, would have the effect to relieve him of one-half of the obligation in suit by casting that much of it upon the estate which he represented. He was thus personally interested against that estate, hence, not competent for the purpose proposed. *Bellas v. Fagely*, 19 Pa. St. 276; *Hogebloom v. Gibbs*, 88 Pa. St. 235. Admitting, however, that Alcorn was but surety in the note, and that, because of that fact, Branthoover had nothing to gain by charging the estate, yet, as he was personally a party to the record, he could not be made a witness against the estate without the consent of its representative. *Wolf v. Fink*, 1 Pa. St. 435; 44 Am. Dec. 141; *Swanzy v. Parker*, 50 Pa. St. 441; 88 Am. Dec. 549."

In *Indiana*, if an action is brought against the representative of the deceased maker and a surviving maker, and they set up separate defenses, it is within the discretion of the trial court to permit the survivor to testify. *Meyer v. Morris*, 78 Ind. 558.

1. *Church v. Howard*, 79 N. Y. 415, reversing 17 Hun (N. Y.) 5; *Hill v. Hotchkin*, 23 Hun (N. Y.) 414; *Lawton v. Sayles*, 40 Hun (N. Y.) 252; *Baker v. Jerome*, 50 Ohio St. 682.

But in an action by the living payee against the personal representative of a deceased surety, the principal obligor may testify in behalf of the surety's representative. *Kesler v. Mauney*, 89 N. Car. 369.

2. *Langley v. Dodsworth*, 81 Ill. 86; *Boynton v. Phelps*, 52 Ill. 210; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, affirming 47 Ill. App. 568.

prove a contract with the deceased for an extension of the time of payment.¹

In an action by a surety who has paid a promissory note to recover the amount so paid from the estate of a deceased surety, the maker of the note is without interest in the event of the action, and is, therefore, competent to prove that the plaintiff was not a co-surety, but a surety of the deceased.² But in an action by the personal representative of a surety who has paid the debt against the principal debtor and the co-sureties, the latter are not competent witnesses.³ And where the action is against the maker and an indorser, then neither defendant is competent for the other.⁴ In a contest between the estate of the deceased payee and an indorser, which can in no way affect the maker's liability on the note, he may be a witness.⁵

1. *Bradshaw v. Combs*, 102 Ill. 428, affirming 6 Ill. App. 115. See *White v. Ross*, 147 Ill. 435.

In *Dodgson v. Henderson*, 113 Ill. 363, the court said: "It is apparent from the allegations of the bill, as well as from the evidence introduced in support of the bill, that complainant could not make a defense to the action at law, for the reason that Allen, who was the only person who knew that an agreement had been made to extend the time of payment of the note, was not a competent witness in the action at law. Section 2, ch. 51, of the Rev. Stats. of 1874, p. 488, expressly excludes a defendant from testifying in an action brought by an executor, like the one brought against Allen and Henderson. Resort to a court of equity was, therefore, a necessity—the only tribunal where relief could be obtained. In *Bradshaw v. Combs*, 102 Ill. 428, we held that a bill in equity was an appropriate remedy in a case of this character, and that the principal on the promissory note, on a bill filed against an administrator or executor by the surety, was a competent witness. As to complainant's right to file the bill, and upon the question of the competency of Allen as a witness, the case cited is conclusive, and no further notice need be taken of that question."

2. *Canfield v. Bentley*, 60 Vt. 655.

3. *Harper v. McVeigh*, 82 Va. 751.

4. *Alexander v. Dutcher*, 70 N. Y. 385; *Whitmer v. Rucker*, 71 Ill. 410.

In an action on a promissory note indorsed by the defendant to the plaintiff's decedent, the defendant offered himself as a witness to prove that he had sold a patent right belonging to

the plaintiff's intestate, and that the note was given by the purchaser in part payment therefor, being made payable to him instead of the deceased in order to show that he had properly discharged the trust; but it was held that he was not competent to give such evidence. *Sallade v. Gerlach*, 132 N. Y. 548.

In an action by the representative of a deceased indorsee against an indorser, the latter is not competent to prove that he received no notice of protest. *Louis v. Weisenham*, 1 Mo. App. 222.

5. *Guery v. Kinsler*, 3 S. Car. 423; *Hayden v. McKnight*, 45 Ga. 147.

In *Freeman v. Bigham*, 65 Ga. 587, the court said: "Sterling was no party to the indorsement. Essentially, it is a separate contract from his own as the maker of the note, and he was competent to testify in regard to all that transpired between Neal and Bigham. He has no interest in the issue. Before and since the Evidence Act, he would be competent; before, because he has no interest, having the note to pay, if ever he is able, either to Neal or to Bigham, and to Neal sooner than to Bigham, because Neal has already a judgment against him, and Bigham has none; and since the Evidence Act, because he is no party to the contract or cause of action, which is the indorsement. And every indorsement is a new contract."

In *Fuller v. Lendrum*, 58 Iowa 356, the court said: "It is objected that Lyon is not a competent witness to transactions between himself and Hall, because of his interest in the event of this suit. We think he has no disqualifying interest. It is not claimed

So where the maker of a note is dead the payee is not competent to testify as to transactions with the deceased which may affect his liability on the note.¹

(3) *Creditors*.—A creditor is not a competent witness to support his claim against the estate of his deceased debtor.² And where a voluntary payment of a claim is made by the personal representative, the person to whom it is made is not competent to support the claim when the item is contested in the settlement of the representative's accounts.³ A creditor of an insolvent estate is not competent for the personal representative in an action prosecuted against the government for the benefit of the creditors.⁴

by anyone that Lyon has paid the judgment. It is still in full force as to him, and he neither gains nor loses anything by the result, whatever it may be. If the judgment is held to be valid against Fuller, Lyon's rights are in no manner affected, and if Fuller be held to be discharged, the judgment is still in force against Lyon."

1. Thus one who sues on a promissory note *prima facie* barred by the Statute of Limitations, is not competent to prove a new promise by the maker who has since died. *Dobson v. Dickson*, 62 Ga. 639.

Where the maker is dead and the defense is that the note has been altered since its execution, the plaintiff is not competent to prove that the deceased signed it as it appeared on the trial. *Gist v. Gans*, 30 Ark. 285.

2. *Larch v. Goodacre*, 126 Ind. 224; *Cliff v. Shockley*, 77 Ind. 297; *McConnell v. Huntington*, 108 Ind. 405; *Reed v. Reed*, 30 Ind. 313; *Wood v. Stafford*, 50 Miss. 370; *Jacks v. Bridewell*, 51 Miss. 881; *Johnson v. Champlin*, 88 Ga. 527; *Nesbitt v. Parrott*, 84 Ga. 142; *Dolan v. Dolan*, 89 Ala. 256; *Seligman v. Ten Eyck*, 60 Mich. 267; *In re Young's Estate*, 148 Pa. St. 573, 575; *Dawson v. Hemelrick*, 33 W. Va. 675; *Tate v. Tate*, 75 Va. 522; *Todd v. Martin* (Cal. 1894), 37 Pac. Rep. 872.

He is not even competent to prove the dignity of his claim as affecting only its priority. *Latimer v. Sayre*, 45 Ga. 468.

Neither may he impeach, by his own testimony, what purports to be a receipt in full given by him to the deceased. *Boughton v. Bogardus*, 35 Hun (N. Y.) 108.

The creditor of an estate is not competent where his own creditor is enforcing the claim in order to pay his debt. *Aymett v. Butler*, 8 Lea (Tenn.) 453.

The assignor of an account is incompetent to support the claim in the hands of his assignee against the estate of a deceased person. *Ketcham v. Hill*, 42 Ind. 64.

If the widow claims as a creditor of the estate, she is not competent to support her own claim. *Buckingham v. Wesson*, 54 Miss. 533.

A claimant against the estate of a deceased person is not competent to sustain his claim by proving negligence on the part of the decedent. *Simpson v. Gafney* (N. H. 1890), 20 Atl. Rep. 931.

But upon the hearing of an application to sell real estate, the creditor may prove the existence of debts when it is established by disinterested witnesses that the personal property is not sufficient to pay the debts. *Alford v. Alford*, 96 Ala. 385.

And the creditor of a person living, whose debt one, since deceased, promised to pay for a valuable consideration, is competent to prove the promise. *Hooper v. Hooper*, 32 W. Va. 526.

In *California*, it is held that a mechanic's lien on property belonging to the estate of a deceased person, is not such a claim against the estate as will preclude the lienor from testifying in proceedings to foreclose the lien, because the action is in the nature of a proceeding *in rem*, in which no personal judgment can be obtained. *Booth v. Pendola* (Cal. 1890), 23 Pac. Rep. 200.

3. *Fross' Appeal*, 105 Pa. St. 258.

Where the administrator of a deceased woman paid a doctor's bill on presentation, and the allowance of the item was objected to in the settlement of the administrator's account, it was held that the doctor was incompetent to prove her promise to pay it. *Baker v. Galpin*, 39 N. J. Eq. 491.

4. *Henegan v. U. S.*, 17 Ct. of Cl. 155.

In some jurisdictions, a surviving party to a series of transactions constituting a running account, may verify his books of account by his own suppletory oath that they are his books of original entry of the contemporaneous transactions therein set down.¹ But in other jurisdictions, this is not permitted on the ground that it would be admitting the testimony of the surviving party concerning personal transactions with a person since deceased.²

(4) *Husband and Wife*.—The identity of interest of husband

1. *Lewis v. Meginniss*, 30 Fla. 419; *Deans v. King*, 20 Fla. 533; *Robinson v. Dibble*, 17 Fla. 457; *Bailey v. Harvey*, 60 N. H. 152.

In *Strickland v. Wynn*, 51 Ga. 600, the court said: "The allowing the defendant to state under oath that the book which he proposed to offer in evidence was his original book of entry, was not such testimony or evidence in relation to the cause of action in issue or on trial as is contemplated by the act of 1866, embodied in the 3854th section of the code. It was not the intention of that act to restrict the admission of evidence, but to enlarge the rule for its admission. It would have been competent for the defendant to have identified his original book of entry by his own oath before the passage of the act of 1866, as much so as to prove the service of a notice by his own oath. There was no error in allowing the defendant to identify his original book of entry by his own oath at the trial, notwithstanding the complainant was dead."

In *Leggett v. Glover*, 71 N. Car. 211, the court said: "We are of the opinion that it was no part of the purpose of the late statute, Code of Civ. Proc., § 343, to narrow the competency of parties to be witnesses, but to widen the same, and that it must be read with the old statute, as if they all together provided that a party should be competent as a witness generally, but he should not be permitted to testify of transactions with a person since deceased, whose representative was a party, except as heretofore he was permitted to testify under the book-debt law; the effect of which is that the book-debt law stands unaltered."

But where the entries in such book are not intelligible in themselves, and do not in substance set forth the facts which constitute a right of action in favor of the witness against the deceased, any explanation of the entries therein must come from disinterested

witnesses. A party to the transaction may not thus, in effect, make himself a witness generally, merely refreshing his own memory by the entries, instead of verifying the books by his oath. *Silver v. Worcester*, 72 Me. 322.

The son and heir at law of a deceased person is competent for his father's personal representative to prove that a book produced is one of his father's books of original entry, and that the accounts therein, charged to the opposing party's intestate, are in his father's handwriting. *Keener v. Zartman*, 144 Pa. St. 179.

2. *Davis v. Seaman*, 64 Hun (N. Y.) 572.

In *Dismukes v. Tolson*, 67 Ala. 386, the court, after explaining the purpose of the statute, said: "Applying these principles, we do not think that the defendant Tolson was a competent witness under the statute to prove the various book entries to which he was permitted to testify in the court below. These entries were a mere written declaration of the fact that the defendants had paid for the corn which they purchased from the deceased in his lifetime. They were contemporaneous with the principal fact of payment, and are regarded in the eye of the law as verbal acts, being part and parcel of the *res gestæ*. 1 Greenl. Ev., § 120. They clearly constituted a part of the transaction with the deceased, and come within the statutory prohibition. To allow a defendant to prove such entries by his own oath, against the estate of the decedent, would be to permit him to accomplish indirectly what he is prohibited from doing directly by the express mandate of the statute."

A party is prohibited from testifying that his account with one now deceased was correct, as such testimony is, in substance and effect, a statement that the services had been rendered under a contract or upon request. *Boyd v. Cauthen*, 28 S. Car. 72.

and wife is such that, in the absence of a statute expressly removing the disability, where one of them is rendered incompetent to testify by reason of the death of the opposing party, the other is also incompetent.¹ In some jurisdictions, however, incompetency from this cause is removed where the witness has no personal interest in the matter in controversy other than that arising from the marital relation, and the testimony proposed is of such a character as to be no violation of the confidence of such relation.²

1. *Bitner v. Boone*, 128 Pa. St. 567; *Sutherland v. Ross*, 140 Pa. St. 379; *Berry v. Stevens*, 69 Me. 290; *Kilgore v. Hanley*, 27 W. Va. 451; *Muir v. Miller*, 82 Iowa 700; *Auchampaugh v. Schmidt*, 72 Iowa 656; *Crane v. Crane*, 81 Ill. 165; *Warrick v. Hull*, 102 Ill. 280; *Bevelot v. Lestrade*, 153 Ill. 625; *Way v. Harriman*, 126 Ill. 132; *Waggonseiler v. Rexford*, 2 Ill. App. 455; *Treleaven v. Dixon*, 119 Ill. 553 (*overruling* *Marshall v. Peck*, 91 Ill. 187); *Scherer v. Ingerman*, 110 Ind. 443, where it is said that section 501, Rev. Stats. 1881, was overlooked in *Williams v. Riley*, 88 Ind. 290, in which the contrary was held. *Hicks v. Hicks* (Tex. Civ. App. 1894), 26 S. W. Rep. 227; *Wylie v. Charlton* (Neb. 1895), 62 N. W. Rep. 220.

In a real action affecting the title to the husband's property, it seems that the wife's inchoate right of dower, if the husband's title is established, is a sufficient interest in the event of the action to exclude her testimony where the opposing party sues or defends as the representative of a deceased person. *Erwin v. Erwin*, 54 Hun (N. Y.) 166; *Baldwin v. Walker*, 67 Hun (N. Y.) 651; 23 N. Y. Supp. 1149; *Steele v. Ward*, 30 Hun (N. Y.) 555. But the husband's right of curtesy initiate is not a sufficient interest to exclude him. *Cooper v. Monroe*, 77 Hun (N. Y.) 1.

In a suit by a wife against the heirs of the grantee, to set aside a conveyance of land, in which she joined with her husband, on the ground that she was induced to execute it by fraud and duress, neither she nor her husband is a competent witness to support such allegations. *Crane v. Crane*, 81 Ill. 165; *Warrick v. Hull*, 102 Ill. 280. It has been held, however, that if she brings a suit to set aside a conveyance of her own land made during coverture, she may testify that she executed it under duress of threats made by her

husband since deceased. *Washington City First Nat. Bank v. Eccleston*, 48 Md. 145.

In *Johnson v. Fry*, 88 Va. 695, it was held that where parties are disqualified by reason of being husband and wife, the opposing party might not testify. But see Acts of Assembly of *Virginia*, 1893-1894, ch. 619, approved March 5, 1894.

But where a surviving trustee brought an action against the representatives of a deceased co-trustee, to recover property alleged to have been purchased by the deceased trustee with trust funds, it was held that the husband of a deceased *cestui que trust*, whose children were entitled to a share of the property if it were recovered, was competent to testify to conversations with the deceased trustee. *Conklin v. Snider*, 104 N. Y. 641.

A wife is not a competent attesting witness to a will which contains a devise to her husband. *Sullivan v. Sullivan*, 106 Mass. 474; 8 Am. Rep. 356.

2. *Clements v. Marston*, 52 N. H. 31; *Rushing v. Rushing*, 52 Miss. 329; *Whitman v. Foley*, 125 N. Y. 651.

Where the husband is a nominal party in an action concerning his wife's separate property, he may testify in her behalf, although the other party to the cause of action is dead. *Ellis v. Alford*, 64 Miss. 8; *Rushing v. Rushing*, 52 Miss. 329.

In *Iowa*, the husband of a devisee is a good subscribing witness to the will. *Bates v. Officer*, 70 Iowa 343; *Hawkins v. Hawkins*, 54 Iowa 443.

Where a married woman sues an executor by her husband as next friend, the husband may testify in her behalf. *Trahern v. Colburn*, 63 Md. 99.

Where a husband sues in his common law right for the wages of his wife, she may testify to the circumstances of her employment, notwithstanding the death of her employer. *Porter v. Dunn*, 131 N. Y. 314.

(5) *Donor and Donee*.—In a suit to set aside a gift of property, the donor is not, after the death of the donee, a competent witness in his own behalf as to the facts and circumstances relating to the transaction.¹ One who claims personal property as a gift from a person since deceased is not competent to support his title against the claim of the personal representative of such deceased person.² Neither is one who claims real estate under a deed of gift from a person since deceased, competent to defend his title against the heirs of the grantor.³ The heirs and distributees of the estate of a deceased donor are not competent to defeat a gift made by him, thereby increasing the assets of the estate for their own benefit.⁴

But where the disqualification of the one disqualifies the other, she may not so testify. *Ashworth v. Grubbs*, 47 Iowa 354.

1. *Wade v. Pulsifer*, 54 Vt. 45; *Yeakel v. McAtee*, 156 Pa. St. 600.

2. *Patterson v. Dushane*, 115 Pa. St. 334; *In re Turner's Estate* (Pa. 1895), 31 Atl. Rep. 867; *Elsinger v. Beytagh*, 74 Ga. 399; *Bothwell v. Dobbs*, 59 Ga. 787; *Sherman v. Lanier*, 39 N. J. Eq. 249; *Martin v. Smith*, 25 W. Va. 579; *LaMountain v. Miller*, 56 Vt. 433; *Rooney v. Minor*, 56 Vt. 527; *Waver v. Waver*, 15 Hun (N. Y.) 277; *Scott v. Riley*, 49 Mo. App. 251; *Dunn v. German-American Bank*, 109 Mo. 101; *Hopkins v. Manchester*, 16 R. I. 663; *Way v. Harriman*, 126 Ill. 132; *Johnson v. Head*, 33 Md. 352; *Stuckey v. Bellah*, 41 Ala. 700; *James v. James*, 81 Tex. 373; *Turner v. Murchison* (Tex. Civ. App. 1895), 31 S. W. Rep. 428; *Cockrell v. Mitchell* (Miss. 1894), 15 So. Rep. 41.

Where a note given for the purchase-money of land sold by a married woman was made payable to the husband and wife, and the husband handed to his wife, before his death, it was held that this was not a gift within the meaning of the rule, because the note was already the property of the wife. *Magee v. Burch*, 108 Mo. 336.

But in a contest between the son and the widow of a deceased person, it has been held that the son is competent to prove a gift of personal property to him by his father. *White v. White*, 71 Ga. 670.

In *Durham v. Shannon*, 116 Ind. 403, it was held that the plaintiff in an action of replevin, brought to recover personal property purchased by the defendant at an administrator's sale, was competent to prove a

gift of the property to him by the intestate.

3. *Boykin v. Smith*, 65 Ala. 294; *Ewing v. Ewing*, 96 Pa. St. 381; *Diehl v. Emig*, 65 Pa. St. 320; *Patterson v. Dushane*, 115 Pa. St. 334; *Huggins v. Huggins*, 71 Ga. 66.

In *Keener v. Zartman*, 144 Pa. St. 179, it appeared that the defendant's intestate had conveyed certain real estate to his son without a valuable consideration, and that the conveyance was made after the alleged debt to the plaintiff's intestate was contracted. In an action to recover the amount claimed to be due the creditor's estate, it was alleged, and not denied, that defendant's intestate left no personal property; and it was held that, upon the trial of the cause, the son to whom the gift had been made was not competent on behalf of his father's administrator, because, if the plaintiff recovered, the land given to him by his father might be taken in satisfaction of the judgment.

It has been held that heirs at law are competent to prove declarations of the ancestor made at the time when he put them in possession of property with which it is sought to charge them as advancements. *O'Neal v. Breecheen*, 5 Baxt. (Tenn.) 604.

In *Texas*, it has been held that a son who claims real estate by parol gift from his father, since deceased, the gift having been followed by possession and improvement, is competent, as against one claiming under a conveyance from his father, to prove the transaction between himself and his deceased father, because he does not claim the land as heir or legal representative of his father. *Wootters v. Hale*, 83 Tex. 563.

4. *Fort v. Davis*, 67 Ala. 481.

(6) *Heirs, Devisees, etc.*—Where the probate of a will is contested by the heirs and next of kin on the ground of fraud, undue influence, or want of testamentary capacity, the contestants are not competent in their own behalf as to personal transactions and communications with the testator.¹ And in such contest, devisees and legatees are not competent to testify to personal transactions and communications with the decedent preceding, attending, or succeeding the execution of the will.²

1. *Schoonmaker v. Wolford*, 20 Hun (N. Y.) 166; *Hatch v. Pengnet*, 64 Barb. (N. Y.) 189; *Matter of Lasak's Will*, 131 N. Y. 624; *Matter of McArthur's Will* (Supreme Ct.), 12 N. Y. Supp. 822; *Corderey v. Hughes*, 6 Ill. App. 401; *Blake v. Rourke*, 74 Iowa 519; *In re Goldthorp's Estate* (Iowa, 1895), 62 N. W. Rep. 845; *McMechen v. McMechen*, 17 W. Va. 683; 41 Am. Rep. 682.

In such contest, the heir is not competent to testify as to the sanity of the testator. *Brace v. Black*, 125 Ill. 33.

But the husband of an heir, who is joined with her as a plaintiff in an issue of *devisavit vel non*, is a competent witness for the contestants of the will. *Wolf v. Powner*, 30 Ohio St. 472.

See *Nash v. Reed*, 46 Me. 168, where a rule contrary to that stated in the text was adopted. To the same effect is *Hays v. Ernest*, 32 Fla. 18.

2. *Matter of Eysaman's Will*, 113 N. Y. 62; *Matter of Bartholic's Will* (Supreme Ct.), 12 N. Y. Supp. 640; *Matter of Lasak's Will*, 57 Hun (N. Y.) 418; *Cadmus v. Oakley*, 3 Dem. (N. Y.) 324; *Eighmie v. Taylor*, 68 Hun (N. Y.) 587; *Matter of Bernsee's Will*, 141 N. Y. 391; *Loder v. Whelpley*, 111 N. Y. 239; *Lane v. Lane*, 95 N. Y. 494; *Matter of Smith's Will*, 95 N. Y. 516; *Smith v. James*, 72 Iowa 515; *Sisters of Visitation v. Glass*, 45 Iowa 154; *Lewis v. Aylott*, 45 Tex. 190; *Brown v. Mitchell*, 75 Tex. 9; *Goerke v. Goerke*, 80 Wis. 516; *French v. French*, 14 W. Va. 458.

Where the probate of a codicil is contested, a residuary legatee of the will is not competent for the contestants as to transactions and conversations with the testator. *Matter of Dunham's Will*, 121 N. Y. 575.

The testimony of the proponent claiming an interest under the will, should not be excluded where the contestant is not the heir, devisee, legatee, or representative of the deceased. *Brown v. Bell*, 58 Mich. 58.

In some jurisdictions, the devisees are permitted to testify in rebuttal of evidence introduced by the contestants tending to show fraud and undue influence on the part of such devisees. *Garvin v. Williams*, 50 Mo. 206; *Miltenberger v. Miltenberger*, 78 Mo. 31; *Shailer v. Bumstead*, 99 Mass. 112. Compare *McHugh v. Fitzgerald* (Mich. 1894), 61 N. W. Rep. 354.

But they are not competent to testify to the due execution of the will. *Miltenberger v. Miltenberger*, 78 Mo. 27.

A legatee who has released his legacy is competent to prove personal transactions and conversations with the testator in behalf of the proponent of the will. *Matter of Wilson's Will*, 103 N. Y. 374; *Loder v. Whelpley*, 111 N. Y. 239; *Grimm v. Tittman*, 113 Mo. 56.

The widow who is named in the will as executrix, and is also a legatee, is not competent in support of the will when it is contested by the heirs. *Lane v. Lane*, 95 N. Y. 501.

But she is competent to prove that the will was found among the testator's valuable papers. Such evidence is not of a personal transaction with him. *Cornelius v. Brawley*, 109 N. Car. 542.

Under the *Michigan* statute, legatees may testify in behalf of the proponent. *Brown v. Bell*, 58 Mich. 58; *Scofield v. Walker*, 58 Mich. 96; *In re Lautenschlager's Estate*, 80 Mich. 290; *Penny v. Croul*, 87 Mich. 15; *In re Lambie's Estate*, 97 Mich. 49. And the same is true in *Florida*, *Hays v. Ernest*, 32 Fla. 18; and *Alabama*, *Henry v. Hall* (Ala. 1895), 17 So. Rep. 187.

And in *New Jersey*, where none but parties to the record are excluded, it was held that a beneficiary under the will was not, as a proponent thereof, a party to an action within the meaning of the statute, and might, therefore, testify in support of the will. *Mackin v. Mackin*, 37 N. J. Eq. 528.

And it has been held that in a contest over the probate of a will, a devisee is competent as to transactions between

In an action by or against the personal representative of a deceased person, it is generally held that heirs and next of kin whose interest is not opposed to that of the estate are competent witnesses for the representative.¹ But in a contest among the heirs themselves concerning the distribution of the property of the estate, the parties are all incompetent as to transactions and communications with their common ancestor.² And where both

himself and the testator, on the ground that all claimants are on equal footing and have the same privileges. *Flood v. Pragoff*, 79 Ky. 617.

In *Vermont*, a legatee may testify in behalf of the proponent. *In re Buckman's Will*, 64 Vt. 313; *Foster v. Dickerson*, 64 Vt. 233. So, also, in *Tennessee*. *Beadles v. Alexander*, 9 Baxt. (Tenn.) 604; *Davis v. Davis*, 6 Lea (Tenn.) 543.

1. *Patterson v. Collar*, 34 Ill. App. 632; *affirmed* 137 Ill. 403; *Freeman v. Freeman*, 62 Ill. 189; *Byers v. Thompson*, 66 Ill. 421; *Douglass v. Fullerton*, 7 Ill. App. 102; *Gerz v. Weber*, 151 Pa. St. 396; *Watson's Estate*, 11 Phila. (Pa.) 99; *Bixley v. Wormly*, 44 Iowa 347; *Muir v. Miller*, 82 Iowa 706; *Denbo v. Wright*, 53 Ind. 226; *Sullivan v. Sullivan*, 6 Ind. App. 65; *Hughlett v. Conner*, 12 Heisk. (Tenn.) 83; *Crothers v. Crothers* (W. Va. 1895), 20 S. E. Rep. 927.

An heir is a competent witness in an action by the assignee of his ancestor. *Swezey v. Collins*, 40 Iowa 540.

Devises under a will are not excluded from testifying adversely to a claim made by the executor for alleged services rendered by him to the testator. *Bantz v. Bantz*, 52 Md. 686; *Smith v. Hay*, 152 Pa. St. 377.

In an action by the personal representative to recover rent due the estate, an heir at law is competent to testify to transactions and conversations between his deceased father and the defendant. *Pendill v. Neuberger*, 67 Mich. 562.

The heirs are competent for the personal representative to show that the signatures to papers alleged to have been executed by the ancestor are not genuine. *In re Toomey's Estate*, 150 Pa. St. 535.

In ejectment brought by a son claiming as heir of his father against his brother, who claims by deed from the father, a sister who is not a party, and has no interest adverse to the deceased grantor, is a competent witness. *Crothers v. Crothers*, 149 Pa. St. 201.

But where the contest is between the representative and a son of the deceased person, concerning the title to personal property, the son may not testify to transactions with his father in support of his own claim. *Chambers v. Hill*, 34 Mich. 523.

In *New York*, it seems that those entitled to distributive shares of the estate are not competent witnesses for the representative. *LeClare v. Stewart*, 8 Hun (N. Y.) 127. And the same is true in *Alabama*. *McCrary v. Rash*, 60 Ala. 374. See also *Swift v. Martin*, 19 Mo. App. 488.

Thus, in an action by an administrator to set aside an assignment of a bond and mortgage by his intestate, on the ground of mental incapacity of the assignor at the time of the assignment, the next of kin are not competent to testify to communications with the deceased tending to show his feebleness of mind. *Holcomb v. Holcomb*, 95 N. Y. 324. But compare *Freeman v. Spalding*, 12 N. Y. 373, decided under section 399 of the Code of Procedure.

Where it appeared that the ancestor had, shortly before his death, executed an assignment of all his property, including the claim in action, for the benefit of his creditors, from which it was to be inferred that his estate was insolvent and that there would be nothing to be distributed among the next of kin, it was held that a son of the intestate was competent in behalf of the estate, as his interest was at most uncertain and contingent. *Lathrop v. Hopkins*, 29 Hun (N. Y.) 608.

2. *Wolfe v. Kable*, 107 Ind. 565; *Neas v. Neas*, 61 Iowa 641; *Comer v. Comer*, 119 Ill. 170; *Way v. Harriman*, 126 Ill. 132; *Ellis v. Stewart* (Tex. Civ. App. 1893), 24 S. W. Rep. 585.

Thus, where one distributee claims property in the possession of an ancestor at his death, under an alleged parol purchase from the ancestor, he is not competent to prove the purchase. *Saunders v. Greever*, 85 Va. 252; *Lloyd v. Hollenback*, 98 Mich. 203.

of the original parties to a transaction are dead, the heirs and next of kin of one of them, may not testify to personal transactions or communications with the other.¹

In a dispute between a husband, as tenant by the curtesy, and the heir of his wife, concerning the surplus money realized on a sale of mortgaged real estate of the wife, the husband is not competent to testify to communications between himself and the deceased wife.² On the trial of a feigned issue to determine whether the representative owes the estate, legatees and distributees are competent as to matters occurring in the lifetime of the decedent.³ Where the question of heirship is in issue, those claiming to be heirs are not competent to support their claim.⁴ Where the widow and heirs are parties in their own right, the legal representative of the estate not being a party, the rule of exclusion does not apply.⁵

d. TRANSACTIONS WITH PARTNERS AND OTHER JOINT CONTRACTORS.—In an action by or against a surviving partner, the opposing party is not, as a rule, competent to testify to transactions or conversations with the deceased partner.⁶ But it has

Neither is one child of the deceased competent against another who claims under a deed from their common ancestor. *King v. Humphreys*, 138 Pa. St. 310; *Crothers v. Crothers*, 149 Pa. St. 201.

In a contest between the widow and heir, as to the ownership of property, the former is not competent to testify as to a transaction with her deceased husband, in support of her claim. *Gardner v. McLallen*, 79 Pa. St. 398; *Lancaster v. Blaney*, 140 Ill. 203; *In re Irwin's Estate*, 1 Pa. Dist. Rep. 265; *Burton v. Baldwin*, 61 Iowa 283.

But in *Maryland*, it has been held that in a contest between the widow and next of kin, as to the distribution of the decedent's estate, the next of kin are competent witnesses. *Jones v. Jones*, 36 Md. 447; 11 Am. Rep. 505.

1. *McCrary v. Rash*, 60 Ala. 374; *Ebert v. Gerding*, 116 Ill. 216; *Parks v. Andrews*, 56 Hun (N. Y.) 391; *Mansion v. Lambert*, 10 Bush (Ky.) 295; *Messimer v. McCray*, 113 Mo. 382; *Leathers v. Ross*, 74 Iowa 630; *Neblett v. Neblett*, 70 Miss. 576.

An heir of plaintiff's intestate is not competent to testify to facts which, if true, were equally within the knowledge of the defendant's testator. *Penny v. Croul*, 87 Mich. 15; *Wright v. Gilbert*, 51 Md. 146.

In a suit by the guardian of an imbecile, to set aside a deed made by him, the heirs of the grantee are not com-

petent to testify to facts which occurred prior to the appointment of the guardian. *McNicol v. Johnson*, 29 Ohio St. 85.

The protection given to heirs by the statute includes heirs of heirs. *Merrill v. Atkin*, 59 Ill. 19.

2. *Rusling v. Bray*, 38 N. J. Eq. 398.

3. *Smith v. Hay*, 152 Pa. St. 377; *Bantz v. Bantz*, 52 Md. 686.

But on the final settlement of the accounts of a deceased administrator, between his administrator and the administrator *de bonis non*, an heir or distributee of the intestate's estate is not competent to testify as to any transaction with, or statement by, the deceased administrator. *McDonald v. Jacobs*, 77 Ala. 524.

4. *Adams v. Edwards* (Pa. 1887), 6 Cent. Rep. 762.

5. *Lawrence v. LaCade*, 46 Ark. 378; *Bird v. Jones*, 37 Ark. 195; *Titus v. O'Connor*, 18 Hun (N. Y.) 373; 57 How. Pr. (N. Y.) 391; *Howle v. Edwards*, 97 Ala. 649; *Johnson v. Merithew*, 80 Me. 111; *Newton v. Newton*, 77 Tex. 508.

Thus where a widow brings an action under a civil damage act, against one who has sold intoxicating liquor to her husband, since deceased, the defendant is competent in his own behalf. *Reget v. Bell*, 77 Ill. 593.

6. *Edwards v. Parker*, 88 Ala. 356; *Parker v. Edwards*, 85 Ala. 246; *Hussey v. Peebles*, 53 Ala. 432; *Jackson v.*

been held that the opposing party may testify where the surviving partner was present and was cognizant of the whole transaction,¹ and where the transaction or conversation proposed to be proved was had with the surviving partner, though before the death of his co-partner.² In an action against a surviving partner by the legal representative of a third person, the defendant is not competent in his own behalf.³ And where a firm is sued and an alleged member of it denies that he is a partner and dies before

Clopton, 66 Ala. 29; *Alexander v. Alford*, 89 Ky. 105; *Lawhorn v. Carter*, 11 Bush (Ky.) 7; *Foster v. Hart*, 29 Ill. App. 260; *Adams v. Eatherly Hardware Co.*, 78 Ga. 485; *Ford v. Kennedy*, 64 Ga. 537; *Morgan v. Johnson*, 87 Ga. 382; *Pettit v. Geesler*, 58 How. Pr. (Montgomery County Ct., N. Y.) 195; *Farley v. Norton*, 67 How. Pr. (N. Y. City Ct.) 438; *Green v. Edick*, 56 N. Y. 613; *Clift v. Moses*, 112 N. Y. 434; *Baxter v. Leith*, 28 Ohio St. 84; *Hanna v. Wray*, 77 Pa. St. 27; *Standbridge v. Catanach*, 83 Pa. St. 368; *Hook v. Bixby*, 13 Kan. 164; *Roney v. Buckland*, 4 Nev. 45; *Gage v. Phillips*, 21 Nev. 150; *Stuart v. Altman* (Tex. Civ. App. 1894), 28 S. W. Rep. 461.

The cases of *Crane v. Gloster*, 13 Nev. 279, and *Vesey v. Benton*, 13 Nev. 284, were decided under the act of 1869 and are not now the law. So, also, the cases of *Bragg v. Clark*, 50 Ala. 363, and *Bradley v. Patton*, 51 Ala. 108, were decided before the passage of the act of March 2, 1875, amending section 2704 of the Revised Code of Alabama, and are not now the law of that state.

Where a guardian has loaned his ward's money to a firm and taken a note to himself individually, he is not a competent witness for the purpose of defeating the firm's right of set-off, to prove that a deceased partner, with whom the transaction was had, had notice that the money belonged to the ward. *Alexander v. Alford*, 89 Ky. 105.

In replevin against a firm by the mortgagee of chattels bought from the firm by the mortgagor on a conditional sale, the plaintiff is competent in his own behalf, although the partner who made the conditional sale is dead. *Hood v. Olin*, 68 Mich. 165.

Prior to 1866, a plaintiff was not prohibited, by section 399 of the *New York Code of Procedure*, from testifying to a transaction with a deceased partner as against a surviving partner. *Tremper v. Conklin*, 44 N. Y. 58.

Contra.—It has been held that the sur-

vivor to a transaction may testify in his own behalf against a firm, though the partner with whom the transaction was had is dead, on the ground that the firm does not represent the estate of the deceased partner. *Combs v. Black*, 62 Miss. 831; *Faler v. Jordan*, 44 Miss. 283; *Love v. Stone*, 56 Miss. 449; *McCutchen v. Rice*, 56 Miss. 454; *Carlton v. Mays*, 8 W. Va. 245; *Roberts v. Yarbboro*, 41 Tex. 449; *Clapp v. Hull* (R. I. 1894), 29 Atl. Rep. 687. Compare *Dodds v. Rogers*, 68 Ind. 110; *Hess v. Lowrey*, 122 Ind. 231; *Wood v. Stewart*, 9 Ind. App. 321.

1. *Kale v. Elliott*, 18 Hun (N. Y.) 198; *Leaprot v. Robertson*, 37 Ga. 586; *McGehee v. Jones*, 41 Ga. 123; *Savard v. Herbert*, 1 Colo. App. 445; *Peacock v. Stott*, 90 N. Car. 518; *Comstock v. Hier*, 73 N. Y. 280; 29 Am. Rep. 142; *Case v. Ellis*, 9 Ind. App. 274.

2. *McCutchen v. Rice*, 56 Miss. 455; *Bennett v. Frary*, 55 Tex. 145.

In order to exclude the witness, it should be made to appear that the transaction was with the deceased partner. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566.

The death of a partner who is a non-resident, and is not actively engaged in the business of the firm, will not disqualify an opposing party as a witness. *Hardy v. Chesapeake Bank*, 51 Md. 562; 34 Am. Rep. 325.

3. *Holmes v. Tenney*, 68 Me. 416.

But when a firm is sued by a surviving party to a contract made on the part of the firm by a deceased partner, a surviving partner is competent on the part of the firm. *Bryan v. Tooke*, 60 Ga. 437.

In an action by an administrator against a member of a firm on his individual note, no member of the firm is competent to prove that the defendant paid it to the firm by direction of the deceased payee. *Stallings v. Hinson*, 49 Ala. 92.

Where a member of a firm, with whom

the trial, the surviving partners are not competent to prove that the deceased was a member of the firm.¹

In some jurisdictions, other joint contractors are accorded the same protection as co-partners, and after the death of one of them, with whom a transaction was had, the opposing party may not testify thereto;² but in other jurisdictions, the mouth of the

the deceased had transacted business, retired from the firm during the lifetime of the decedent, who continued thereafter to do business with the remaining members, it was held that the retired member was a competent witness against the decedent's representative, as he had no interest in the matter. *Flournoy v. Wooten*, 71 Ga. 168.

A member of a firm cannot render himself competent for his co-partners, as against the personal representative of a deceased person, by permitting judgment to go against him by default. *Worthington v. Miller*, 85 Ky. 320. *Dick v. Williams*, 130 Pa. St. 41.

In an action against the personal representative of a deceased person by an assignee in bankruptcy, a partner of the bankrupt is not competent for the plaintiff. *Zeh's Estate*, 13 Phila. (Pa.) 272.

1. *Giesecke Boot, etc., Mfg. Co. v. Seevers*, 85 Iowa 685; *Sikes v. Parker*, 95 N. Car. 232; *Hogeboom v. Gibbs*, 88 Pa. St. 235; *Cooper v. Wood*, 1 Colo. App. 101; *Hurlbut v. Meeker*, 104 Ill. 541; *Eppinger v. Canepa*, 20 Fla. 262; *Hunter v. Herrick*, 26 Hun (N. Y.) 272; *affirmed*, without opinion, 92 N. Y. 626.

But a surviving partner is competent to prove that a deceased person who acted for the firm was a member of it, for the purpose of excluding the testimony of the opposing party. *Spencer v. Trafford*, 42 Md. 1.

A surviving partner seeking an accounting with the personal representative of his deceased partner, is not competent in his own behalf as to the partnership affairs. *Causler v. Wharton*, 62 Ala. 358; *Armfield v. Colvert*, 103 N. Car. 147. *Compare Lyon v. Snyder*, 61 Barb. (N. Y.) 172.

A surviving partner may testify as to the handwriting of his deceased partner and explain how a letter purporting to have been written by the latter came into his possession. *Wing v. Bliss* (Supreme Ct.), 8 N. Y. Supp. 500.

Where a member of a firm who has since died had signed the firm name to a note, a surviving partner is competent,

upon an issue of *non est factum*, to prove the signature unauthorized. *Bryan v. Tooke*, 60 Ga. 437.

2. *Gavin v. Bischoff*, 80 Iowa 605; *Harnish v. Herr*, 98 Pa. St. 6; *Dean v. Warnock*, 98 Pa. St. 565; *Lacock v. Com.*, 99 Pa. St. 207; *Moore v. Schofield*, 96 Cal. 486. *Compare Mead v. Weaver*, 42 Neb. 149.

Where the contract was several as well as joint, and the survivor was liable to a separate action as well before as after the death of his co-contractor, it was held that the opposing party might testify. *Sprague v. Swift*, 28 Hun (N. Y.) 49.

Likewise, in an action by the personal representative of a deceased person against two defendants, where separate judgments may be rendered against them, one of them may testify for the other, though incompetent in his own behalf. *Ely v. Clute*, 19 Hun (N. Y.) 35.

In such cases, the opposing party may testify to transactions and conversations with the surviving joint contractor. *Rawson v. Cherry*, 44 Ga. 75; *Nugent v. Curran*, 77 Mo. 323.

The rule does not apply where the surviving joint contractor is cognizant of all matters testified to by his opponent and may contradict him if he will. *North Georgia Min. Co. v. Latimer*, 51 Ga. 47; *Harrison v. Neely*, 41 Ohio St. 334. Or where the surviving joint contractor has taken the stand and testified as to the transactions himself. *Hammond v. Drew*, 61 Ga. 189.

In an action on an official bond, the plaintiff is not excluded as a witness by reason of the fact that one of the obligor's sureties is dead, the personal representative of such surety not being a party to the action. *Hall v. State*, 39 Ind. 301.

In *California*, the surviving joint contractor may not testify for the opposing party as to personal transactions with his deceased co-contractor. *Moore v. Schofield*, 96 Cal. 486.

Where one of several co-obligors withdrew his answer upon a stipulation that judgment was to be entered against

opposing party is closed only when a sole party on the other side is dead, or, if there are several, when they are all dead.¹

c. TRANSACTIONS WITH AGENTS.—Where a transaction was had with an agent of a person since deceased, the other party thereto may testify concerning it, if the agent is alive and competent to testify.² The rule as to the effect of the death of an

him for a certain amount, it was held that he might testify to transactions between himself and the plaintiff's intestate, as he had no further interest in the event of the action. *Conger v. Bean*, 58 Iowa 321; *Baker v. Kellogg*, 29 Ohio St. 663.

1. *Hayward v. French*, 12 Gray (Mass.) 459; *Goss v. Austin*, 11 Allen (Mass.) 525; *Worthley v. Hammond*, 13 Bush (Ky.) 510; *Johnson v. Coles*, 21 Minn. 108; *Fulkerson v. Thornton*, 68 Mo. 468; *Nugent v. Curran*, 77 Mo. 323; *Wallace v. Jecko*, 25 Mo. App. 313. See also *Paddock v. Potter* (Vt. 1895), 31 Atl. Rep. 784.

But in *Messimer v. McCray*, 113 Mo. 382, it was held that where a wife joins her husband in a conveyance of his land they are not joint contractors within the meaning of the rule, and the grantee, or one claiming under him, is not competent to prove the transaction after the death of the husband, though the wife be living. The court said: "It is contended he is not disqualified under our rulings; that where a contract is entered into by a party with two persons, and only one of the persons is dead, the other party is not disqualified. *Fulkerson v. Thornton*, 68 Mo. 468; *Nugent v. Curran*, 77 Mo. 323. A sufficient answer to this contention is that the contract sought to be set up as a defense in this action was not between James L. Orr, senior, and two persons, but between him and one person, Charles C. Birch, the only person who could enter into contract with Orr, senior, by deed, the execution and delivery of which would convey the title to the premises claimed. Husband and wife ordinarily are not two persons in contemplation of law, but one person, and the husband, notwithstanding modern innovations, still remains the one person, at least so far as his own property is concerned. It does not follow because a woman relinquishes her inchoate right of dower in the land of her husband, in a deed by which he purports to have sold and conveyed his land to another, that she is a party to the contract be-

tween the vendor and vendee, grantor and grantee; or competent to testify on the subject of such contract, which is only consummated when the deed is delivered by the husband. The ruling in the cases cited is obviously limited not only to cases where there are really two parties to the contract, but where the surviving party to the contract is competent to speak on the subject as a witness, which, Orr, senior, being dead, the plaintiff in this case would not be competent to do for the same reason (Birch being dead) that Orr, junior, is incompetent."

2. *Pratt v. Elkins*, 80 N. Y. 201; *Smith v. Smith*, 91 Mich. 7; *Ward v. Ward*, 37 Mich. 253; *Orr v. Rode*, 101 Mo. 387; *Jacquin v. Davidson*, 49 Ill. 82; *Miller v. Wilson* (Mo. 1894), 28 S. W. Rep. 640.

But in such case, the surviving party's examination must be confined to such portion of the transaction as was had personally with the agent. *Reherd v. Clem*, 86 Va. 374. The presence of an agent of the deceased does not render the opposing party competent to testify to a conversation with the deceased. *Hutchinson v. Cleary*, 3 N. Dak. 270.

The custodian of an agreement between parties is not such an agent as will make the survivor a competent witness in his own behalf. *Comer v. Comer*, 24 Ill. App. 526.

The officer before whom a deed is acknowledged is not an agent of the grantee within the meaning of the rule, so as to let in the evidence of the grantor after the death of the grantee. *Booth v. McJilton*, 82 Va. 827.

The surviving party to a contract may not testify to a conversation with the attorney of the deceased in the presence of the latter in reference to the contract. *McRae v. Malloy*, 90 N. Car. 521.

Where the agent of the deceased party is also dead, the other party may be a witness in his own behalf if the agent was examined as to the transactions before his death. *Perry v. Mulligan*, 58 Ga. 479.

agent is not uniform. In a number of the states, it is held that after the death of an agent through whom a contract was made, the other party thereto may not, of his own motion, testify to any transaction relative to the matter in controversy, had with the agent personally in the absence of the principal.¹ In other jurisdictions, a party is not precluded from testifying to transactions and conversations with the agent of the opposing party, notwithstanding such agent is dead at the time of the trial.² The statutes in some of the states provide that where an officer or agent of a corporation, through whom a contract with the corporation is made or with whom a transaction was had, is dead at the time of the trial, the other party to such contract or transaction may not testify thereto in his own behalf, unless the matters in issue are known to some other officer or agent of such corporation.³ And, conversely, where the other party to the transaction

In *Pennsylvania*, a surviving party to a contract is not competent to testify as to any matter relating thereto which occurred prior to the death of the other party, notwithstanding the deceased party was represented by an agent who is, at the time of the trial, alive and competent to testify. *Sutherland v. Ross*, 140 Pa. St. 379. And the same is true in *Tennessee*. *Cottrell v. Woodson*, 11 Heisk. (Tenn.) 681.

In *Lemon v. Hornsby*, 63 Ga. 271, it was held that one whom it was sought to make liable on a draft by reason of the acceptance of his agent, was competent to prove a want of authority in the agent, notwithstanding the previous death of the drawer, the payee and the accepting agent both being alive.

1. *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736; *Warten v. Strane*, 82 Ala. 311; *Aultman v. Adams*, 35 Mo. App. 503; *Robertson v. Reed*, 38 Mo. App. 32; *Nichols v. Jones*, 32 Mo. App. 657; *Stanton v. Ryan*, 41 Mo. 510; *Butts v. Phelps*, 79 Mo. 302; *Williams v. Edwards*, 94 Mo. 447; *St. Charles First Nat. Bank v. Payne*, 111 Mo. 298; *Trunkey v. Hedstrom*, 131 Ill. 204; *Johnson v. Hart*, 82 Ga. 767; *Doerflinger v. Nelson*, 76 Ga. 101; *Harpending v. Daniel*, 80 Ky. 449; *Cornell v. Barnes*, 26 Wis. 473; *McIndoe v. Clarke*, 57 Wis. 165; *Griawold v. Edson*, 32 Minn. 436.

And he cannot render himself competent by putting in evidence the deposition of such deceased agent formerly taken by his principal. *McIndoe v. Clarke*, 57 Wis. 165.

And the fact that the agent testified at a former trial of the cause will not

change the rule. *Harpending v. Daniel*, 80 Ky. 449.

An executor is not a competent witness for the sureties on his bond, to prove the payment of a legacy to the agent of a legatee; such agent being dead at the time of the trial. *Leach v. McFadden*, 110 Mo. 584.

In *Missouri*, the rule is limited to transactions by a party to an action with the deceased agent of the opposing party while acting on behalf of his principal. *St. Charles First Nat. Bank v. Payne*, 111 Mo. 291.

2. *Reynolds v. Iowa, etc., Ins. Co.*, 80 Iowa 563; *Bellows v. Litchfield*, 83 Iowa 36; *Cochran v. Almack*, 39 Ohio St. 314; *First Nat. Bank v. Cornell*, 41 Ohio St. 401; *Voss v. King*, 33 W. Va. 236; *Howerton v. Lattimer*, 68 N. Car. 370; *Sprague v. Bond*, 113 N. Car. 551; *Hostetter v. Schalk*, 85 Pa. St. 220; *Poquet v. North Hero*, 44 Vt. 91; *Spencer v. Trafford*, 42 Md. 1; *Hildebrand v. Crawford*, 65 N. Y. 107, *affirming* 6 Lans. (N. Y.) 502.

In *Indiana*, it is held that a deceased partner is an agent of the surviving partner within the meaning of the rule. *Dodds v. Rogers*, 68 Ind. 110; *Hess v. Lowrey*, 122 Ind. 231.

It has been held that a party may testify to a transaction with a deceased agent of a deceased principal. *Morgan v. Bunting*, 86 N. Car. 66; *Hildebrand v. Crawford*, 65 N. Y. 107.

3. *Baumann v. Manistee Salt, etc., Co.*, 94 Mich. 363; *Rayburn v. Mason Lumber Co.*, 57 Mich. 273; *Farmers' Union Elevator Co. v. Syndicate Ins. Co.*, 40 Minn. 152; *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736; *Stanley v.*

with the corporation is dead, the officers or agents of the corporation with whom such transaction was had, are not permitted to testify concerning the same against the personal representative of the deceased.¹

Sheffield Land, etc., Co., 83 Ala. 260; *Downing v. Woodstock Iron Co.*, 93 Ala. 262; *Mayfield v. Savannah, etc., R. Co.*, 87 Ga. 374; *Merchants' Nat. Bank v. Demere*, 92 Ga. 735; *Williams v. Edwards*, 94 Mo. 447.

A locomotive engineer through whose negligence the plaintiff was injured, is an agent of the company within the meaning of the rule. *Mayfield v. Savannah, etc., R. Co.*, 87 Ga. 374.

In *Georgia*, it is held that the same is true where the transaction was had with the officer or agent of a public corporation, such officer or agent being dead at the time of the trial. *Langford v. Wilkinson County*, 75 Ga. 502. But the contrary has been held in *South Carolina*. *Coleman v. Chester*, 14 S. Car. 286.

And in *Virginia*, it has been held that one who has acted as agent of a board of public works is competent to prove a transaction between himself and the board which occurred at a regular meeting thereof, though some of the members have since died. *Kelly v. Board Public Works*, 75 Va. 263.

If the transaction or conversation proposed to be proved is equally within the knowledge of a surviving officer or agent of a corporation, the opposing party may testify as to it. *Lyttle v. Chicago, etc., R. Co.*, 84 Mich. 289.

But there are other jurisdictions in which it has been held that the rule as laid down in the text does not exist. *Roberts v. Richmond, etc., R. Co.*, 109 N. Car. 670; *Reynolds v. Iowa, etc., Ins. Co.*, 80 Iowa 563; *First Nat. Bank v. Cornell*, 41 Ohio St. 401; *Bexar Bldg., etc., Assoc. v. Newman* (Tex. Civ. App. 1893), 25 S. W. Rep. 461.

1. *Brennan v. Michigan Cent. R. Co.*, 93 Mich. 156; *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330; *Arrott Steam-Power Mills Co. v. Way Mfg. Co.*, 143 Pa. St. 435; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481; *Soeding v. Bonner, etc., Iron Co.*, 35 Mo. App. 349; *Planters, etc., Bank v. Neel*, 74 Ga. 576; *Central R., etc., Co. v. Papot*, 59 Ga. 342; *Southwestern R. Co. v. Papot*, 67 Ga. 675; *Gainesville First Nat. Bank v. Cody*, 93 Ga. 127; *Keller v. West, etc., Mfg. Co.*, 39 Hun (N.Y.)

348. And by the same rule the stockholders of a moneyed corporation are excluded when the opposing party is dead. *Foster v. Collner*, 107 Pa. St. 305; *Burlington Bank v. Owen*, 52 Iowa 107.

In *North Carolina*, it has been held that, in an action by the board of county commissioners, a member of the board is not competent to prove transactions with the defendant's intestate. *Forsyth County v. Lash*, 89 N. Car. 159.

In *Michigan*, the rule applies only to such officers and agents of a corporation as are authorized to act for the company in reference to the matter about which the evidence is offered. *Brennan v. Michigan Cent. R. Co.*, 93 Mich. 156.

In *Mississippi*, it is held that the officers and agents of corporations are not disqualified by reason of the death of the opposing party. *Mitchell v. Tishomingo Sav. Inst.*, 56 Miss. 444.

And in *Maryland*, it has been held that, in an action against an executor by a corporation to recover the testator's unpaid subscriptions for stock, the stockholders may testify. *Downes v. Maryland, etc., R. Co.*, 37 Md. 100.

The cashier of a bank, to whom stock was transferred by the owner to avoid liability as a stockholder, is not prevented, after the latter's death, from testifying as to the facts. *Stephens v. Bernays*, 42 Fed. Rep. 488.

In *New York*, it is expressly provided by statute that a person shall not be deemed interested by reason of being a stockholder or officer of any banking corporation which is a party to an action or proceeding, or interested in the event thereof, the opposing party being dead. *New York Code Civ. Proc.*, § 829. And the officers of a charitable institution, who serve without pay, are not excluded. *Matter of O'Rourke* (Surrogate Ct.), 34 N. Y. Supp. 45.

And in *Missouri*, the same result has been reached by judicial interpretation of the statute of that state. The court reached the conclusion that officers and stockholders of banking corporations were competent at common law, and that it was not the intention of the

The officers and members of a benefit society, though liable to pay assessments, are competent to testify in behalf of their society, when it is sued on an insurance policy by one who is named as a beneficiary therein. In such case, the plaintiff sues in his own right and is in no sense a representative of the decedent's estate.¹ An agent of one since deceased, is competent to prove the fact of his agency, the scope of his authority, and the terms of a contract made by him on behalf of his principal;² and he is competent for these purposes though called to testify against the personal representative of his deceased principal,³ unless there is an issue as to whether he or the estate of his deceased principal is liable on the contract made by him.⁴

statute to disqualify anyone who was formerly a competent witness. *Bates v. Forcht*, 89 Mo. 121.

In an action upon the bond of the treasurer of a lodge, persons who were members when the bond was executed and when the suit was brought, are not competent to prove that a person since deceased signed the bond as a surety. *Fink v. Hey*, 42 Mo. App. 295.

In an action by the beneficiaries in a life insurance policy against a bank, to obtain possession of the policy, it was held that the president and cashier of the bank might testify to conversations and transactions with the policy holder since deceased, because the plaintiffs were not prosecuting their action in a representative capacity. *Macaulay v. Central Nat. Bank*, 27 S. Car. 219.

1. *Reichenbach v. Ellerbe*, 115 Mo. 588; *Sherret v. Royal Clan of Order of Scottish Clans*, 37 Ill. App. 446; *Hamill v. Supreme Council*, 152 Pa. St. 537; *Perine v. Grand Lodge*, 48 Minn. 82. Compare *Barry v. Equitable L. Assur. Co.*, 59 N. Y. 587.

In *Hamill v. Supreme Council*, 152 Pa. St. 542, in which it was contended that a member of the society was incompetent to testify for the defense on the ground that he was liable to pay assessments, and that the plaintiff represented the interest of the deceased policy holder, the court said: "If this contention were true in fact, the question would come within the operation of the 5th section of the act of May 23d, 1887, and the witnesses, would be incompetent. It is equally true that if that section is inapplicable to the case, the witnesses were clearly competent, for the reason that competency is now the rule, and incompetency only exists by force of the exceptions contained in the statute. It is very plain to us that the exception

of the 5th section of the statute is inapplicable, for the very simple reason that no right of the deceased to the subject in controversy has passed, either by his act or by the act of the law, to the plaintiff. The deceased never had any right to the benefit which was to be paid to his wife. It was hers and hers only, payable to her exclusively, and, of course, no one but she could maintain any action for its recovery. She is a living person, and no other person ever had or could have the right to recover this money. As between her and the defendant, there is a clear contention as to whether the funds shall be paid by the defendant to her, and there is no contention, and cannot be, upon that subject, as between the defendant and the legal representatives of the deceased. The plaintiff is not such a representative. She takes, if she takes at all, in her own right alone as the beneficiary of the fund, and she does not represent any right or interest of her deceased husband in the fund. She represents herself and her own rights only in the subject in controversy."

2. *Lytle v. Bond*, 40 Vt. 618; *Smith v. Pierce*, 65 Vt. 200; *Gifford v. Thomas*, 62 Vt. 34; *Davis v. Hawkins*, 163 Pa. St. 228.

So where both of the original parties to a transaction are dead, an agent of one may testify against the representative of the other. *Rodgers v. Moore*, 88 Ga. 88.

The agent of the survivor is competent against the representative of a deceased party to a transaction. *Payne v. Miller*, 89 Ga. 73.

3. *Davis v. Davis*, 93 Ala. 173; *Garratt v. Trabue*, 82 Ala. 227; *Smith v. Pierce*, 65 Vt. 200.

4. Thus, in *Augusta Nat. Bank v.*

Where one of the original parties to a contract is dead, the agent of the surviving party, who acted for his principal solely and has no personal interest in the transaction, is a competent witness for the survivor.¹ But where an agent has acted in his own name, without disclosing that of his principal, he will not be permitted to testify concerning the transaction after the death of the other party thereto.²

Bones, 75 Ga. 246, it appeared that a lease of certain iron works had been rescinded, and it was claimed that the witness who subsequently had charge thereof contracted the debt sued on as agent of the owners, one of whom was dead at the time of the trial. In reference to the competency of the witness, the court said: "We do not think that this witness was competent to testify in this case, under section 3854 of the code, because he fell within the first exception to that section: 'Where one of the parties to the contract or cause of action in issue or on trial is dead, the other party shall not be permitted to testify in his own favor.' The issue in the case was whether the contract of lease between the plaintiffs in error had been rescinded, and whether the debt sued on by Bones was made by W. E. Jackson, junior, individually or as agent for plaintiffs in error. These are the main issues on trial, and W. E. Jackson's representatives are parties thereto. W. E. Jackson, junior, is also a party to these issues, and he is directly interested in the same so as to relieve himself from liability, and to place it upon the plaintiffs in error. He would not be a competent witness at common law, and he is not relieved by the Evidence Act of 1866, as he falls within the first exceptions to that act."

1. *Payne v. Miller*, 89 Ga. 73; *Montague v. Thomson*, 91 Tenn. 168; *Baer v. Pfaff*, 44 Mo. App. 35; *Connor v. New York* (Supreme Ct.), 19 N. Y. Supp. 85; *Whitman v. Foley*, 125 N. Y. 651; *Nearpass v. Gilman*, 104 N. Y. 506, *affirming* 16 Hun (N. Y.) 121; *Darwin v. Keigher*, 45 Minn. 64; *Wager v. Barbour*, 84 Va. 419; *Blakely v. Frazier*, 11 S. Car. 122; *Hanf v. Northwestern Masonic Aid Assoc.*, 76 Wis. 450; *Samuel v. Bartee*, 53 Mo. App. 587; *Shaub v. Smith*, 50 Ohio St. 648; *Cobb v. Wolf* (Ky. 1895), 29 S. W. Rep. 303.

In *Darwin v. Keigher*, 45 Minn. 64, the court said: "Our statute extends the rule of the common law as to the

competency of witnesses, and in general neither the parties to an action, nor those who may be interested in the event of it, are excluded from being witnesses. This general rule is, however, qualified by the provision that 'it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein or concerning any conversation with, or admission by, a deceased or insane party or person, relative to any matter at issue between the parties.' Gen. Stats. 1878, ch. 73, § 8. The plaintiff's agent was competent to testify as to the contract, unless he was either a party to this action or was interested in the event of it, and, hence, within the above recited statute. He was not a party but a stranger to the action, nor was he, so far as appears, interested in the event thereof. The meaning of this language used in respect to the competency of persons to testify, was well understood when the rules of the common law were changed by statute, and it bears the same meaning in the statute as when used under the common law with reference to the same subject."

In jurisdictions where agents of corporations are excluded after the death of opposing parties, an exception to this rule must be noted where the surviving party to the contract is a corporation. See *Baer v. Pfaff*, 44 Mo. App. 35.

In *Indiana*, it is provided by section 500, Rev. Stats. 1881, that no person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit upon or involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representative or heirs of the decedent, unless he shall be called by such heirs or legal representatives. See *Piper v. Fosher*, 121 Ind. 412; *Devol v. Dye*, 123 Ind. 321. The rule is the same in *Georgia*. *Thompson v. Ray*, 92 Ga. 540.

2. In *Standford v. Horwitz*, 49 Md.

f. TRANSACTIONS WITH THIRD PERSONS—(1) Between the Witness and a Third Person.—The death of one party to a cause of action does not preclude the other party from testifying to transactions or communications between himself and a third person living at the time of the trial,¹ and, unless the statute expressly prohibits it, either party to an action may testify to a

525, it appeared that the witness had signed a mortgage and certain promissory notes in his own name. It was claimed at the trial, however, that he acted as agent for his son, but it was held that his testimony should be excluded, the other party to the transaction being dead. The court said: "Our evidence laws, as construed by this court, provide that when one party to a contract or cause of action is dead, the other party shall not be allowed, on his own offer, to testify in respect thereto. He cannot, by his own testimony, establish a contract in his favor against a deceased party, nor can he, by such testimony, assail one upon which he is *prima facie* liable to the deceased. It is too plain for argument that the purpose as well as the effect of the testimony of this witness was to assail, in part at least, the consideration of the note for \$1680 in favor of the deceased, which he admitted he signed as maker, and which on its face does not disclose any agency on his part. Upon the face of the note he is undoubtedly liable to the payee therein, and he cannot escape the liability by showing that he in fact signed it as agent for his son. This proposition was fully discussed and settled in the case of *Higgins v. Senior*, 8 M. & W. 834."

1. *Pattison v. Armstrong*, 74 Pa. St. 476; *Hill v. Truby*, 117 Pa. St. 320; *Waddell v. Swann*, 91 N. Car. 105; *Watts v. Warren*, 108 N. Car. 514; *Downs v. Belden*, 46 Vt. 674; *Martin v. Jones*, 59 Mo. 181; *Harding v. Elzey*, 88 Ind. 321.

Where the sister of the plaintiff received money from their mother as a gift, one-half of which she was to deliver to the plaintiff on demand, and the defendant induced the sister to deliver the plaintiff's share to him, it was held, in an action to recover it back, that the plaintiff was competent to prove the gift of the money to her by her mother, although the latter was dead at the time of the trial, because the defendant did not derive title from the decedent. *Mason v. Prendergast*, 120 N. Y. 536.

Where a deceased person had, in his lifetime, assigned a life insurance policy to his brothers, and the assignment was attacked by creditors as fraudulent, it was held that the assignees might testify to what debts they paid for the deceased in support of the consideration for the assignment, such payments being transactions between them and third persons, and not with the decedent. The court said: "The witnesses were not called upon to testify concerning a personal transaction or communication between them and the deceased person, their brother. They were asked to testify as to transactions and communications with persons other than the deceased, and as to which such third persons could testify, if need be. The statute does not, by its terms and purpose, prevent the surviving party from testifying concerning transactions and communications with third persons that may affect adversely the estate of the deceased person, or the rights of persons in and to the same." *Watts v. Warren*, 108 N. Car. 520.

In *Hill v. Truby*, 117 Pa. St. 324, the court said: "We think it was error to reject the offer to prove by Hill what occurred between him and the tax collector, on the ground of incompetency of the witness. We held, in *Ash v. Guie*, 97 Pa. St. 493; 39 Am. Rep. 818, that the spirit of the act of 1878 embraced the survivor of two or more who jointly contracted, and, therefore, the plaintiff could testify as to matters occurring between himself and the surviving defendants. But we did not mean to decide that he could not testify as to relevant matters which occurred between himself and strangers. There would be no propriety and no necessity for such a decision. Such matters were not excluded by any interpretation of the act of 1869, except that which declared the general incompetency of the witness. That incompetency was removed by the act of 1878 in the case of the survivor of joint obligors. It is true the act in terms qualified the witness to testify to matters having oc-

transaction or conversation between himself and a third person, other than the agent of the opposing party, who is dead at the time of the trial, provided it is relevant to the matter in issue, and the legal representative of such third person is not a party to the action.¹ Where, however, the statute inhibits testimony by a

curréd between the surviving party and the adverse party on the record, but that was because it was that class of matters which were specially excluded by the construction which had been given to the act of 1869, and that was the evil intended to be more particularly remedied by the act of 1878. But there could be no good reason for excluding other matters occurring between the witness and other persons who were not parties. Such exclusion had been, previously to the act of 1878, merely the result of a personal incompetency to testify at all, but when that general incompetency was removed, matters which were otherwise unobjectionable could not be excluded on that account. We are clearly of opinion, therefore, that other and indifferent matters between the witness and a stranger might be proved as well by a surviving obligor or his adversary, providing only that they were relevant to the issue trying."

In *Taylor v. Duesterberg*, 109 Ind. 171, the court said: "Where the contract or matter involved in the suit or proceeding is such that one of the parties to the contract or transaction is, by death, denied the privilege of testifying in relation to such matter, the policy of the statute is to close the lips of the other also in respect to such matter. Where, however, an administrator assails the title of another, such title having been acquired through a third party, in a transaction to which the decedent was a stranger, the parties to the transaction cannot be prevented from speaking in reference to such matters, even though they occurred during the lifetime of the decedent. A contract or matter in which the decedent in his lifetime never had any concern or interest, cannot be so involved in a suit by his personal representative as to preclude the parties interested in the transaction, although it may come collaterally in question, from upholding it by their own testimony. If it were otherwise, the death of a stranger, who presumably could not have testified concerning the matter if living,

would close the mouths of the only persons interested in the contract when it was made."

In *North Carolina*, it is held that, while a party may not directly testify to a conversation with the deceased, he may nevertheless testify to a rehearsal of the same in a conversation with an agent of the deceased if it is a part of the *res gestæ*. *Tredwell v. Graham*, 88 N. Car. 208; *Gilmer v. McNairy*, 69 N. Car. 335; *State v. Morris*, 69 N. Car. 444.

But in *Georgia*, a party may not testify to statements of the deceased, repeated to him by an agent of the deceased, touching a past contract between the witness and the decedent. *Freeman v. Bigham*, 65 Ga. 580.

1. *Thomas v. Kelly*, 74 N. Car. 416.

In *VanHorne v. Clark*, 126 Pa. St. 411, the plaintiff claimed under a sheriff's deed for the land in dispute sold as the property of the defendant's father, then deceased. The defendant claimed under a deed from her father executed prior to the entry of the judgment on which the sheriff's sale to the plaintiff was made. It was held that the defendant was a competent witness, notwithstanding the death of her grantor, to prove the real consideration for the deed. The court said: "We are unable to see any valid objection to the competency of Ruth Clark as a witness. It is true she was the defendant in the ejectment, and her father, from whom she derived title, was dead. She was not called to testify against his title, but in support of it, or, to speak with greater accuracy, to prove the consideration she paid for the land. Neither party to the record is acting in a representative capacity. The plaintiff below was not prejudiced by the death of William J. Clark. If either party was prejudiced, it was the defendant. The case does not come within any of the exceptions of any of the acts of assembly relating to the competency of witnesses, nor do we think it comes within their spirit."

But a party who is incompetent to give in evidence a conversation with a

party or a person interested in the event of the action concerning communications between himself and a deceased or insane party or person, it is construed to exclude testimony concerning communications with a person deceased or insane at the time of the trial, though the legal representative of such deceased or insane person is not a party to the issue.¹

(2) *Between the Deceased and a Third Person.*—In many cases, a distinction has been made between transactions and communications between the witness and the deceased and those exclusively between the deceased and a third person. In these cases, it has generally been held that the witness, though a party to the action and interested in the event thereof, may testify to a transaction or conversation between the deceased and a third person had in the presence of the witness or within his hearing, provided he took no part therein.² But if he took any part in the transaction by

deceased person, will not be permitted to give it as rehearsed by him to a third person. *Cottrell v. Cottrell*, 81 Ind. 87.

1. In *Griswold v. Edson*, 32 Minn. 436, Gilfillan, C. J., said: "Prior to 1861, a party could testify to any matter pertinent to the issue. In 1861, the statute was changed so as to exclude a party testifying in his own favor, when the other original party to the contract or cause of action was dead or insane. In 1866, it was again changed so as to admit a party to testify in his own favor, though the other party were dead or insane, if the transaction on the other side, that is, the side of the dead or insane party, was had by an agent 'whose testimony is received.' This last phrase was held, in *Bigelow v. Ames*, 18 Minn. 527, to mean an agent whose testimony can be received, or is receivable. It was again changed in 1877, to read as it now stands in General Statutes 1878. The purpose of these various changes is manifest. Prior to 1861, a party testifying in his own favor to a contract or transaction with the other party, had the opportunity and the temptation to give an uncontradictable false account of it, where the mouth of the other party was closed by death or insanity, so that his version could not be heard. The act of 1861 intended to take away the opportunity, but it went further than was necessary for that purpose; for the opportunity would not exist, notwithstanding the death or insanity of the opposite party, if the transaction to which the surviving or sane party offered to testify were had with an agent

alive and sane, and who might be called to contradict him; and yet, even if such were the case, the act excluded him. To correct this, the change in 1866 was made. The language in which that change was made left doubt and uncertainty as to the rule; hence the change in 1877. Appellant contends as to that act that it intends only to exclude a party from testifying to a conversation with or declaration of a party, the latter being dead or insane, and not of any other person, whether an agent or not, and although dead or insane; that the words 'or person' are superfluous, used in the same sense as the preceding word 'party,' merely tautological. In view of the clear purpose of the various changes in the law, beginning with 1861, we do not think so. The danger of allowing a party to testify where he may feel safe to testify falsely, from the fact that the other party to the conversation cannot be produced to contradict him, because dead or insane, is just as great where he offers to testify to conversations or admissions of one not a party to the action or cause of action, as of a party. There was just as much reason for excluding a party's evidence as to a conversation with or admission of any other person who has died or become insane, as for excluding it as to a conversation with or admission of one a party. The only reason for excluding it in either case is the danger of perjury. That exists in one case as fully as in the other. We cannot reject the words 'or person' or construe them as having any but their ordinary meaning."

2. *Swezey v. Collins*, 40 Iowa 542;

Dougherty v. Deeney, 41 Iowa 19; *Johnson v. Johnson*, 52 Iowa 589; *Lines v. Lines*, 54 Iowa 600; *Mayes v. Turley*, 60 Iowa 407; *Smith v. James*, 72 Iowa 517; *Gable v. Hainer*, 83 Iowa 459; *Farmers, etc., Bank v. Creveling*, 84 Iowa 677; *Roe v. Harrison*, 9 S. Car. 279; *Hughey v. Eichelberger*, 11 S. Car. 36; *McLaurin v. Wilson*, 16 S. Car. 402; *Shaw v. Cunningham*, 16 S. Car. 631; *Colvin v. Phillips*, 25 S. Car. 231; *Kennemore v. Kennemore*, 26 S. Car. 251; *Moore v. Trimmier*, 32 S. Car. 525; *Sullivan v. Latimer*, 38 S. Car. 158; *Simmons v. Sisson*, 26 N. Y. 264; *Lobdell v. Lobdell*, 36 N. Y. 327; *Cary v. White*, 59 N. Y. 336; *Hildebrant v. Crawford*, 65 N. Y. 107; *Pinney v. Orth*, 82 N. Y. 619; *Holcomb v. Holcomb*, 95 N. Y. 316; *Simmons v. Havens*, 101 N. Y. 433; *Marsh v. Gilbert*, 2 Redf. (N. Y.) 465; *Sanford v. Sanford*, 61 Barb. (N. Y.) 293; *Patterson v. Copeland*, 52 How. Pr. (N. Y. Supreme Ct.) 460; *Crawford v. Haines*, 44 Hun (N. Y.) 597; *Stern v. Eisner*, 51 Hun (N. Y.) 224; *Matter of Brown* (Supreme Ct.), 14 N. Y. Supp. 122; *Jackson v. Payne*, 114 Pa. St. 67; *McCamy v. Cavender*, 92 Ga. 254.

In *Lobdell v. Lobdell*, 36 N. Y. 327, the court said: "Now the transaction or communication respecting which he sought to testify was not between himself and the deceased person, or, in the explicit language of the statute, 'had personally by said party with a deceased person,' but between the deceased and a third person. I am unable to see why he was not a competent witness to that transaction, or how, without extending the limitation further than the statute has done, he could be excluded. Although it may be said that a party standing in the relation in which he does ought to have been excluded, for he has the same advantage over the plaintiffs, as a witness, as his father would have had if living and standing as defendant in the suit, still, unless the section as it stood can be construed so as to exclude him, the legislature and not the court must rectify the omission. It will not suffice to say that the case is within the spirit of the enactment, unless a fair construction of the language used will bring it within the enactment itself. The subject of the section is the allowance of parties to be witnesses in their own behalf, and its object is to provide generally for their examination as such witnesses, and the specific ex-

ceptions to such examination. The legislature having undertaken to specify the exceptions, the courts cannot allow any that are not specified by the legislature. When the legislature explicitly limited the exclusion of a party, to cases in which he should offer to testify in respect to a transaction or communication had personally by him with the deceased person, it is impossible to construe that exclusion as meaning to cover transactions or communications had by some third person, whoever he may be and however connected with the party offering to testify, with the deceased person. Such construction would ignore the terms 'had personally by him,' which serve to show the precise extent of the exclusion."

The rule has been applied even when such transaction was with the husband or wife of the witness. *Lines v. Lines*, 54 Iowa 600; *Hughey v. Eichelberger*, 11 S. Car. 49; *McLaurin v. Wilson*, 16 S. Car. 402.

In *Gable v. Hainer*, 83 Iowa 457, it appeared that a son, died indebted to the estate of his father, who had died a short time before the son's death. An action was brought by the father's administratrix against the son's executors, to recover the debt, and it was held that the daughter of the plaintiff's intestate, though interested in the event of the action, was competent to testify to such business transactions between her father and her deceased brother as she had acquired a knowledge of otherwise than through personal communications with her brother. The court said: "Special complaint is made of the testimony of said Emma Gable. It appears that she was either a member of the family, or much of the time at the home, of Henry Gable. She was examined as a witness in the case more than once. At the first examination, some of the testimony appears to us to be very close to the line of exclusion prescribed by the statute. But on her last examination, everything appears to have been excluded, except the contents of certain letters and papers sent by her father to her brother, Henry Gable. She stated positively that she acquired a knowledge of the writings without any communication with her brother. This being the testimony, it was as competent as if the communication between father and son had been by conversation with each other, and the witness a mere listener. That testimony of that kind is competent, has

word, sign, or act, his testimony concerning it should be excluded;¹ or, if the decedent's remarks were addressed to him as

been repeatedly held by this court. *Sweezy v. Collins*, 40 Iowa 542; *Dougherty v. Deeney*, 41 Iowa 19; *Johnson v. Johnson*, 52 Iowa 589; *Lines v. Lines*, 54 Iowa 600."

In *Colvin v. Phillips*, 25 S. Car. 228, it was held that in an action against the administrator of a deceased judgment debtor, prosecuted by the assignee of the judgment, the plaintiff might testify to a conversation between his assignor, who was then the owner of the judgment, and the judgment debtor, who was dead at the time of the trial. The court said: "The general rule is that interest does not disqualify, and hence, to render any testimony incompetent under the provisions of that section, it is necessary to bring such testimony under the express terms of some one of the exceptions to such general rule, mentioned in the proviso. *Guery v. Kinsler*, 3 S. Car. 423; *Cantey v. Whitaker*, 17 S. Car. 527. Now in this case, this witness whose testimony was objected to, though a party to the action, and though testifying as to a conversation of a deceased person, in proceeding against his administrator was not testifying in regard to any transaction or communication between such witness and a person at the time of such examination deceased, etc. On the contrary, the transaction or communication to which he was testifying was between Nicholas Colvin, the father of the witness, and the deceased, Phillips. For all that appears, the witness at the time of the conversation was like any other disinterested bystander, testifying as to a conversation between the two original parties to the judgment, both of whom are now dead. It is clear, therefore, that the testimony objected to cannot be brought within the express terms of the exception relied upon, as has been frequently held by this court." *Citing Roe v. Harrison*, 9 S. Car. 279; *Hughey v. Eichelberger*, 11 S. Car. 36; *McLaurin v. Wilson*, 16 S. Car. 402.

Where the witness, one of the defendants, had in his possession certain money belonging to the deceased, but handed it to him who afterwards handed it to the wife of the witness, another defendant, it was held that the witness was competent to testify as to what

was said and done by the deceased and the wife of the witness, as that was in no sense a transaction between the witness and the deceased. *Mayes v. Turley*, 60 Iowa 407.

Where a husband conveyed property to a third person, who, after the husband's death, conveyed it to the widow, who brought ejectment against a purchaser of the property at an execution sale thereof against her husband, the property having been sold under the execution on the theory that her husband's conveyance was in fraud of creditors, it was held that she was a competent witness in her own behalf, as she was not a party to the transaction relied on to support the defendant's title, and the representative of her deceased husband was not a party to the action. *Willingham v. Smith*, 48 Ga. 580. *Compare Johnson v. Johnson*, 52 Iowa 586.

A party may testify to transactions or conversations between the decedent and the opposing party in which the witness took no part. *Crawford v. Haines*, 44 Hun (N. Y.) 597; *Brice v. Miller*, 35 S. Car. 537.

Thus, a defendant sued jointly with the personal representative of a deceased person, may testify to a transaction between the plaintiff and the deceased, though his rights conflict with those of the decedent's estate. *New Ebenezer Assoc. v. Gress Lumber Co.*, 89 Ga. 125.

But a party will not be permitted to testify to a conversation between the deceased and a third person who is an agent of the witness and is acting for him at the time. *Head v. Teeter*, 10 Hun (N. Y.) 548.

And it has been held that, where the third person was the attorney and agent of the deceased, and was acting for him when such conversation took place, the survivor might not testify thereto. *McRae v. Malloy*, 90 N. Car. 521.

1. *Kraushaar v. Meyer*, 72 N. Y. 602; *Badger v. Badger*, 88 N. Y. 559; 42 Am. Rep. 263; *Holcomb v. Holcomb*, 95 N. Y. 325; *Ross v. Harden*, 42 N. Y. Super. Ct. 427; *Smith v. Ulman*, 26 Hun (N. Y.) 386.

Especially is this true where such third person is also dead. *Halyburton v. Dobson*, 65 N. Car. 88.

well as to a third person, he should not be permitted to testify concerning them.¹

In *New York*, this rule has been greatly modified by recent decisions. In the early cases under the Code of Civil Procedure, the rule established under the Code of Procedure was apparently adopted, but in the more recent cases involving contests over the probate of wills on the ground of fraud, restraint, undue influence or want of testamentary capacity, parties interested in such contests have not been permitted to testify to transactions and communications with the decedents, although they took no active part therein.² And a significant remark dropped by the court in a

1. *Brague v. Lord*, 67 N. Y. 498; 2 Abb. N. Cas. (N. Y.) 1; *Hard v. Ashley* (Supreme Ct.), 18 N. Y. Supp. 413; *Erwin v. Erwin*, 54 Hun (N. Y.) 166.

In *Brague v. Lord*, 67 N. Y. 498, it appeared that the deceased had addressed a remark to a third person, at the same time turning toward the witness, and it was held that the witness might not testify thereto. The court said: "Mr. Lord's remark about what he would have to pay his lawyers, turning toward the plaintiff, appears to have been addressed to plaintiff as well as to Mr. Thomas Lord, and may have satisfied the jury that Mr. Lord looked upon plaintiff as his lawyer throughout the transaction, and conceded that he would have to pay him as such. The remark to Mr. Thomas Lord about paying their lawyers did not of itself amount to much. It derived its significance wholly from the alleged turning toward plaintiff, and thus giving him to understand that he was the party referred to. This, we think, was a personal communication within the intent of the 399th section."

2. In *Matter of Eysaman's Will*, 113 N. Y. 62, a legatee under the will, who was present at its execution and had taken some part in former conversations on the occasion, was permitted in the court below to testify to subsequent conversations between the testator and persons other than the witness. This was held error on the ground that the execution of the will constituted one transaction. The court said: "We think it was error to admit this evidence. The act of executing the will, although consisting of several incidents constituted but one transaction and derived its efficacy as a valid execution from the performance of each requirement of the statute. The transaction was continuing and related to but one

subject, namely, the execution of a will. A participation by a person in any of the material acts required to complete its valid execution made the transaction one between the testator and that person. Ware was present from the subscription to the publication and attestation, and it cannot reasonably be held that he did not participate in the execution of the will."

Next came *Matter of Dunham's Will*, 121 N. Y. 577, in which the probate of a codicil was contested by the beneficiaries under the original will. The question was as to the competency of a specific and residuary legatee under the original will to testify to conversations and transactions between the testator and third persons; the witness having taken no part therein. The court said: "The witness was the nephew, and both a specific and residuary legatee under the will of the testator. The object of the proposed evidence could only have been to show undue influence, or restraint, exerted upon the deceased, or his mental incapacity; for it was offered by the contestant under formal objections, upon these grounds, to the admission to probate of a codicil to the original will, by which there was given from the estate to the proponent of the codicil, respondent here, a legacy relatively large in amount. Therefore, while as to any communications or transactions with the witness, the proposed evidence was plainly enough inhibited by section 829 of the code, his testimony as to the conversations or transactions while he was present in the room, had between the deceased and other persons, was, under the circumstances, inadmissible. In the case of *Holcomb v. Holcomb*, 95 N. Y. 316, and, more recently, in the *Matter of Eysaman's Will*, 113 N. Y. 62, this court has given such a construction to this

recent case may indicate a disposition to confine the rule within narrower limits in cases other than will contests.¹

In some other jurisdictions, substantially the same language in statutes has been construed so liberally as to prevent an interested

provision of the code as would prohibit a person interested in the event from giving such evidence. The ground for the ruling is that communications in the presence of the witness are deemed to be made to him. While the ruling may be said to be stretched to the extremest tension, it has the merit, possibly, of being in furtherance of justice. The evidence is intended to work here against the respondent, who derives her interest under the testator's codicil, and whose lips are sealed by the law, as to the matters; and to permit a witness so much interested as this one was in the amount of the estate ultimately distributable, to testify to things said and done by testator, though with others, but while he was present, with the only supposable purpose of affecting the interests of the respondent, would certainly seem to be giving an undue advantage to the one as against the other." *Compare* *Petrie v. Petrie*, 126 N. Y. 683; *Matter of Palmtree's Will*, 78 Hun (N. Y.) 43.

In *Matter of Bernsee's Will*, 141 N. Y. 391, Andrews, C. J., said: "Christian D. Bernsee was, under our decisions, an incompetent witness to testify to any conversation or transaction in his presence at the time of the execution and publication of the will. He was one of the chief beneficiaries thereunder and was directly interested in establishing due execution. What occurred at that time was a transaction between the testatrix and the witness, within the meaning of section 829 of the code, although he took no actual part in the conversation and it was wholly between the testatrix and the attesting witnesses. If active participation in the conversation was necessary to exclude an interested witness, and he should, as an observer, be permitted to testify to transactions in form between the deceased and third persons, although such transactions were in his interest, it would furnish an easy and convenient method, in every case, of evading the statute. The decisions have enforced the spirit of the statute by excluding such evidence, and have treated transactions between the deceased and third persons in the presence of inter-

ested parties as if the witness actually participated therein." *Citing* *Holcomb v. Holcomb*, 95 N. Y. 316; *Matter of Eysaman's Will*, 113 N. Y. 62; *Matter of Dunham's Will*, 121 N. Y. 575.

In *Eighmie v. Taylor*, 68 Hun (N. Y.) 587, the court said: "Having thus examined the principal cases in the court of appeals and the later ones in the other courts of this state, bearing upon the question under consideration, we think they clearly establish the rule that in probate or other cases where a will, other instrument, or act is contested on the ground of undue influence, restraint, mental incapacity, or fraud, a person who is interested in the event of an action or proceeding is disqualified to testify to any transaction or communication which occurred in his presence or hearing, although it was not with or addressed to such person, or one in which he participated. It also seems to be established by these cases that upon other issues an interested witness may be permitted to testify to a conversation or transaction between a decedent and a third person in the presence of the witness, provided he was not referred to by the parties to such conversation and did not participate in it by word, sign, or act, but if there was any such reference or participation, although slight, the witness is incompetent."

1. In *Devlin v. Greenwich Sav. Bank*, 125 N. Y. 756, which was a contest concerning a gift *causa mortis*, the court said: "It is doubtful if the witness could be permitted to testify as to a conversation in her presence between her uncle and father Carew relative to the gift she claimed. The cases, *Matter of Eysaman's Will*, 113 N. Y. 62, and *Matter of Dunham's Will*, 121 N. Y. 575, have very greatly limited the old rule in regard to such conversation."

But in *O'Brien v. Weiler*, 140 N. Y. 286, which was a contest between a ward and the executors of her guardian, as to the ownership of money standing to the credit of the guardian in bank, it is said that it was not sufficient to exclude the ward's evidence to show that it related to a transaction between the deceased guardian and another in her

party from testifying to transactions or conversations between the deceased and a third person, notwithstanding the witness took no part therein whatever.¹ Again, it has been held that in an action by or against the legal representative of a deceased person, where there are two parties on the opposing side having like interests, neither of them may testify as to a conversation or transaction between the deceased and the other.²

The fact that a third person was present at a transaction or conversation between two parties, one of whom has since died, and may be called to testify thereto, is not sufficient to let in the testimony of the surviving party.³

presence, but in which she took no part. *Cary v. White*, 59 N. Y. 336, and *Simmons v. Havens*, 101 N. Y. 427, are cited with approval.

1. *Robinson v. James*, 29 W. Va. 232; *Seabright v. Seabright*, 28 W. Va. 463; *Larison v. Polhemus*, 36 N. J. Eq. 506; *Matthews v. Hoagland*, 48 N. J. Eq. 476.

In *Robinson v. James*, 29 W. Va. 232, the court adopted the reasoning of *Lobdell v. Lobdell*, 32 How. Pr. (N. Y. Supreme Ct.) 1, notwithstanding the fact that that case had been reversed in 36 N. Y. 327, saying, that in its opinion the reasoning of the supreme court is more in accord with the spirit of the decisions in that state than that of the court of appeals.

In *Parks v. Caudle*, 58 Tex. 221, the court said: "In our opinion, a party is prohibited from testifying not merely as to statements by the deceased to him, or transactions between him and the deceased, but also as to such statements to or transactions between deceased and third persons, and that, too, although occurring when the witness had no interest therein."

2. In *Wills v. Wood*, 28 Kan. 408, *Brewer, J.*, said: "Rebecca M. Forbes, one of the plaintiffs, a daughter and heir of Willis Wills, was a witness in the case, and testified to being present at a conversation of David E. James with her mother. She was asked to give that conversation, but the testimony was objected to and ruled out. It is not claimed that the mother would be a competent witness as to this conversation, because it would be a communication had personally by her with the deceased person, in the case in which the adverse parties are the administratrix and heirs at law of such deceased person. But it is claimed that though the party carrying on the

conversation is incompetent, any party who heard the conversation is a competent witness thereto; and the cases of *McKean v. Massey*, 9 Kan. 602, and *Simmons v. Sisson*, 26 N. Y. 264, are cited. As a general proposition, this is correct. The inhibition of the statute is only on the party having the communication or transaction with the deceased; but this case presents peculiar features, which, we think, justifies the ruling of the district court. Mrs. Forbes, as well as Mrs. Maples, was plaintiff, each claiming as heir of Willis Wills, and each seeking to recover from the administratrix and heirs of David E. James. Neither could testify under the statute as to any transaction or communication had personally with David E. James. Can it be possible that when the two are present with James, and a conversation is carried on, that while neither could testify as to what James said to herself personally, she could testify as to what he said to the other? We think not. Such a ruling would be forbidden by the spirit, at least, of the statute. That statute plainly contemplates preventing one party from introducing in evidence conversations had with the ancestor of the adverse party, and this, because the lips of such ancestor, closed by death, cannot be heard to give his version of the conversation. And where there are two persons on the one side, having like interests, they should, for the purpose of giving force to the statute, be considered as one, and neither be permitted to give her version of the conversations and statements of the deceased to the other in her presence."

3. *Chambers v. Hill*, 34 Mich. 523; *Taylor v. Bunker*, 68 Mich. 258; *Donnell v. Braden*, 70 Iowa 551; *Hutchinson v. Cleary*, 3 N. Dak. 270; *Holcomb v.*

*g. TRANSACTIONS WITH DECEDENT THROUGH WHOM OPPO-
NENT DERIVES TITLE.*—In an action involving the title to prop-
erty, one party may not, as a rule, testify to a transaction or
conversation with a person, since deceased, from, through, or un-
der whom the opposing party derives title.¹ And in some juris-
dictions, the protection of the statute is not confined to the

Holcomb, 95 N. Y. 325; Heyne v. Doer-
fler, 124 N. Y. 509.

1. Chase v. Irvin, 87 Pa. St. 286; Wal-
ton v. Hinnau, 146 Pa. St. 396; Karns
v. Tanner, 66 Pa. St. 297; Brothers v.
Mitchell, 157 Pa. St. 484; Mattoon v.
Young, 45 N. Y. 698; Mason v. Pren-
dergast, 120 N. Y. 536; Richards v.
Crocker (Supreme Ct.), 20 N. Y. Supp.
954; Zane v. Fink, 18 W. Va. 693;
Field v. Brown, 24 Gratt. (Va.) 74;
Tunno v. Robert, 16 Fla. 738; Harris
v. Jacksonville Bank, 22 Fla. 506;
Hughes v. Israel, 73 Mo. 538; Mul-
ler v. Rhuman, 62 Ga. 332; Mack v.
Bensley, 63 Wis. 80; Littlefield v.
Littlefield, 51 Wis. 23; Cuthrell v.
Cuthrell, 101 Ind. 375; Smith v. Taylor,
2 Wash. 425.

In ejectment by one claiming as heir
of his father, against a brother or sister
of the plaintiff claiming under a deed
from the father, the plaintiff is not
competent to prove the mental inca-
pacity of the grantor to make the deed.
King v. Humphreys, 138 Pa. St. 310.

In Crothers v. Crothers, 149 Pa. St.
205, the court said: "It is apparent,
therefore, that the litigation involves a
transaction to which Samuel J. Croth-
ers and his son Leman were parties,
and which his son William is now at-
tempting to invalidate. *Prima facie*,
the interest of Samuel Crothers passed
by his own formal and properly au-
thenticated act to Leman, who is a
party on the record, and whose title
thus acquired is the subject in contro-
versy. The interest of William, who is
the opposite party on the record, is
adverse to this title, and his contention
involves a denial of the right of the
deceased grantor to transmit it. Is he
a competent witness to testify to mat-
ters which he alleges in avoidance of
his father's deed? An answer to this
question is found in King v. Humph-
reys, 138 Pa. St. 310. In that case, as
in this, the plaintiff claimed title by
descent from his deceased father, and
his sister, the defendant, claimed under
a deed from him. It was alleged there,
as it is here, that at the time of the

execution of the deed, the grantor had
not sufficient mental capacity to make
it, and that the grantee obtained it
from him by fraud and undue influence.
It was held that the plaintiff was not a
competent witness to matters on which
he relied to set aside the deed."

The heirs of a grantee are protected
from the testimony of one who claims
under a subsequent conveyance from
their ancestor's grantor. Morrison v.
Morrison, 140 Ill. 573.

Purchasers of a partnership interest
from the executor of a deceased mem-
ber of a firm derive title from the de-
ceased within the meaning of the rule.
Foster v. Hart, 29 Ill. App. 260.

In *Ohio*, the statute in terms protects
the grantee of the deceased person from
the testimony of the opposing party
concerning transactions and communi-
cations with his deceased grantor, and
it is held that this does not by implica-
tion protect the assignee of a chose in
action, the assignor being dead. And
in an action on a promissory note against
one purporting to be the maker, by an
assignee of the note from the original
holder and payee, who died after the
assignment, the defendant is a compe-
tent witness to prove any fact material
to the issue in the case. Elliott v. Shaw,
32 Ohio St. 431.

One who claims under a tax deed
does not derive his title from, through
or under the person whose property was
sold for the non-payment of taxes, and
consequently cannot claim the protec-
tion of the statute, though such owner
has since died. Begole v. Hazzard, 81
Wis. 274.

Where, in a partition suit, a question
arises as to the ancestor's intention in
making a voluntary conveyance to one
of the parties, none of the parties may
testify thereto. Dille v. Webb, 61 Ind.
85. Compare Ellis v. Stewart (Tex.
Civ. App. 1893), 24 S. W. Rep. 585.

A defendant who is disqualified to
testify in his own behalf to a conversa-
tion with the plaintiff's deceased grant-
or, will not be permitted to testify thereto
in behalf of other defendants whose

immediate grantee or assignee of a deceased person, but a party is precluded from testifying to any personal transaction or communication with the remote grantor or assignor of the opposing party, which would injuriously affect his title to the property in controversy.¹ And the rule excludes not only a party to the

interest is identical with that of the witness. *Fenton v. Miller*, 94 Mich. 204.

The devisee of a wife is incompetent to prove the wife's title as against the heir of the deceased husband. *Hess v. Gourley*, 89 Pa. St. 195.

In ejectment against one to whom the interest of a deceased lessor has passed, neither the lessee, nor one claiming under him, is competent to prove the transaction. *Duffield v. Hue*, 129 Pa. St. 94.

A mortgagor is not competent against the assignee of a deceased mortgagee, to prove a transaction with the deceased which would invalidate the mortgage. *Luetchford v. Lord*, 132 N. Y. 465.

And a mortgagor is not competent, against the legal representative of the deceased mortgagee, to impeach the validity of the mortgage, even though he is not a party to the action. *Carey v. Fairchild* (Pa. 1887), 9 Atl. Rep. 328; *Geissmann v. Wolf*, 46 Hun (N. Y.) 289.

After the death of the mortgagor, the terre-tenant is not competent, as against the mortgagee, to prove that the mortgagor had sold the property to him prior to the date of the mortgage. *Griggs v. Vermilya*, 151 Pa. St. 429.

Where the grantee in a deed is dead, the grantor is not a competent witness to impeach the title of the grantee's devisee, by showing that the deed was intended to be in trust for the grantor and his heirs, *Murray v. New York, etc., R. Co.*, 103 Pa. St. 37; or that the deed was delivered to the deceased conditionally. *Paxton v. Paxton*, 38 W. Va. 616.

The beneficiary in a life insurance policy does not derive title from the person whose life was insured. *Barry v. Equitable L. Assur. Co.*, 59 N. Y. 587.

Where a husband devised land to his wife for life with power to alienate, if necessary for her support, it was held that her grantee was a competent witness in his own behalf in an action of ejectment brought against him by the husband's heirs, after the death of the widow, because the plaintiffs did not derive title through her. *Larsen v. Johnson*, 78 Wis. 300.

The allience of the personal representative is not within the proviso. *Rapley v. Klugh*, 40 S. Car. 134.

In *Mississippi*, it has been held that the grantee of one since deceased does not represent the decedent's estate within the meaning of the statute of that state, and the evidence of a party contesting his title, concerning transactions with the deceased grantor, should not be excluded unless it is admissible for some other reason. *Love v. Stone*, 56 Miss. 449. But the rule is otherwise where the decedent's estate is still interested in the property; for example, where the decedent has simply mortgaged the property before his death. *Jackson v. Smith*, 68 Miss. 53.

A defendant in an action for partition is competent to testify to communications between himself and a former trustee of the property, since deceased, under whom the plaintiff claims. *Minton v. Pickens*, 24 S. Car. 592.

In *Texas*, it has been held that, in trespass to try title, both the defendant and his wife may testify to a transaction had personally with the plaintiff's deceased grantor. *Eddie v. Tinnin* (Tex. Civ. App. 1894), 26 S. W. Rep. 732.

1. *Littlefield v. Littlefield*, 51 Wis. 23.

In *Pope v. Allen*, 90 N. Y. 301, the court said: "We have no duty to perform except to examine and consider the exceptions taken during the progress of the trial and urged here as grounds of reversal. The most important of these arises upon the refusal of the trial court to permit the defendant to testify to the bargain which he made with Rogers for the purchase of the twenty-five acres, and which was founded upon the prohibitions of section 829 of the code. At the time of the trial both N. B. Pope, who was the plaintiff's immediate grantor, and Jonathan Rogers, who conveyed to N. B. Pope, were dead, and the defendant contends that the personal transactions, as to which his mouth was closed, were those with the plaintiff's immediate grantor and not those with the grantor of the latter. Under the language of the old code, there was authority for

action, but, also, the person from whom such party derives title, because he is interested in protecting the title of his grantee,¹

this doctrine. Section 399; *Prouty v. Eaton*, 41 Barb. (N. Y.) 409; *Cary v. White*, 59 N. Y. 336. We need not consider these cases, since the language upon which they were founded has been materially changed in the later revision. The former prohibition excluded the party's evidence as to 'any personal transaction or communication between such witness and a person at the time of such examination deceased, . . . against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person.' It was possible to construe this language as limiting the prohibition to the particular deceased person from whom directly the adverse party took his title. Whether even that construction was sound might not be beyond debate, but the essential change in the language at all events requires us to adopt a different construction. The language now is 'against the executor, administrator, or survivor of a deceased person, . . . or a person deriving his title or interest from, through, or under a deceased person, . . . concerning a personal transaction between the witness and the deceased person.' Section 829. The specific modes of succession named in detail in the old code are represented in the revision by a general and broader phrase. The deceased person referred to in the latter is one from whom or through whom the adverse party derives his title, or under whom he holds. The plaintiff here derived his title 'from' Jonathan Rogers, 'through' N. B. Pope, and held 'under' the former as well as the latter. The language covers the case, and we can see no just reason which excludes personal transactions with N. B. Pope, which does not also apply to Rogers, under whom both parties claimed title."

In *Ripley v. Seligman*, 88 Mich. 177, the court said: "As originally enacted, the statute was confined to suits or proceedings prosecuted or defended by the representatives of a deceased person, or by any surviving partner. Act No. 125, Laws of 1861; Act No. 188, Laws of 1863. By the amendment of 1875, Act No. 155, the statute was extended so as to include heirs, assigns, devisees and legatees, and it so remains at the present time. The word 'assigns' is used

here in its legal sense, and signifies a person to whom any property or right is transferred by a deceased person in his lifetime. The statute is broad enough to cover successive transfers, or where the controversy depends upon the acts or dealings with the property of the deceased in his lifetime; and anyone who is called upon to prosecute or defend some interest which is affected by the act or agreement of the deceased party, through whom he claims, may invoke the protection of the statute to shield his interest from the testimony of the opposite party to matters which, if true, were equally within the knowledge of the deceased person through whom he claims."

The *South Carolina* statute does not exclude transactions or conversations with a deceased grantor as against his remote alienee. *Cantey v. Whitaker*, 17 S. Car. 527; *Jones v. Plunkett*, 9 S. Car. 392.

In a contest between the remote grantee of a deceased person and the successors to the decedent's title to adjoining lands, concerning an alleged right of way over the plaintiff's land, the plaintiff and his immediate grantor are competent to testify to transactions between themselves and the deceased. *McFerren v. Mont Alto Iron Co.*, 76 Pa. St. 180.

1. *King v. Worthington*, 73 Ill. 161; *Bennett v. Virginia Ranch, etc.*, *Cattle Co.*, 1 Tex. Civ. App. 321; *Youngs v. Cunningham*, 57 Mich. 153; *Barbour v. Wiehle*, 116 Pa. St. 308; *Gray v. Whitney*, 81* Pa. St. 332; *Stewart v. Stewart*, 19 Fla. 846; *Dawson v. Hemelrick*, 33 W. Va. 675. Compare *Henry v. Com.*, 107 Pa. St. 361; *Smith v. Rishel*, 164 Pa. St. 181.

Where a claimant of land assigns his title after the death of the party in possession, he is not competent to testify that the possessor held merely by his permission. *Jones v. Sherman*, 56 Miss. 559.

A mortgagor who has conveyed the premises, but is made a party to the foreclosure suit, is not competent for his grantee to prove a personal transaction with the deceased mortgagee, though no personal judgment is sought against him. *Smith v. Hathorn*, 25 Hun (N. Y.) 159.

The execution of a release by a plain-

unless he is first released from liability on his covenants of warranty.¹

The death of the grantor of one party will not exclude the testimony of the opposing party when there is no privity of estate between the witness and such deceased grantor, and the witness is not offered to prove a personal transaction or communication between himself and the deceased.² The death of one or more of the grantors in a deed does not disqualify a surviving grantor

tiff, the effect of which is to vest his interest in a co-plaintiff, does not render him competent for the latter as to transactions with the defendant's decedent. By that act he becomes the plaintiff's assignor, and his testimony comes directly within the inhibition of the statute. *O'Brien v. Weiler*, 140 N. Y. 281, affirming 68 Hun (N. Y.) 64. Compare *Mageman v. Bell*, 13 Neb. 247.

In *Tinastman v. Croushore*, 104 Pa. St. 192, it was held that the assignor of the personal representative was not competent to support the claim in the latter's hands, although the court expressed regret that this ruling was made necessary by the language of the statute.

In *Smith v. Cross*, 90 N. Y. 556, the court said: "The question now to be determined is whether Wilson was a competent witness to testify to the facts sworn to by him under the section of the code cited. That section provides as follows: 'Upon the trial of an action . . . a party or person interested in the event, or a person from, through, or under whom such party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness . . . in behalf of the party succeeding to his interest or title, against . . . a person deriving his title or interest from, through, or under a deceased person, . . . by assignment or otherwise, concerning a personal transaction, or communication, between the witness and the deceased person,' etc. These plaintiffs derived their title to the mortgage through a deceased person. The defendants, claiming to be the owners of the land covered by the mortgage, were seeking by their defense to protect the land against the mortgage, to defeat the mortgage as a lien upon the land; and they derived their title to the land through or under Wilson, by his deed to Cross in 1872, and the deed, just before the trial to the action, to Mrs. Cross. He was called as a wit-

ness on behalf of parties who succeeded to his interest, whatever it was, in the land, and he was called to protect that land and that interest against the mortgage. He was, therefore, clearly, within the letter and spirit of that section of the code, an incompetent witness."

1. *Warren v. Steer*, 112 Pa. St. 634.

2. In *Waltman v. Herdic*, 90 Pa. St. 464, the court said: "Samuel Titus, one of the defendants, was offered as a witness in his own behalf to prove such actual possession as had vested title in himself, and was excluded for incompetency 'because Daniel Billman, whose estate still holds the legal title as shown by the plaintiffs in this suit, is dead, having in his lifetime conveyed only an equitable interest to the parties.' The first thing that arrests attention is the absence of privity between Billman and Titus. There is no semblance of contract relation, nor are their respective titles links of the same chain. Before Billman had an interest in the Brady tract, while he lived, and since his death, Titus claimed the land in suit as part of the Hepburn warrant; the plaintiffs, holding under Billman and others, demand nothing beyond the Brady survey. Aside from the location of the original tract line, Titus sets up title under the Statute of Limitations, the very nature of which excludes its derivation from Billman. There was no proposal to prove by Titus anything that Billman ever said or did, and plaintiffs point to nothing tending to show that there ever was any communication between them respecting the land. If the survivor is incompetent, where will competency begin when some grantor in the chain of title of the opposing party is dead? Can it be that if one party derives title through or under a deceased grantor, however remote, neither can be a witness? Proximity or remoteness of the deceased grantor is of no consequence, for the true inquiry is, has death sealed the lips of one party to a transaction of

to testify against one claiming under the grantee, who is living at the time of the trial.¹ But in a contest between a living mortgagee and the legal representative of a deceased mortgagee of the same land, as to the priority of the mortgages, the mortgagor is not competent to prove that the decedent's mortgage, though prior in date, was not in fact delivered first.² And in a contest between a devisee and the testator's grantor of the land devised, the latter is not a competent witness as to transactions between himself and the deceased.³

Where a widow seeks to avoid a conveyance of property made

which both had knowledge? The proviso was not intended to exclude a party in such a case as this, and we are of opinion there was error in rejecting the offer set forth in the 11th assignment." *Compare* *Mason v. Prendergast*, 120 N. Y. 536; *Kenyon v. Youlen*, 53 Hun (N. Y.) 591; *Brown v. Moore*, 26 S. Car. 160.

In *Craig v. Brendel*, 69 Pa. St. 155, it appeared that Craig had purchased land at sheriff's sale, under a judgment against Brendel, the title being in Brendel's wife. Craig alleged that the land belonged to Brendel, and brought ejectment for it against Brendel, and died before the trial. It was held that Brendel was a competent witness as against the devisees of Craig, to prove that his wife purchased the land and paid for it with her own money. The court said: "While it may be considered as true that John Craig, the deviser of the plaintiffs, is their assignor in law according to *Karns v. Tanner*, 66 Pa. St. 297, yet Frederick L. Brendel, the defendant here, who was offered as the witness, does not stand as the party opposite to them in the thing or transaction which is the subject of the controversy in this suit. The opposite party is Mrs. Brendel, who claims in her own right and not by any privity with Frederick L., her husband. John Craig bought Frederick L. Brendel's title at sheriff's sale. In this suit, F. L. Brendel does not dispute the sheriff's sale, or the title of John Craig; he sets up no title in or for himself. It is the title of Mrs. Brendel that is the subject of contest, and this is wholly adverse to any title of F. L. Brendel, her husband. She bought the property and, as she alleges, paid for it with her own money, and the deed was made to her. It is obvious F. L. Brendel is called to testify to no thing, contract, or transaction to which he and the deceased

John Craig were parties. He is not asked to speak of things pertaining to their affairs, which might be known to Craig and himself, and as to which Craig, if alive, might contradict him; he is called to testify to matters to which he himself was no party in interest, and as to which he would have to testify as a stranger to the transaction."

In *Bradley v. West*, 68 Mo. 69, it appeared that one party claimed under a deed from a person since deceased, and the opposing party claimed by adverse possession under color of title, but there was no privity of estate between such adverse claimant and the deceased grantor of the other party, and it was held that the grantee was competent to prove the execution of the deed to himself; the estate of the deceased grantor having no interest in the event of the action. But upon reasoning, which does not appear to be entirely satisfactory, this case was overruled in *Chapman v. Dougherty*, 87 Mo. 625; 56 Am. Rep. 469.

In *Bush v. Barron*, 78 Tex. 9, it was held that one who claimed the property in dispute in his own right, was competent to prove statements of the deceased person, at whose administrator's sale the opposing party bought the property.

1. *Palmer v. Farrell*, 129 Pa. St. 162.

2. *Hoadley v. Hadley*, 48 Ind. 452.

But in *Allen v. Davis*, 65 Ga. 179, it was held that a grantor, who had conveyed the same land to two grantees severally, stood indifferent between them, his interest being balanced, as he was liable to one of them in any event; and that he was therefore competent to impeach the prior conveyance, notwithstanding the grantee therein was dead at the time of the trial.

3. *Chapman v. Dougherty*, 87 Mo. 617; 56 Am. Rep. 469, overruling *Bradley v. West*, 68 Mo. 69.

by her husband, in alleged fraud of her right of dower, she is not a competent witness to prove communications between her deceased husband and herself concerning the transaction.¹ But upon a writ of dower by a widow against the heir of her deceased husband, who is the tenant in possession, the demandant is a competent witness in her own behalf because the real cause of action is the withholding an estate in land to which she claims title by operation of law; neither of the parties to the suit claiming under a contract, one of the parties to which is dead.²

1. *Palmer v. Palmer*, 62 Iowa 204; *Sanford v. Ellithorp*, 95 N. Y. 48; *Brandon v. Dawson*, 51 Mo. App. 244.

In *Witthaus v. Schack*, 105 N. Y. 332, the court said: "It is not disputed that the plaintiff is a party and interested in the event of the action, or that the subject of the inquiry related to a personal communication between the deceased person and the witness, but it is claimed, as stated in respondent's points, that the plaintiff was not an incompetent witness under section 829 of the code, because the title or interest to be affected by the action was not derived by defendant from plaintiff's husband but from the plaintiff. The plaintiff thus seeks to stand upon the letter of the statute and to claim exemption from its provisions by reason of the alleged creation of a contingent estate, intermediate the seisin of the husband and the execution of the deed, which it is claimed suspended the husband's title to a part of his property and created a new estate transferable only by a conveyance from the wife. The error in this proposition consists in the assumption that the wife has an estate in the lands of her husband during his life which she can convey to another. The settled theory of the law as to the nature of an inchoate right of dower is that it is not an estate or interest in land at all, but is a contingent claim arising not out of contract but as an institution of law constituting a mere chose in action incapable of transfer by grant or conveyance, but susceptible only during its inchoate state, of extinguishment. By force of the statute, this is effected by the act of the wife in joining with her husband in the execution of a deed of the land. Such deed, so far as the wife is concerned, operates as a release or satisfaction of the interest and not as a conveyance, and removes an incumbrance instead of transferring an interest or estate." After a review of the authorities as to the nature of a

wife's inchoate right of dower, the court continued: "It would seem clear from the authorities that the act of the wife in joining her husband in the execution of a deed of his lands does not constitute her a grantor of the premises or vest in the grantee any greater or other estate than such as he derives from the conveyance of the husband. Its effect is merely to extinguish a contingent claim existing as a possible incumbrance and ceasing to exist by reason of the execution of the husband's deed and to be revived only by the subsequent cancellation or annulment of his conveyance. It is also obvious that the grantee in such deed takes title to the whole premises solely by virtue of the title and estate of the husband, and therefore in the fullest sense derives his title through, from, and under such grantor. We are, therefore, of the opinion that the defendant took the title to the entire premises in dispute from Rudolph A. Witthaus, and that his wife was not a competent witness to testify to personal transactions and communications occurring between herself and her husband in reference to such deed. The defendant is, therefore, within the letter as well as the spirit of section 829 of the code."

2. In *Flynn v. Coffee*, 12 Allen (Mass.) 133, the court said: "The admission of the demandant to testify was right. In suing to recover her dower, there is no party to the contract or cause of action who is dead, within the meaning of the statute, so as to preclude her from testifying. The cause of action is the withholding from her an estate in land to which she claims title. That a former owner of the estate, through whom her title is derived, is dead, is no more an objection in the case of dower than in the case of an inheritance. It is only upon the death of her husband, and not in his life, that her right of action accrues."

In *Wentworth v. Wentworth*, 71 Me. 74, the court said: "A point is taken,

In an action against the heir of a deceased person to establish and enforce an alleged resulting trust in favor of the plaintiff, he is not a competent witness in his own behalf to prove transactions with the defendant's ancestor which tend to establish the trust,¹ but he may testify to transactions between himself and a deceased person from whom neither party to the action derives title.² And where the action is brought by the heir of the party who paid the purchase-money against the holder of the legal title, the defendant may not testify to transactions between himself and the plaintiff's ancestor.³ After the death of the grantee in a deed, which is absolute on its face, the grantor

though untenable, we think, that the demandant should have been debarred from testifying, the tenant holding the estate as an heir of the demandant's husband. The statute (section 87, ch. 82, Rev. Stats.) provides that the living party shall not testify, where the other party is an executor or administrator, or made a party as heir of a deceased party. The statutory inhibition applies only in cases where the heir is made a party because he is an heir, and where the ancestor would have been the party were he alive. It was intended to reach cases where real estate is represented in court by heirs, as personal estate is by executors or administrators; as where in a real action heirs come in to prosecute or defend a suit instead of their ancestor, who dies *pendente lite*; or where heirs commence proceedings to redeem a mortgage running to the ancestors, *Cary v. Herrin*, 59 Me. 361; or where the proceeding is against heirs, to recover land which in the lifetime of the ancestor was held in trust for another person. *Simmons v. Moulton*, 27 Me. 496. Here the defendant is not sued because an heir. He would have been sued if a grantee of his father. He is sued only because he is the tenant of the estate. Nor would the ancestor, if alive, be situated as he is. In such case there could be no claim or action."

In *New Jersey*, it is held that in a suit by a widow against her husband's heirs at law, to set aside a deed made to them by her husband before his death, on the ground of fraud, she is a competent witness, under the statute of 1880, to testify to transactions with her husband and conversations with him. *Crimmins v. Crimmins*, 43 N. J. Eq. 86; *Smith v. Smith*, 52 N. J. L. 207.

It seems, however, that she would not have been competent to so testify be-

fore the passage of that statute. See cases above cited, and *Colfax v. Colfax*, 32 N. J. Eq. 206.

1. *Higgins v. Butler*, 78 Me. 523; *Burleigh v. White*, 64 Me. 23; *Wiley v. Davis* (Me. 1887), 10 Atl. Rep. 493; *Johnson v. Quarles*, 46 Mo. 423; *Connelly v. Dunn*, 73 Ill. 218; *Johnston v. Johnston*, 138 Ill. 385; *Noble v. Withers*, 36 Ind. 193; *Wood v. Fox*, 8 Utah 380; *McDevitt v. Frantz*, 85 Va. 740, 922. See also *Wolf v. Wolf*, 158 Pa. St. 621.

In *Indiana*, it was held that, where the title to land had been fraudulently taken by the husband in his own name, the wife having paid the purchase price, and the purchaser, at an execution sale of the land against the husband, since deceased, brought ejectment against the widow to recover possession, the defendant was competent to testify to all matters touching her rights in the land. *Tracy v. Kelley*, 52 Ind. 535. But she is not competent to testify where she brings an action against her former husband's heirs to establish such trust. *Noble v. Withers*, 36 Ind. 193.

In *California*, the plaintiff in an action to enforce a resulting trust against the representative of the deceased trustee may testify to facts occurring before the trustee's death. *Myers v. Reinsteint*, 67 Cal. 89.

In *New Jersey*, it has been held that a woman who believed herself to be the lawful wife of the man with whom she lived, although it was learned after his death that he had another wife living, was competent to testify that she paid the consideration for property conveyed to her supposed husband and herself, and also paid for the improvements made thereon; these not being transactions with the deceased. *Gebel v. Weiss*, 42 N. J. Eq. 521.

2. *Loftin v. Loftin*, 96 N. Car. 94.

3. *Malady v. McEnary*, 30 Ind. 273.

is not competent to prove that the conveyance was made in trust for himself.¹

h. IN ACTIONS FOR SERVICES RENDERED.—In an action against an executor or administrator to recover for services rendered the deceased, the plaintiff is not competent to testify to facts which would raise an implied promise on the part of the deceased to pay for the same.² Neither is he competent to prove what services he rendered the deceased,³ except such as were so rendered that they do not, independently of the contract of employment, constitute a personal transaction with the deceased.⁴ Where the fact of the rendition of services has been proved by other witnesses, the claimant may, in the absence of an express contract, testify as to the reasonable value of the same, as such testimony does not relate to a personal transaction with the deceased.⁵ But he is not competent to prove that he has not been paid for the same, since testimony negating a transaction with a deceased person is as clearly within the inhibition contained in the proviso to the statute as that in affirmation thereof.⁶

i. WRITTEN COMMUNICATIONS.—Written communications with persons since deceased are within the statutory inhibition as well as oral communications, and it is, therefore, not permissible

1. *Murray v. New York, etc., R. Co.*, 103 Pa. St. 37; *Wood v. Broliar*, 40 Iowa 591; *Fetta v. Vandevier*, 3 Colo. App. 419.

And in an action against the grantee of the heir of a deceased person, to have a deed, absolute on its face, from the plaintiff to the deceased ancestor of the defendant's grantor, declared a deed of trust, the plaintiff is not competent to prove transactions with the deceased which tend to establish the trust. *Buf-fum v. Porter*, 70 Mich. 623.

2. *Peck v. McKean*, 45 Iowa 18; *Smith v. Johnson*, 45 Iowa 308; *Wilson v. Wilson*, 52 Iowa 44; *Wagner v. Robinson*, 56 Ga. 47; *Somerville v. Crook*, 9 Hun (N. Y.) 664.

The assignor of a claim for professional services is not a competent witness for his assignee as against the personal representative of a deceased person. *Shain v. Forbes*, 82 Cal. 577.

3. *Owens v. Owens*, 14 W. Va. 88; *Kirk v. Barnhart*, 74 N. Car. 653; *Herring v. Herring* (Iowa, 1895), 62 N. W. Rep. 666.

In an action to recover for services rendered and materials furnished to the defendant's testator, the plaintiff is not competent to prove the correctness of his bill of particulars showing the contract price of such services and materials made after the testator's

death. *Fisher v. Verplanck*, 17 Hun (N. Y.) 150.

4. *Deans v. King*, 20 Fla. 533; *Lerche v. Brasher*, 104 N. Y. 157, *reversing* 37 Hun (N. Y.) 385; *Belden v. Scott*, 65 Wis. 425.

A physician who presents a claim for medical services may testify to the physical condition of the deceased within the period of such services, and to the proportion of his own time required in looking after his patient's health. *Sullivan v. Latimer*, 38 S. Car. 158.

In an action by an attorney against the executor of a deceased client to recover his fees, the plaintiff may, after competent proof of the contract of employment, testify as to his acts as such attorney, provided such acts were done in the absence of the deceased and without his immediate or personal participation. *Lerche v. Brasher*, 104 N. Y. 157.

5. *Burrows v. Butler*, 38 Hun (N. Y.) 157; *Belden v. Scott*, 65 Wis. 425; *Lewis v. Meginniss*, 30 Fla. 424, *citing* *Belote v. O'Brian*, 20 Fla. 126; *Deans v. King*, 20 Fla. 533.

6. But if no evidence of payment has been given by the defendant, it is harmless error where the plaintiff testified that he has not been paid for his services, as payment is an affirmative defense, the burden of establishing which

for the survivor to prove by his own testimony that he wrote letters to the deceased and that they were received by the latter.¹ Where letters which passed between two persons in the course of a business correspondence have been lost, one party to the correspondence is not, after the death of the other, competent to prove the contents of such letters.² And where the decedent's personal representative has put in evidence letters purporting to have been

is upon the defendant. *Lerche v. Brasher*, 104 N. Y. 161. See also *In re Brown's Estate* (Iowa, 1894), 60 N. W. Rep. 659; *Ridler v. Ridler* (Iowa, 1895), 61 N. W. Rep. 994.

1. *VanVechten v. VanVechten*, 65 Hun (N. Y.) 215.

In *Resseguie v. Mason*, 58 Barb. (N. Y.) 89, where an administrator brought suit upon a claim against the intestate's son, the defendant offered in evidence certain letters and was permitted at the trial to testify that he had written the letters to the deceased and had, after his father's death, found them among the latter's papers. The court said: "In the present case, the letters were proved by the testimony of an incompetent witness. The only evidence of their having been written by the defendant to the intestate, or of their having been found among the papers of the latter, thus showing that he had received and retained them, was the testimony of the defendant himself. The objection was taken that the defendant was incompetent to testify on the subject under section 399 of the Code, and exception to the ruling admitting the evidence duly taken. The testimony was clearly incompetent. It related to both a transaction and a communication between the party testifying and a deceased person, whose claims against such party were the subject of the litigation. The provisions of section 399 of the code relate as well to written as to verbal communications. It cannot be said that these letters and written statements of the accounts between the defendant and the intestate could have had no influence on the mind of the referee in deciding the issues tried before him. They touched the vital points at issue, and must be presumed to have had their legitimate influence."

2. *Boozer v. Teague*, 27 S. Car. 348; *Montague v. Thomason*, 91 Tenn. 168.

In *Schratz v. Schratz*, 35 Mich. 485, it appeared that one Henry Schratz, who resided in Germany, gave to the claimant, Conrad Schratz, a power of

attorney, authorizing him to take charge of a lot in the city of Detroit, of which the deceased died seised, and to do generally in relation thereto whatever the deceased might do if personally present. The owner of the lot died, and Conrad Schratz, his attorney in fact, presented a claim against his estate, some of the items of which were contested, and the claimant relied upon the correspondence between himself and his principal to substantiate his claim. The claimant was permitted at the trial to testify that he had written several letters to deceased and had received letters from him in reply thereto, and that these letters fully informed the deceased of the items of expenditure which were contested, and that the replies showed that the deceased fully understood what was being done, and that the letters from the deceased were lost or destroyed, and could not be found. It was moved by counsel for the representative of the deceased that the court strike out this testimony, which motion was denied and an exception was taken. Upon appeal, the court said: "The statute, as amended by Act No. 155 of the Sess. Laws of 1875, p. 184, clearly covers this case. It provides that 'when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person.' This amendment was evidently overlooked during the trial, although we think that this case came within the provision as it stood before amendment. There could be no question, admitting the testimony given to be true, but that the contents of the letters were within the knowledge of the deceased equally as within that of the witness. The letters, if they could have been produced, would have been admissible, but their loss or destruction would not change the rule

written by the surviving party to the transaction undergoing investigation to the deceased, such surviving party is not competent to impeach the genuineness of the letters.¹ The surviving party is competent, however, to prove the fact that he received through the mail a letter purporting to have been written by the deceased party to the correspondence, because the latter, if living, could not contradict such fact.²

and permit the witness to testify as to their contents. Such evidence is clearly within the letter, and spirit of this statute, and should not have been admitted."

In *Sabre v. Smith*, 62 N. H. 663, the court said: "The remaining question arises from the exclusion of the plaintiff's offer to testify that he sent Putnam a letter mailed at Providence within fifteen days after the date of Putnam's proposal, accepting his proposal to deliver the two hundred tons of hay. Conceding that the plaintiff might properly have been allowed to testify to the mailing of the letter, he was rightly excluded as a witness to its contents, of which Putnam must be deemed to have had knowledge, because the presumption is that he received the letter by due course of mail. 1 Greenl. Ev., § 40. And this presumption is not rebutted by the mere fact that the letter was not found among his papers after his decease. The case presented, then, is the ordinary one where the living party to a transaction offers himself as a witness in relation to it, when the other party, being dead, cannot testify; and the statute bar applies."

1. *Ford v. Holmes*, 61 Ga. 419.

2. *Boozar v. Teague*, 27 S. Car. 348; *Spear v. Evans*, 51 Wis. 42.

In *Daniels v. Foster*, 26 Wis. 691, Dixon, C. J., said: "The question is whether, after the death of the writer, it is competent for the party who receives a letter at a distant place to which it is addressed to testify to such receipt. The deceased party could not, from the nature of the transaction, have made any directly contradictory statement. He was a party to the transaction, but not an immediate party, at least to that part of it concerning which the proof is offered. The fact to be proved is not one of which he had any positive knowledge or which he could, if living, have positively denied. He could deny it indirectly or by inference only, by denying that he ever wrote the letter,

but this would be testimony to another fact or point, as to which it is not proposed to examine the living party and of which he has no positive knowledge. It is in the nature of circumstantial evidence so far as the testimony of the living party goes, and the question is whether he can testify to a circumstance transpiring in the absence of the deceased, and of which the deceased had no knowledge and could not disprove except by denying the principal fact which the circumstance tended to prove, or by testifying to some other distinct fact or circumstance which would have an opposing or contradictory tendency and effect. The statute forbids the examination of a party in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, against parties who are executors, administrators, etc., of the deceased. Laws of 1863, ch. 176. The case does not seem to come within the letter of the statute, and yet the communication was, in some sense, personal. But the personal transaction or communication of the statute no doubt means a transaction or communication face to face, or by the parties in the actual presence and hearing of each other. In every such case, the statute excludes the testimony of the living party, upon the obviously wise and just ground that his adversary, whose cause of action or defense survives and who was possessed of equal knowledge and was equally capable of testifying to what the transaction or communication really was, has been removed by death and so cannot confront the survivor or give his version of the affair or expose the omissions, mistakes, or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great to allow the surviving party to testify in his own behalf. The law has, therefore, wisely excluded him. But this reason for the exclusion is not applicable to the present case, at least not fully applicable.

j. LOSS OF WRITTEN EVIDENCE.—In case of the loss of a written contract, or other writing material in evidence in a contest between the survivor and the legal representative of the deceased party to a transaction, the surviving party is competent to prove such loss in order to lay a proper foundation for the introduction of secondary evidence of its contents,¹ unless the fact of his having had possession of such instrument is a material issue, and necessarily involves a transaction with the deceased.² But he is not competent himself to testify as to the contents of the lost instrument, because, in so doing, he would not be testifying to an independent fact, as in giving evidence of the loss of the instrument, but would be testifying to a transaction between himself and the deceased.³ The grantee in a lost deed may testify to his former possession thereof and that the signature thereto was in the hand-

Could we know that Mr. Fox, if living, would testify that he never wrote the letter in question, that it was a forgery, then indeed there would seem to be strong reason for excluding the testimony. But we do not and cannot know this, and it is only by assuming the supposititious character of the letter, and that Mr. Fox would have so testified, that any appearance of hardship exists. Had Mr. Fox survived, this controversy might never have arisen. He might have acknowledged the genuineness of the letter which is now the subject of such doubt and conflict of opinion, and might have freely forwarded the discharge therein spoken of. We cannot say what he would have said or done respecting this now perplexing question, and cannot indulge in any presumption either way which shall influence its determination. The statute does not, unless by an interpretation obviously more liberal than its language and the plain intent of the legislature will admit, exclude the testimony of these defendants; and so we must hold that it was admissible and must be considered upon the question under consideration." *Compare* Ellbert v. Finkbeiner, 68 Pa. St. 243.

1. Parker v. Edwards, 85 Ala. 246; Stevens v. Witter, 88 Iowa 636; Milam v. Milam, 60 Ind. 58; Choate v. Huff (Tex. App. 1891), 18 S. W. Rep. 87.

2. Calwell v. Prindle, 11 W. Va. 307; Messimer v. McCray, 113 Mo. 382.

In Keech v. Cowles, 34 Iowa 261, the court said: "Appellant claims that plaintiff is not a competent witness of the loss of the notice, and hence she was unable to lay the proper foundation for the introduction of the record

thereof. In this he is in error. At common law, the party's own oath may be received as to the facts and circumstances of the loss of a paper, in order to the introduction of secondary evidence of its contents. 1 Greenl. Ev., § 349. This rule is not changed by the provisions of chapter 159 of the Revision. Section 3980 renders competent parties who were incompetent at common law, and section 3982 provides that section 3980 shall not apply when the adverse party is the executor of a deceased person and the facts to be proved transpired before the death of the deceased. No one competent at common law is rendered incompetent by these provisions." To the same effect is Nash v. Gibson, 16 Iowa 306.

3. Parker v. Edwards, 85 Ala. 246; Hadsall v. Scott, 26 Hun (N. Y.) 617; Messimer v. McCray, 113 Mo. 382; Stevens v. Witter, 88 Iowa 636; Boozer v. Teague, 27 S. Car. 348; Schratz v. Schratz, 35 Mich. 485; Sabre v. Smith, 62 N. H. 663; Robinson v. James, 29 W. Va. 224; Hussey v. Kirkman, 95 N. Car. 63; Britton v. Tischmacher (Tex. Civ. App. 1895), 31 S. W. Rep. 241.

There is a *dictum* to the contrary in Howard v. Galbraith (Tex. Civ. App. 1894), 30 S. W. Rep. 689.

In Montague v. Thomason, 91 Tenn. 168, which was an action by executors upon a promissory note, the defendant proposed to testify that the deceased payee had written him a letter, since lost, authorizing a renewal of the note by the execution of another and the cancellation of the old one, and that he had executed a new note and sent it to the deceased; but it was held that he was incompetent to give such testimony,

writing of the alleged grantor, notwithstanding the latter is dead at the time of the trial.¹

k. POST-MORTEM EVENTS.—As a rule, the death of one party to a contract or cause of action does not disqualify the other party to testify to any matter occurring after such death.² But

on the double ground that it related to both a transaction with and a statement by the deceased.

1. Thus, in *Simmons v. Havens*, 101 N. Y. 427, it appeared that a mother had conveyed certain real estate to her daughter, then unmarried. The deed was not recorded, and the mother, on account of her displeasure at her daughter's marriage, took it from the daughter's bureau drawer and destroyed it and subsequently conveyed the land to the defendant, Havens, who, according to the evidence, had full knowledge of the facts. The daughter brought ejectment against the defendant, and her testimony was objected to on the ground that it involved a personal transaction with her mother, then deceased. The court said: "Exception was also taken to the plaintiff being allowed to testify that she had the deed in her possession and that the signature was in the handwriting of her mother. She was not asked and did not state from whom she received the deed, and her testimony as to the handwriting or the contents of the deed did not involve a personal transaction between her and her mother. The plaintiff might have received the deed from some third person."

2. *Swasey v. Ames*, 79 Me. 483; *Griffin v. Griffin*, 125 Ill. 430; *Vigus v. O'Bannon*, 118 Ill. 334; *Funk v. Eggleston*, 92 Ill. 515; 34 Am. Rep. 136; *Rogers v. Tiley*, 144 Ill. 664; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; 57 Am. Rep. 120; *Irwin v. Patchen*, 164 Pa. St. 51; *Adams v. Edwards* (Pa. 1887), 6 Cent. Rep. 764; *Stanford v. Murphy*, 63 Ga. 410; *Moore v. Dutson*, 79 Ga. 456; *Martin v. Jones*, 59 Mo. 181; *McGlothlin v. Hemry*, 59 Mo. 213; *Poe v. Domec*, 54 Mo. 119; *Witherspoon v. Blewett*, 47 Miss. 570; *Reinhardt v. Evans*, 48 Miss. 230; *Brown v. Brown*, 48 N. H. 90; *Lawrence v. Vilas*, 20 Wis. 381.

In *Stephens v. Cotterell*, 99 Pa. St. 191, the court said: "In the rejected evidence covered by the third assignment, there was an offer to prove by Barzilla Stephens, one of the plaintiffs, substantially that he first took possession of

the property on or about the time of the appraisal, and, also, where the property was found after letters of administration were granted to the plaintiffs. The defendant objected thereto, first, as it tended to prove a fact prior to the death of Israel, and second, that where they found it, when they took possession after his death, was irrelevant. The objections were sustained. In this we think there was error. It is not concealed that one purpose of this evidence was to create a presumption that the present plaintiffs had not taken possession of the property before the death of Israel. Nevertheless, the offer was to prove facts existing and acts occurring after his death. Although the evidence may, in its effect, tend to prove the same facts existed prior to his death that is no cause for its exclusion. *Rothrock v. Gallaher*, 10 Norris (Pa.) 108. It was entirely competent to prove, as bearing on both positions contended for by the defendant, where the property was found and in whose possession at the time the administrators, as such, took possession thereof." Compare *In re Hoffer's Estate*, 156 Pa. St. 473; *Rothrock v. Gallaher*, 91 Pa. St. 108.

A minor is protected as to all matters occurring prior to his attaining his majority. *Stone v. Cook*, 79 Ill. 424.

But in *Biggs v. McCurley*, 76 Md. 409, it was held that a lessee who brought an action against the administrator of his lessor for a breach of covenant was incompetent in his own behalf, although the breach occurred after the death of the lessor, because the contract, on which the action was founded, was made with the lessor. The court said: "And if it be conceded that the lease in this case is the contract or cause of action in issue, then, the lessor being dead, the lessee himself, it is clear, is not a competent witness. And, to escape this conclusion, it was argued that the breach and not the lease itself was the cause of action within the meaning of the statute, and, as the breach occurred after the death of the lessor, the plaintiff was a competent witness. Now, it may be true, that in order to maintain the action, the plaintiff was bound to

in some jurisdictions, the rule excludes the surviving party's testimony as to all matters occurring prior to the probate of the will or the grant of letters of administration.¹

1. INDEPENDENT FACTS.—The purpose of the provisos to enabling acts here under consideration is not to render a party incompetent generally, when the opposing party is acting in a representative capacity, but to prevent one party to a contract or cause of action from testifying to personal transactions or communications with the opposing party after the latter has died or has become incapacitated to testify in his own behalf. It follows, therefore, that a party to an action may testify to any fact which is material in evidence and does not involve a personal transaction with the opposing party, notwithstanding the death or insanity of the latter.²

prove a breach of the lease by the lessor, but it is equally true that there could not be a breach or cause of action unless there had been a contract between the parties. And though the cause of action may be said to embrace the lease and the breach, yet the lease, after all, is the contract on which the action is based. And this being so, it is the contract within the meaning of the statute, and the lessor, one of the parties to this contract, being dead, the lessee, the other party, is not, it is clear, a competent witness."

1. *Palmer v. Kellogg*, 11 Gray (Mass.) 27; *Lincoln v. Lincoln*, 12 Gray (Mass.) 45; *Cronan v. Cotting*, 99 Mass. 334; *Merrill v. Pinney*, 43 Vt. 605; *Roberts v. Lund*, 45 Vt. 82.

A witness may explain a letter written by him to an executrix touching matters which transpired after the death of the testator. *Gifford v. Thomas*, 62 Vt. 34.

2. *Pritchard v. Pritchard*, 69 Wis. 373; *Belden v. Scott*, 65 Wis. 425; *Engmann v. Immel*, 59 Wis. 249; *Daniels v. Foster*, 26 Wis. 686; *Stewart v. Stewart*, 41 Wis. 624; *Page v. Danaher*, 43 Wis. 226; *Parker v. Maxwell*, 51 Minn. 523; *O'Neal v. Reynolds*, 42 Ala. 197; *Wood v. Brewer*, 73 Ala. 259; *Miller v. Cannon*, 84 Ala. 64; *Belote v. O'Brian*, 20 Fla. 126; *Raulerson v. Rockner*, 17 Fla. 809; *Ring v. Jamison*, 2 Mo. App. 584; *Besson v. Cox*, 35 N. J. Eq. 87; *McKean v. Massey*, 9 Kan. 600; *Giles v. Wright*, 26 Ark. 476; *State v. Osborne*, 67 N. Car. 259; *Ballard v. Ballard*, 75 N. Car. 190; *Sheibley v. Hill*, 57 Ga. 232; *Trimble v. Mims*, 92 Ga. 103; *French v. French* (Iowa, 1894), 59 N. W. Rep.

21; *Marietta v. Marietta* (Iowa, 1894), 57 N. W. Rep. 708; *Trimmier v. Thomson* (S. Car. 1894), 19 S. E. Rep. 291; *Krepps v. Carlisle*, 157 Pa. St. 358; *In re Hoffer's Estate*, 156 Pa. St. 473; *Hamilton v. Starr* (Tex. Civ. App. 1894), 27 S. W. Rep. 587; *Sharmer v. Johnson* (Neb. 1895), 61 N. W. Rep. 727.

In *Wood v. Brewer*, 73 Ala. 262, the court said: "What are to be considered transactions with, or statements by, deceased persons under section 3058 of the code of 1876, is a question which very frequently comes before us. To come within the former class, it must be some act done by the deceased or in the doing of which he personally participated. To be within the latter class, there must have been a conversation to which he was a party, in which his statements, replies, or presumed admission from silence, are sought to be introduced in evidence. In each case, to fall within the prohibited line, the transaction or statement must be of such a character and so connected with the deceased as that, if living, the presumption would be, he could deny, qualify, or explain it. This is the sense of the rule. The legislature by it intended to deny to living suitors the advantage they would otherwise have over the estates of deceased adversaries, if permitted to testify to transactions with, and statements by, such adversaries after death had rendered it impossible that such adversaries could be heard in reply. If the testimony relate to a transaction with another or fall not within the class supposed to be particularly within the knowledge of the deceased, neither the

rule of exclusion nor the reason of it applies." *Citing McCrary v. Rash*, 60 Ala. 274; *Tisdale v. Maxwell*, 58 Ala. 40; *Boykin v. Smith*, 65 Ala. 294; *Killen v. Lide*, 65 Ala. 505.

And again, in *Miller v. Cannon*, 84 Ala. 63, the court said: "We think our former interpretations of the statute we are construing, considered collectively, have established the following propositions: When the case falls expressly within either of the exceptions for which the statute makes provision, neither a party to the record, nor anyone else having a vested pecuniary interest in the result of the suit, can testify against the estate of a deceased party, first as to (that is, directly relating to) any transaction with, or statement by, the deceased involved in the issue on trial; second, that testimony whose direct office and purpose are to corroborate or weaken, strengthen or rebut, other evidence given of such transaction with, or statement by, decedent, is equally within the reason and spirit of the prohibition. *Tisdale v. Maxwell*, 58 Ala. 40; *McCrary v. Rash*, 60 Ala. 374; *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566; *Boykin v. Smith*, 65 Ala. 294; *Killen v. Lide*, 65 Ala. 505; *Dismukes v. Tolson*, 67 Ala. 386; *Goodlett v. Kelly*, 74 Ala. 213. When, however, the testimony does not relate directly to, nor shed any direct light on, some transaction with, or statement by, the deceased adversary, then the prohibition does not apply. Hence, such witness may testify to pertinent collateral facts and transactions not falling directly within the expressly prohibited class, although the effect may be to materially change the aspect of the case and impair the probative force of the testimony. *Wood v. Brewer*, 73 Ala. 259, falls within this class." See also *Green v. Green* (Mo. 1894), 28 S. W. Rep. 1008.

In *State v. Osborne*, 67 N. Car. 259, the court said: "The third exception was also properly overruled. The plaintiff, it is true, was incompetent to prove any transaction between himself and his deceased guardian, but he was competent to prove any other transaction of his guardian. The transaction in this case was a sale of the property of the plaintiff by his guardian to a third person." *Citing Halyburton v. Dobson*, 65 N. Car. 88; *Isenhour v. Isenhour*, 64 N. Car. 640.

In *Pritchard v. Pritchard*, 69 Wis. 375, which was an action against the

administrator to recover for the board of his decedent, it was held that the plaintiff was competent to prove for how long a time the deceased was absent from his house during a certain period, in order to show how long he boarded with him, and also to show what kind of board he furnished. The court said: "The testimony of the respondent objected to, that the deceased during said time was absent so many weeks for the purpose of showing how many weeks he boarded with the respondent, and the testimony of the respondent that he had possession of the three hundred dollar note and had shown it to Christenson and Bauman before the death of the intestate, and that deceased, while living, boarded with the respondent, and the kind of board he received, may be considered together as resting upon the same objection that they were transactions with the deceased under the ban of the statute. Rev. Stats., § 4069. These were independent facts and in no sense transactions with the deceased. They were like unto the evidence decided to be competent in *Belden v. Scott*, 65 Wis. 425, that the plaintiff kept the books of the deceased, and with how much labor, and the value of the services. See also *Daniels v. Foster*, 26 Wis. 686."

In *Sheibley v. Hill*, 57 Ga. 234, the court said: "The defendant was offered as a witness and his testimony was rejected by the court. We think that as to the contract between him and Joseph Davis, or any transactions touching it between him and Joseph Davis, the latter being dead, he was incompetent because the reason on which the statute excluding him is founded is that the other party to the contract is dead and cannot confront him. But he was offered here, among other things, to show the identity of the paper sued on with the paper sold and bought at the administrator's sale. That was a matter between him and the administrator, a sale by the administrator to him, and, as to that transaction, we think that he was competent."

In an action against an executor for the conversion of personal property by his testator, the plaintiff is competent to prove the value of the property. *Gregory v. Fichtner*, 27 Abb. N. Cas. (N. Y. C. Pl.) 86. But he may not testify that he delivered the property to the deceased for safe-keeping. *Nunnally v. Becker*, 52 Ark. 550.

In other words competency is the rule and the surviving party to the transaction may testify to all material facts within his knowledge, except such as came to his knowledge through a personal transaction or conversation with the deceased,¹ and in order

1. *Chadwick v. Cornish*, 26 Minn. 28; *Parker v. Maxwell*, 51 Minn. 523; *Gable v. Hainer*, 83 Iowa 457; *Sypher v. Savery*, 39 Iowa 258; *Denning v. Butcher* (Iowa, 1894), 59 N. W. Rep. 69; *Lobdell v. Lobdell*, 36 N. Y. 327; *Taber v. Willets*, 44 Hun (N. Y.) 546; *Franklin v. Pinkney*, 18 Abb. Pr. (N. Y. Super. Ct.) 186; *Raulerson v. Rockner*, 17 Fla. 809; *Lockhart v. Bell*, 86 N. Car. 443; 90 N. Car. 499; *Norris v. Stewart*, 105 N. Car. 455; *Bunn v. Todd*, 107 N. Car. 266; *Hopkins v. Bowers*, 108 N. Car. 299; *Cowan v. Layburn* (N. Car. 1895), 21 S. E. Rep. 175; *Jones v. Waddell*, 12 Heisk. (Tenn.) 338; *Harris v. Seinsheimer*, 67 Tex. 356; *Puryear v. Foster*, 91 Ga. 444.

A party may testify to acts of his own with which he makes no attempt, by his own testimony, to connect the deceased, such connection being made by the testimony of other witnesses. *Foggette v. Gaffney*, 33 S. Car. 310; *Steiner v. Eppinger*, 61 Fed. Rep. 253; *Martin v. Shannon* (Iowa, 1894), 60 N. W. Rep. 645.

In an action by an administrator upon a note, the defendant may support his defense that the note had been assigned to his wife by testifying that he saw it in her possession. *Smith v. Sergeant*, 67 Barb. (N. Y.) 243. And in an action on a promissory note against the estate of the deceased maker, the plaintiff may testify to his possession of the note prior to and at the time of the maker's death. *Mortimer v. Chambers*, 63 Hun (N. Y.) 335.

Where a party had seen the account book of the opposing party's decedent, it was held that he might testify to an entry which he saw therein in the handwriting of the deceased. *Carroll v. Davis*, 9 Abb. N. Cas. (N. Y. C. Pl.) 60.

Testimony as to facts learned by observation, which tend to show testamentary capacity, or the want of it, does not relate to a personal transaction with the deceased. *Lamb v. Lamb*, 105 Ind. 456; *Burkhart v. Gladish*, 123 Ind. 337; *Severin v. Zack*, 55 Iowa 28; *Sim v. Russell* (Iowa, 1894), 57 N. W. Rep. 601; *Williams v. Williams*, 90 Ky. 28. Compare *Matter of McCarthy's Will* (Supreme Ct.), 20 N. Y. Supp. 581.

So the surviving party may testify that he saw the deceased at a certain time and place. *Matter of Brown* (Supreme Ct.), 14 N. Y. Supp. 122.

In an action against the personal representative of a deceased person, to recover for the hiring of personal property, the plaintiff may testify that the deceased had possession of and enjoyed the use of such property, though he is not competent to prove the contract of hiring. *Gray v. Cooper*, 65 N. Car. 183.

Where the personal representative of a deceased person is sued for the price of medicines furnished to the decedent in his lifetime, the plaintiff is competent to prove of what ingredients such medicines were composed, as that does not involve a transaction with the deceased. *Belote v. O'Brian*, 20 Fla. 126.

Where it has been proved that parties were induced to make an agreement by false representations of the other party, since deceased, such parties may testify that they believed and relied on such representations. *Hard v. Ashley*, 117 N. Y. 606, reversing 53 Hun (N. Y.) 112, *sub nom.* *Hard v. Davison*. The court of appeals said: "What led to the making of an arrangement, and the negotiations which shaped it, had all taken place between the parties at a time prior to the execution of the contract. This contract was the effect of the agreement upon which the minds of the parties had met in consent. When, therefore, it was presented to the witnesses for their execution, their belief or reliance in the statement which the deceased had theretofore made, were relevant facts within their own knowledge, and which the deceased could not have known nor testified to himself. If he were living, he could not have contradicted their testimony in that respect."

The widow of a testator, who is named as a legatee in his will, is competent to prove that his will was found among his valuable papers after his death. *Cornelius v. Brawley*, 109 N. Car. 542.

The surviving party is competent to prove the testimony of a witness, since deceased, given at a former trial of the cause. *Costen v. McDowell*, 107 N. Car. 546.

to exclude the witness it should be made to appear that his knowledge of the facts to which he proposes to testify was derived from such transaction or conversation and not from another source.¹ An interested party is competent to prove the handwriting of a deceased person if his knowledge thereof was obtained otherwise than through the transaction undergoing investigation.² The obligor in a bond may testify that when he placed it in the hands of an agent for negotiation, it was blank as to the name of the obligee or the amount of the obligation, notwithstanding the obligee is dead at the time of the trial.³ And one who has deposited bonds indorsed in blank for safe-keeping, may testify that when they were deposited there was no name in the indorsement, notwithstanding the custodian and alleged assignee thereof is dead at the time the witness is examined.⁴ Under a statute which excludes matters which, if true, must have been equally within the

In *Mississippi*, the rule stated in the text does not obtain. It has been held, in that state, that a judgment debtor is not competent, after the death of the judgment creditor, to impeach the judgment by proving that no summons was served on him; though, under the law of the state, he might do so if the judgment creditor were living. *Duncan v. Gerdine*, 59 Miss. 550.

1. *Thompson v. Onley*, 96 N. Car. 9; *Lockhart v. Bell*, 86 N. Car. 443; 90 N. Car. 499; *Adams v. Allen*, 44 Wis. 93; *Woolverton v. Van Syckel* (N. J. 1895), 31 Atl. Rep. 603.

It is error to exclude a party to the transaction on the ground that the other party is dead, unless it is clear that he can testify to no material facts which are not within the inhibition of the statute. *Card v. Card*, 39 N. Y. 317.

The presumption being in favor of the competency of the witness, the burden is on the party objecting to show his incompetency. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566; *Hendricks v. Kelly*, 64 Ala. 388; *Dismukes v. Tolson*, 67 Ala. 386; *Hill v. Helton*, 80 Ala. 528.

But in *Reynolds v. Reynolds*, 45 Mo. App. 627, it was held that where one party to a contract is dead and the other party offers himself as a witness in his own behalf, he should accompany his offer by a showing that the proposed testimony is admissible under the statute.

2. *Rush v. Steed*, 91 N. Car. 226; *Sawyer v. Grandy*, 113 N. Car. 42; *State v. Maxwell*, 64 N. Car. 315; *Sankey v. Cook* (Iowa), 47 N. W. Rep. 1077.

The proponents of a holographic will may testify that the will is in the handwriting of the testator. *Martin v. McAdams* (Tex. 1894), 27 S. W. Rep. 255.

A widow is competent to prove the genuineness of her deceased husband's signature, on information which she received in business transactions with him before their marriage. *Stillwell v. Patton*, 108 Mo. 352.

But in replevin to recover goods alleged to have been bought from the defendant's intestate, it was held that the plaintiff was not competent to prove the signature of the deceased to the bill of sale which covered the transaction. *Holliday v. McKinne*, 22 Fla. 153.

3. *Brower v. Hughes*, 64 N. Car. 642; *Isenhour v. Isenhour*, 64 N. Car. 640.

4. In *Wadsworth v. Heermans*, 85 N. Y. 639, *affirming* 22 Hun (N. Y.) 455, *sub nom.* *Hill v. Heermans*, 17 Hun (N. Y.) 470, the plaintiff, as he alleged, had deposited certain bonds indorsed in blank with the defendant's assignor for safe-keeping. During the plaintiff's absence in *Europe*, the name of the custodian of the bonds was inserted in the blanks, and he assigned the bonds to the defendant and died before the commencement of the action. At the trial, the plaintiff was permitted to testify that when he deposited the bonds the name of the deceased was not in the indorsements or anywhere else in the bonds, and it was held that he was competent to give such testimony. The court said: "We do not think the inquiry involved any personal transaction between Hill and Fellows. It respected merely the then

knowledge of the deceased and the witness, a distinction is made between matters within the personal knowledge of the deceased and those of which he had information through other persons; that is, the survivor may not testify to matters which must have been within the personal knowledge of the deceased, but may testify to matters as to which the decedent's testimony would be hearsay, and, therefore, inadmissible were he living.¹

The surviving party may testify to the fact that he had a conversation with the deceased at a certain time and place,² unless

condition of the bonds. It neither affirmed nor negated any personal transaction between the two. The insertion of his name in the blank might well have been the separate and independent act of Fellows, and not in and of itself a personal transaction between the two. Whether it was done with the consent or without the consent of Hill, because of a transfer by him, or through a mistake of Fellows, would have involved a personal transaction between the two. Those were the material inquiries and were excluded. That the name was not in the bonds when Hill left them in the safe amounted only to a description of the bonds and indorsement as thus left. Neither in its essential nature nor by reason of the proofs did it involve a personal transaction between the two, either by way of affirmation or denial. Both Hill's knowledge and Fellows' act were, in their essential character, separate and independent of each other. We must enforce the rule fairly, but draw the line somewhere. It is not always easy to do so with entire certainty and precision. We hesitate less in this case, because if the line is not drawn at the point adopted, it is difficult to see where it can be drawn at all. Inferences may often be framed out of the most independent facts. When Hill testified that he bought the bonds of Redbourn and put them among his own papers in the safe, it might be said, inferentially, to negative any personal transaction with Fellows by which the bonds were to be bought for him. The rule must be applied in each case to the facts as they arise, but without pushing it to extremes beyond its natural application. It may also be observed that there is great justice and fairness in the ruling below. The assignee defending was allowed to show the condition of the bonds at one time with the name of Fellows in. Was it, then, improper for Hill to show their condition

at another time with the name of Fellows out? Did not the dead man have enough of advantage when he was allowed to reach out from his grave and put into the middle of this trial his declaration in writing that he owned these bonds? The spirit and purpose of this provision of the code is equality, to prevent undue advantage; and that purpose should be kept in view when border questions arise and lines of distinction are to be drawn. We think the courts below applied the rule fairly, and committed no error in overruling the objections." See also *Hill v. Heermans*, 17 Hun (N. Y.) 470.

1. *Wheeler v. Arnold*, 30 Mich. 304.

In *Ripley v. Selligman*, 88 Mich. 190, the court said: "In applying this statute, care should be observed in distinguishing between matters equally within the knowledge of the deceased and matters within his information; that is, to distinguish what is knowledge and what is hearsay. It is only as to matters within the knowledge of the deceased that the opposite party is not permitted to testify." Compare *Lockhart v. Bell*, 86 N. Car. 443.

2. *Trimmier v. Thomson* (S. Car. 1894), 19 S. E. Rep. 291.

A party is not precluded from testifying to the fact that he had conversations with the deceased, and when, where, and in whose presence, they were had. *Williams v. Mower*, 35 S. Car. 206.

In *Hier v. Grant*, 47 N. Y. 278, Church, C. J., said: "The question to one of the defendants whether he had a conversation with the deceased partner, Schnauber, in relation to selling Hoyt tobacco, was not obnoxious to the objection that it called for a transaction or communication between defendant and a deceased person. The fact of having a communication was not a transaction within the meaning of the code, nor was it a communication. The referee sustained the objection to

such fact becomes the material question at issue, as where it is necessary to establish it in order to corroborate other witnesses whose testimony is insufficient to establish the cause of action or defense.¹ Testimony, which on its face relates to an independent fact, should be excluded, where it appears that the fact had its origin in, and directly resulted from, a personal transaction with a person since deceased.² But one party may testify to the

the question calling for the conversation and allowed the witness to state only the fact that he had one. Although such a question is upon the threshold of forbidden ground, I do not think it violates the statute, unless, perhaps, in a case where the mere fact of a conversation is the material fact to be proved. The communication made was the important fact in this case, and the circumstance that a conversation was had was immaterial, and no more important than would be the circumstance that the defendant had seen Schnauber on a certain day."

Where an architect sued the personal representative of a deceased person for the price of certain plans which he had prepared for him, and the plaintiff was permitted to testify to the value of the plans, and also that he would not have drawn them without being requested by someone to do so, it was held that he should not be allowed to testify that he had a conversation with the decedent about the plans, as it might be inferred from such testimony that the decedent requested him to draw them. *Ellis v. Filon* (Supreme Ct.), 33 N. Y. Supp. 138.

1. *Hier v. Grant*, 47 N. Y. 278; *Maverick v. Marvel*, 90 N. Y. 656.

In *Killen v. Lide*, 65 Ala. 505, there was some evidence tending to show that the surviving party had made a settlement with the deceased, and the survivor was called to testify that he was present with the deceased and the witness at the time and place referred to, but it was held that he was incompetent to give such testimony. The court said: "Lide, who is alleged to have made the settlement with Killen, was dead, and this suit was by his administratrix. The two witnesses referred to had given evidence tending to prove a settlement. Any fact tending to aid or strengthen their evidence of that disputed proposition was evidence tending to prove its truth, or it was nothing. If it tended to prove its truth, then it was evidence of a trans-

action with the intestate which the statute renders him incompetent to give. Code of 1876, § 3058. The testimony then was irrelevant and worthless, or it was prohibited by the statute." *Citing Tisdale v. Maxwell*, 58 Ala. 40. *Compare Downey v. Andrus*, 43 Mich. 65.

2. Thus in *Clift v. Moses*, 112 N. Y. 426, which was an action on certain promissory notes by the legal representative of a deceased payee, the defense was payment to the deceased in his lifetime, and it was held that the defendant was incompetent to testify that either he or his wife had possession of the notes prior to the death of the payee. The court said: "The possession by the defendant or by his wife of the notes prior to the death of Pardee was a material fact on the main issue of the case. Possession of a thing derived from another is, of course, a personal transaction with the person from whom the possession was derived. Proof by Moses that he had possession of the notes prior to Pardee's death did not of itself necessarily show a possession derived from Pardee. In the absence of explanation, this possession may have been derived from Clift or from some third person to whom the notes had been transferred by Pardee & Co. But before Moses was called as a witness, he had proved by his wife that his possession came from Pardee through a direct personal transaction between Pardee and himself. To permit Moses to testify to his possession of the notes prior to Pardee's death or that he saw them in his wife's hands was equivalent under the circumstances to permitting him to testify that he received the notes from Pardee; and as he could not be permitted to testify directly to that fact, he was equally incompetent to testify to a possession which was the inseparable incident and result of a personal transaction. The statute cannot be evaded by framing a question which, on its face, relates to an independent fact, when it is disclosed

other's admissions against interest, though they relate to a transaction or conversation with a deceased person.¹

m. ACTS AND OMISSIONS CAUSING DEATH.—In an action by an administrator to recover damages for the wrongful killing of his intestate, the defendant may not testify concerning the cause of the death.² And where the defendant in such case is a corporation, the officers and stockholders thereof are not competent for the defense.³ Where, however, the right of action is given by the statute directly to the beneficiary, and the damages recovered do not fall into the body of the decedent's estate, for distribution by the administrator, it has been held that the defendant may testify to the circumstances of the killing, because the plaintiff's cause of

by other evidence that the fact had its origin in, and directly resulted from, a personal transaction." *Compare Downey v. Andrus*, 43 Mich. 65.

In *Buie v. Scott*, 107 N. Car. 181, it was held that the payee in a note was not, after the death of the maker and the loss of the note, competent to prove the date thereof, where that fact had become material in connection with other incidents of the execution of the note.

1. In *Hirsh v. Auer* (N. Y. 1895), 40 N. E. Rep. 397, which was an action against the beneficiary named in a certificate in a mutual benefit association, by the children of the insured, to recover the proceeds of the certificate, one of the plaintiffs was permitted to testify to an admission against interest made by the defendant and to give the whole conversation on the occasion of such admission which had reference to a transaction with the insured, and it was insisted that this was error on the ground that such evidence must be excluded under section 829 of the Code Civ. Proc. The court, however, said: "We are of opinion that this evidence was competent as tending to prove an admission of Clara Auer against her interest, she being alive at the time of the trial. This was not an effort on the part of the plaintiffs to show a personal transaction or communication between the witness, Mary Ann Hirsh, and her father, and, consequently, section 829 of the code has no application. It was competent to prove this admission of the defendant, Clara Auer, and, in order to do so, the entire conversation between the witness and defendant was material as pointing out the nature of the admission. The only legal effect of this evidence was to prove the admission of the defendant,

and it was properly received and considered by the trial judge."

2. *Sherlock v. Alling*, 44 Ind. 184; *Hudson v. Houser*, 123 Ind. 309. *Compare Miller v. Dayton*, 57 Iowa 424.

In *Forbes v. Snyder*, 94 Ill. 378, the court said: "Defendants were offered as witnesses generally as to matters anterior to the death of Snyder, and were held incompetent. This ruling we hold to be correct. In this action, the adverse party sues as administratrix, and, in such case, a party or person interested is expressly excepted from the operation of the statute allowing parties to testify on their own motion in their own behalf. But it is insisted that this clause is to be confined to cases wherein the result of the suit must be to increase or diminish the estate of the deceased person, and that the damages in this case do not, in any proper sense, constitute a part of the estate of deceased, are not assets for the payment of debts or for distribution to heirs or devisees. It is true, these damages are not strictly any part of the estate, but they constitute a fund cast upon his next of kin by means of his death. They surely come within the letter of the statute, and, in our judgment, fall within its spirit. The tongue of Snyder is silent as to the events which led to his death. The same reasons which justify the limitations of the general statute, so as to silence adverse parties where the effect of the proceeding is to increase or decrease the estate, seem equally cogent in a case like the present."

3. *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 483, *affirming* 26 Ill. App. 466.

But an employee of the company through whose alleged negligence the death of the plaintiff's intestate was

action is one which never accrued to the deceased or to his personal representative as such.¹ In such cases, the beneficiary, whether a party to the action or not, may testify for the plaintiff.²

π. WHEN CALLED BY THE OPPOSING PARTY.—A witness who is incompetent to testify to personal transactions or communications with a deceased person, upon his own offer, may nevertheless be called and examined concerning the same by the party who has the right under the statute to object to his voluntary testimony.³ In such case, he is not only competent but may be

caused is a competent witness notwithstanding his interest. Illinois Cent. R. Co. v. Weldon, 52 Ill. 290.

1. Wallace v. Stevens, 74 Tex. 559.
In Mann v. Weiland, 81* Pa. St. 256, the court said: "The fourth assignment relates to the competency of the plaintiff in error to testify. That question is answered by the first section of the act of April 15, 1869, P. L. 30. It declares, 'no interest nor policy of law shall exclude a party or person from being a witness in any civil proceeding,' provided (*inter alia*) 'this act shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead, excepting in issues and inquiries *devisavit vel non*, and others respecting the right of such deceased owner, between parties claiming such right by devolution on the death of such owner.' This action is not by or against an executor, administrator, or guardian; nor is the assignor of the thing in action dead. There is no assignment, either actually or constructively. If an action had been brought by Weiland to recover damages for injuries he had sustained, it would have survived to his personal representatives, under the 18th section of the act of April, 1851, *supra*; and after his death the plaintiff in error would not have been competent to testify to matters which occurred during the life of Weiland. This action, however, was not brought by him, nor is it for the recovery of damages for injuries he sustained; but it is for injuries his wife sustained by his death. It is for a cause of action her husband never had. It arose on and after his death, and accrued to his widow. In case of injury causing death, the first section of the act of April 26, 1855 (Pur. Dig. 1094, pl. 3), withholds the right of action from the personal representatives of the decedent, and gives it only to the husband, widow, chil-

dren, or parents of the deceased. The present right of action never existed in favor of Weiland, nor during his life did it exist against the plaintiff in error. When the law created this right of action against the plaintiff in error, it gave it to the defendant in error. It is true the death of her husband was an act precedent to her right of action; but so was the negligence of the plaintiff in error. The two united enacted the cause of action and gave it to the widow. It had no existence prior to that time. It originated between two living persons. Each is now a party to this action. The learned judge, therefore, erred in not permitting the plaintiff in error to testify, and the judgment must be reversed."

In Hale v. Kearly, 8 Baxt. (Tenn.) 49, the widow brought her action in the name of the administrator after presenting proper proof that he refused to sue, and it was held that the defendant might testify in his own behalf as the administrator was only a nominal party; the widow being the real party in interest.

2. Quin v. Moore, 15 N. Y. 432; Strong v. Stevens Point, 62 Wis. 255; Hale v. Kearly, 8 Baxt. (Tenn.) 49; Louisville, etc., R. Co. v. Thompson, 107 Ind. 442; 57 Am. Rep. 120.

3. Thomas v. Thomas, 42 Ala. 120; Chase v. Evoy, 51 Cal. 618; Joss v. Mohn, 55 N. J. L. 407; Sconce v. Henderson, 102 Ill. 376; Ash v. Guie, 97 Pa. St. 493; 39 Am. Rep. 818; Boyd v. Conshohocken Worsted Mills, 149 Pa. St. 363; Leasman v. Nicholson, 59 Iowa 259; Treadwell v. Lennig, 50 Fed. Rep. 872; Whitridge v. Whitridge, 76 Md. 54; Bartlett v. Burden (Ind. App. 1894), 39 N. E. Rep. 175.

Where the parties have taken each other's depositions, and one of them dies before the trial, the deposition of the other may be used to prove facts to which he would not be competent to testify upon his own offer. McDonald

compelled to testify.¹ The fact that he is called and examined by his opponent concerning matters which are not within the inhibition of the statute, does not render him competent in his own behalf to give testimony which would be excluded were he to volunteer as a witness for himself.² He may, however, explain the testimony drawn from him by the questioning of his adversary even though it includes a transaction or conversation with a deceased person.³

v. Woodbury, 65 How. Pr. (N. Y. Supreme Ct.) 226.

If the party protected by the statute makes a misuse of his right to cross-examine his adversary, thereby eliciting conversations between him and the deceased, he cannot prevent the witness from giving his version of them. *Stevens v. Brown*, 12 Ill. App. 619.

1. *Dudley v. Steele*, 71 Ala. 423; *Chase v. Evoy*, 51 Cal. 618; *Roberts v. Briscoe*, 44 Ohio St. 596.

2. *Hopkins v. Bowers*, 108 N. Car. 298; *Sumner v. Candler*, 92 N. Car. 634; *Armfield v. Colvert*, 103 N. Car. 147; *Perry v. Mulligan*, 58 Ga. 479; *Lahey v. Heenan*, 81 Pa. St. 185; *Tretheway v. Carey* (Minn. 1895), 62 N. W. Rep. 815.

In *Miller v. Montgomery*, 78 N. Y. 285, the court, speaking of a witness who had been called by the opposing party, said: "Either party had the right to call him and have him sworn; and either party had the right to examine him as to all matters to which he was competent to testify; and by such examination they waived nothing. By examining him as to matters for which he was competent, a party would not be bound to permit him to testify as to matters for which he was incompetent. By producing him as a witness, a party would not certify that he was competent to testify as to all matters pertinent to the issue on trial. A party may put his lawyer or physician on the stand as a witness to testify to certain facts, and yet the adverse party could not, upon cross-examination, question the witness as to professional communications or disclosures excluded by the general rules of law. But a party may waive his objections to the incompetent evidence in several ways. He may do it by himself inquiring as to the forbidden transactions or conversations. If he does this, the opposite party may inquire as to the same matters. But here Pollock, upon his examination on behalf of the contestants, was asked

only as to facts to which he was perfectly competent to testify. He was not asked as to any transaction or conversation with the testator."

The fact that the witness's examination by the opposing party shows a transaction between him and the deceased will not of itself qualify him to testify to a conversation with the deceased concerning such transaction. *Corning v. Walker*, 100 N. Y. 547.

3. *Beardslee v. Reeves*, 76 Mich. 661; *Lilley v. Mutual Ben. L. Ins. Co.*, 92 Mich. 153; *Smith's Appeal*, 52 Mich. 419; *Michigan Sav. Bank v. Butler*, 98 Mich. 381; *Niccolls v. Esterly*, 16 Kan. 32; *Metz v. Snodgrass*, 9 W. Va. 190; *Roberts v. Briscoe*, 44 Ohio St. 596; *Jackson v. Munford*, 74 Tex. 104; *Foster v. Hess* (Minn. 1894), 59 N. W. Rep. 193; *Hackstaff v. Hackstaff* (Supreme Ct.), 31 N. Y. Supp. 11.

In *Re Dunlap's Estate*, 94 Mich. 17, the court said: "In the present case, the widow was not only called to the witness stand in the probate court, interrogated fully as to the transaction between herself and husband, and asked to make out a list giving the history of the notes, but she was called to the stand in the circuit court, asked to produce the remaining notes, which she did, her attention was called to the list which she had made, and the same was identified, and introduced in evidence. This list showed that several of the notes had been renewed during the lifetime of her husband, and after the date of the alleged gift; that several of these renewal notes had been taken in her husband's name, and that others had been paid to her since her husband's death, and the amounts appropriated by her. The other testimony brought out upon her examination by counsel for the heirs cannot be said to have been confined to admissions made by her after the death of her husband. This widow's disability was waived not only in the probate court but in the circuit. The heirs could not

When the personal representative of a deceased person sues one with whom his decedent had dealings for an accounting, he calls the defendant to testify within the meaning of the rule.¹ But in a suit by a surviving partner for a partnership accounting, the plaintiff is not competent to testify in his own behalf.² And in a suit for an accounting *inter vivos*, an order that the defendant attend and be examined touching the account, will not authorize his examination, should the plaintiff die after the entry of the order and before the examination.³ If a party who has the right to object to the testimony of a witness, calls him and examines him concerning matters within the inhibition of the statute, it seems that the witness may, on his own offer, testify at a subsequent trial of the cause, but such offer, when he proposes to testify to presumably prohibited matters, should be accompanied by a showing that his testimony at the former trial related to matters which occurred during the lifetime of the deceased.⁴ A

be allowed to go into matters equally within the knowledge of the deceased, so far as they deemed necessary to charge her with these notes, and then revive her disability, so as to prevent her from giving the entire history of the transaction, and thus explain what had been drawn out by counsel for the heirs."

If a party is examined by his adversary as to a part of a transaction with the decedent, he may then testify as to the rest of it in his own behalf. *Nicolls v. Esterly*, 16 Kan. 32; *Warren v. Adams*, 19 Colo. 515.

If an executor or administrator calls the opposing party to testify to matters within the inhibition of the statute, he does not thereby waive his right to object to the testimony of the husband or wife of such party. *Gilbert v. Swain*, 9 Ind. App. 88.

1. In *Bowen v. Bowen*, 17 R. I. 738, the court, among other things, said: "In an accounting, the first step is for the master to require the accounting party to present an account under oath. This may properly be regarded as done at the instance of the party whose suit renders the taking of an account necessary, and the party presenting the account may, therefore, in so doing, properly be regarded as testifying upon the call of his opponent, and hence as not within the prohibition contained in the proviso to Public Statutes of *Rhode Island*, ch. 214, § 33."

And in such suit, the fact that one of the defendants is presumably a friendly witness for the complainant goes only

to his credit and not to his competency. *Packer v. Noble*, 103 Pa. St. 188.

2. *Graham v. Howell*, 50 Ga. 203.

And it has been held that, upon a bill for an account by the representatives of a deceased partner, against the surviving partners, the latter are not competent witnesses in their own behalf. *Sangston v. Hack*, 52 Md. 173.

3. *Halsted v. Tyng*, 29 N. J. Eq. 86.

4. In *Bair v. Frischkorn*, 151 Pa. St. 466, the court said: "Frederick Frischkorn, one of the defendants, was called by them to prove that he had an arrangement with plaintiff's intestate, George Bair, by which any payments made to him were to be credited on the note in controversy; that several payments were accordingly made thereon, etc. Plaintiff's objection that the witness is incompetent because he is a party to the record was sustained by the court; and thus arose the only question presented by this record. In this action by the administratrix of George Bair, the defendants were *prima facie* incompetent to testify to any arrangement or contract with her intestate. It was, therefore, incumbent on them to overcome the *prima facie* incompetency of their witness by presenting facts, the effect of which would be to remove the disqualification; for example, if they had been able to show that on a former trial the same witness was called by plaintiff to prove transactions between her intestate and himself, the effect would have been to accredit the witness and thus remove his *prima facie* disqualification. Recognizing the fact that it

party to an action may not, however, call and examine one who appears to be an opposing party, but who is in fact identified with him in interest where the proposed testimony relates to transactions or conversations with a deceased person, the rights of whose estate are in conflict with those of the witness.¹

o. COMPETENCY OF REPRESENTATIVE.—Since it is the purpose of these provisos to enabling acts to protect the estates of deceased and insane persons from the apprehended danger of false testimony by the surviving or sane party to the contract or cause of action, it follows that the testimony of the personal representative given in behalf of the estate which he represents does not fall within the mischief intended to be prevented. Consequently, the general rule is that one who sues or defends in a representative capacity may give any evidence in his own behalf which is not open to objection on grounds other than that here under consideration.² But in some jurisdictions the prohibition extends to

was incumbent on them to do so, the defendants, as part of their offer, proposed to show that on a former trial of this case, viz., June Term, 1891, the witness was called by the plaintiff as if under cross-examination and was asked questions, and answered them, and that thereby the plaintiff made him a competent witness to testify to all matters occurring in the lifetime of George Bair. The inference thus drawn by the defendants is a *non sequitur* from any of the averments contained in their offer. It does not appear therein that the questions propounded to and answered by the witness related to anything occurring in the lifetime of George Bair. If it did so appear, the offer would be self-sustaining; but it does not. For aught that is stated in the offer, the questions may have related to something that occurred since George Bair's decease, and as to which the witness was fully competent to testify. We have no right to assume that they related to anything else."

1. *Cupp v. Ayers*, 89 Ind. 60; *Corderey v. Hughes*, 6 Ill. App. 401; *Weinstein v. Patrick*, 75 N. Car. 346; *Mason v. McCormick*, 75 N. Car. 263; 80 N. Car. 244; *Gulley v. Macy*, 84 N. Car. 434; *Owens v. Phelps*, 92 N. Car. 231; *McCartin v. Traphagen*, 43 N. J. Eq. 323; *Trabue v. Turner*, 10 Heisk. (Tenn.) 447; *Aymett v. Butler*, 8 Lea (Tenn.) 453; *Hill v. McLean*, 10 Lea (Tenn.) 115; *Hubbell v. Hubbell*, 22 Ohio St. 208.

2. *Dow v. Merrill*, 65 N. H. 107; *McLaughlin v. Webster*, 141 N. Y. 76; *Mills v. Davis*, 41 Hun (N. Y.) 415;

Reeve v. Crosby, 3 Redf. (N. Y.) 74; *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238; *Cady v. Brennan* (Supreme Ct.), 31 N. Y. Supp. 190; *McCartney v. Spencer*, 26 Kan. 62; *Jaquith v. Davidson*, 21 Kan. 341; *Jackson v. Jackson*, 40 Ga. 150; *McIntyre v. Meldrim*, 40 Ga. 490; *Flowers v. Flowers*, 92 Ga. 688; *Bradley v. Kavanagh*, 12 Iowa 273; *Stiles v. Botkin*, 30 Iowa 60; *McNamara v. New Melleray Corp.*, 88 Iowa 502; *Thompson v. Humphrey*, 83 N. Car. 416; *Johnson v. Heald*, 33 Md. 352; *Robnett v. Robnett*, 43 Ill. App. 191. Compare *Orendorff v. Utz*, 48 Md. 298.

A surviving partner is not a representative of his deceased co-partner within the meaning of this rule. *Holmes v. Brooks*, 68 Me. 416.

The executor named in a will is a competent attesting witness if he takes no beneficial interest under the will. *Stewart v. Harriman*, 56 N. H. 25; 22 Am. Rep. 408; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Rugg v. Rugg*, 83 N. Y. 592; *Loder v. Whelpley*, 111 N. Y. 239.

And the fact that he may be entitled to commissions for his services, does not render him incompetent as to transactions and communications with the testator. *Matter of Wilson's Will*, 103 N. Y. 374; *Reeve v. Crosby*, 3 Redf. (N. Y.) 74; *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238.

It has been held that the election of the personal representative to testify, will cure the error of previously permitting the other party to testify over his objection. *Dow v. Merrill*, 65 N. H.

both parties to the action or proceeding, and the personal representative may not testify to acts or declarations of his decedent when the effect of his testimony would be to increase the assets of the estate.¹ Where the personal representative acts in his individual right against the interest of the estate, as in the settlement of a personal claim of his own against the estate, or of his account, or where he resists a claim by the estate against him, he stands on the same footing as other interested witnesses, and his testimony should be excluded so far as it relates to personal transactions or communications between himself and his decedent.²

107. But in *Church v. Howard*, 79 N. Y. 415, reversing 17 Hun (N. Y.) 5, the contrary was held. Compare *Roth's Estate*, 150 Pa. St. 268.

A party who derives title from a deceased person, may testify to a personal transaction with such deceased person, though the statute prohibits the opposing party from doing so. *Lyon v. Whittaker*, 77 Hun (N. Y.) 107.

1. *Alder v. Pin*, 80 Ala. 351; *Dunlap v. Mobley*, 71 Ala. 102; *Stringfellow v. Montgomery*, 57 Tex. 349; *Denbo v. Wright*, 53 Ind. 226; *Hobbs v. Russell*, 79 Ky. 61.

2. *Tuck v. Nelson*, 62 N. H. 469; *Perkins v. Perkins*, 58 N. H. 405; *Fulcher v. Mandell*, 83 Ga. 715; *Stanford v. Murphy*, 63 Ga. 410; *Tichenor v. Tichenor*, 43 N. J. Eq. 163; *Smith v. Burnet*, 34 N. J. Eq. 219; 35 N. J. Eq. 314; *Matter of Kellogg*, 104 N. Y. 648; *Kimmel v. Shroyer*, 28 W. Va. 505; *Grier v. Cagle*, 87 N. Car. 377; *Whitesides v. Green*, 64 N. Car. 307; *Davis v. Tarver*, 65 Ala. 98; *Strange v. Graham*, 56 Ala. 614; *Sanderson v. Sanderson*, 17 Fla. 820; *Hyneman's Estate*, 11 Phila. (Pa.) 135; *Breneman's Estate*, 65 Pa. St. 298; *Smith v. Hay*, 152 Pa. St. 377; *Preble v. Preble*, 73 Me. 362; *Troup v. Rice*, 55 Miss. 278; *Goodwin v. Goodwin*, 48 Ind. 584.

"In such case, the executor acts *suo jure*, and against the interest of the creditors, legatees, heirs, and all persons interested in the estate; whereas, in all other cases he is trustee for them, and is supposed to be the proper party to defend the estate against groundless and unjust demands. It follows that in case of his own claim, any party adversely interested may appear and oppose, and in like manner appeal." *Shaw, C. J.*, in *Willey v. Thompson*, 9 Met. (Mass.) 336.

In *Ela v. Edwards*, 97 Mass. 318, *Gray, J.*, said: "The statutes requiring

an executor or administrator to verify the account of his administration by his oath, and to submit to examination on oath before the probate court upon any matter relating to his account, do not make him a competent witness generally in his own behalf. Gen. Stats., ch. 98, § 9; *Bailey v. Blanchard*, 12 Pick. (Mass.) 166. The competency of the appellant in this case, therefore, depends upon the statutes making parties to the record competent witnesses. The General Statutes, ch. 131, § 14, by which parties in all civil actions and proceedings, including probate and insolvency proceedings and suits in equity, are admissible as competent witnesses for themselves or any other party, contains the exception that 'where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor.' The purpose of this exception is to exclude a party to the record from testifying in his own favor when the other party to the contract or cause of action in issue is incapable of testifying against him. *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184; *Brown v. Brightman*, 11 Allen (Mass.) 226. The appellant was not a competent witness within the letter or spirit of this statute. The contract or cause of action in issue and on trial was his claim for services alleged to have been rendered by him to the testatrix in her lifetime. If the claim had been made against the estate of the deceased by any other person than the executor, it must have been prosecuted by action at law, in which the claimant could not have testified in his own favor. An executor having a demand against his testator cannot proceed by action at law because he cannot sue himself, but the appropriate manner of presenting his claim for adjudication is to

As a rule, where both parties are such in a representative capacity, either of them may testify as to transactions with his

charge it in his probate account, of which notice is given, so that any person interested in the estate may appear and dispute it. . . . The party plaintiff to the contract in issue and on trial, as well as the plaintiff of record, was the appellant in his individual right. The party defendant was the estate of which the appellant was executor, but which was necessarily represented in this proceeding by the party objecting to the appellant's claim. The statute regulating the competency of parties to the record as witnesses applies equally to probate proceedings and to actions at law. The fact that the appellant was obliged to make his individual claim by stating it in his account rendered to the court of probate, instead of in a declaration in an action at common law, gave him no right to testify in his own favor, since the death of the person whom he alleged to have made the contract which was the foundation of his claim. As the appellant, in seeking the allowance of this item in his account, was prosecuting a claim in his private behalf, and not acting only in a representative capacity, he was not made a competent witness by Statutes 1864, ch. 304, § 1."

In *Tuck v. Nelson*, 62 N. H. 471, the court said: "The question presented is whether the plaintiff should have been permitted to testify as to the understanding between him and his wife as to the ownership of the shares of stock of which she had the legal title, either as matter of right or discretion to prevent injustice. It is said, in *Moore v. Taylor*, 44 N. H. 375, and *affirmed* in *Chandler v. Davis*, 47 N. H. 464, that the design of the provision in the statute which excludes the survivors from testifying against the estate of a deceased party is to place the parties upon equal footing and not allow the living party to a trade or transaction to be a witness in relation to it when the other party to the same transaction, being dead, cannot testify. An application of this test to the present case shows it to be clearly within the reason and spirit, if not within the strict letter, of the statute. This exception to the general rule allowing parties to testify, was intended for the protection of the estate of the deceased party and not for the personal advantage of the adminis-

trator, and the surviving party is prohibited from testifying, not against the administrator personally, but against the estate which he represents. When an administrator is a party in his official capacity, he may testify and permit the adverse party to testify at his election, because he represents the estate of the deceased party, and the statutory exception being for the benefit of the estate, the administrator may waive it; but when the administrator acts in his individual right and against the interest of the estate, as in the case of the settlement of his personal claim or administration account, he stands like any other party claiming adversely to the estate. In such cases, the estate is the defendant and is necessarily represented by the parties opposing the claim as creditors, heirs, or legatees, and the administrator cannot testify as a matter of right." *Citing Perkins v. Perkins*, 58 N. H. 405; *Ela v. Edwards*, 97 Mass. 318; *Preble v. Preble*, 73 Me. 362.

An executrix is not competent to prove the gift of a chattel to her by her deceased husband. *Sherman v. Lanier*, 39 N. J. Eq. 249.

A guardian may not testify against his ward in an action or proceeding involving the guardian's management of the ward's estate. *Garwood v. Cooper*, 12 Heisk. (Tenn.) 101.

A trustee is not competent to testify to transactions between himself and his *cestui que trust*, since deceased. *Taylor's Appeal* (Pa. 1887), 11 Atl. Rep. 307.

In a proceeding to require an executor to disclose assets, the executor is not competent as to facts occurring before the death of the testator. *Booth v. Tabernor*, 23 Ill. App. 173.

But the rule excluding the testimony of an executor does not apply in an inquiry incidental to taking an account in which no decree can be rendered. *Duchesse d'Auxy v. Soutter*, 28 Fed. Rep. 733.

But in a hearing of a probate appeal from a decree accepting the account of an executor, he is a competent witness to prove the payment of a legacy to a legatee since deceased. *Granger v. Bassett*, 98 Mass. 462; *Bassett v. Granger*, 103 Mass. 177.

And he may testify as to matters within his knowledge in favor of a

adversary's decedent.¹ But under some statutes, which in terms exclude a party when the opposing party is an executor or administrator, both parties are excluded in such cases.²

¶ **REBUTTAL OF REPRESENTATIVE'S TESTIMONY.**—When a personal representative, or other party who is entitled to claim the protection of the statute against the testimony of the surviving or sane party to a contract or cause of action, takes the witness stand himself, and testifies to a transaction or conversation between his adversary and the deceased or insane person represented in the action or proceeding, this opens the door to the surviving or sane party to such transaction, who may, in turn, be a witness in his own behalf concerning such matters.³ But in such case, he should not be permitted, over the objection of his adversary, to testify to any matters within the inhibition of the statute, except those related by the legal representative of the deceased or insane party to the transaction in controversy.⁴ And the fact that the personal representative, without testifying himself, called

claimant against the estate of his decedent. *White's Estate*, 13 Phila. (Pa.) 287.

1. *Haines v. Watts*, 55 N. J. L. 149; *Penny v. Croul*, 87 Mich. 15; *Duryea v. Granger*, 66 Mich. 593; *Buckingham v. Wesson*, 54 Miss. 526; *Kenyon v. Peirce*, 17 R. I. 794; *Colvin v. Phillips*, 25 S. Car. 228.

In an action by an administrator against another administrator of the same estate in another jurisdiction, the defendant is a competent witness in his own behalf. *Stearns v. Wright*, 51 N. H. 600.

2. *Bowie v. Bowie*, 77 Md. 311; *Schmid v. Kreismer*, 31 Iowa 479. *Compare Gennerich v. Ulrich* (Supreme Ct.), 12 N. Y. Supp. 353.

3. *Dow v. Merrill*, 65 N. H. 107; *Ballou v. Tilton*, 52 N. H. 605; *Cousins v. Jackson*, 52 Ala. 262; *Wilcox v. Corwin*, 50 Hun (N. Y.) 425; *Mitchell v. Cochran* (Supreme Ct.), 10 N. Y. Supp. 545; *Sweet v. Low*, 28 Hun (N. Y.) 432; *Lewis v. Merritt*, 98 N. Y. 206; *McLaughlin v. Webster*, 141 N. Y. 76; *Burnett v. Savage*, 92 N. Car. 10; *Murphy v. Ray*, 73 N. Car. 588; *Wiley v. Morse*, 30 Mo. App. 266; *Wade v. Hardy*, 75 Mo. 394; *St. Charles First Nat. Bank v. Payne*, 111 Mo. 291; *Roberts v. Briscoe*, 44 Ohio St. 596; *Rankin v. Hannan*, 38 Ohio St. 438; *Eaves v. Harbin*, 12 Bush (Ky.) 445; *Hurley v. Lockett*, 72 Tex. 262; *Hudson v. Hudson*, 87 Ga. 678; *Hammond v. Drew*, 61 Ga. 189; *Bailey v. Keyes*, 52 Iowa 90; *Ivers v. Ivers*, 61 Iowa 721; *Kelton v. Hill*, 59 Me. 259;

Johnson v. Heald, 33 Md. 352; *Matthews v. Hoagland*, 48 N. J. Eq. 455; *McCartin v. McCartin*, 45 N. J. Eq. 265; *Zane v. Fink*, 18 W. Va. 754; *Robnett v. Robnett*, 43 Ill. App. 191.

Where the heirs at law, being the real parties in interest, have testified, the opposing party may testify in rebuttal. *Parkerson v. Burke*, 59 Ga. 100; *Greenwood v. Henry* (N. J. 1894), 28 Atl. Rep. 1059; *Dowis v. Elliott* (Ky. 1895), 29 S. W. Rep. 142.

If a defendant who is really a plaintiff in interest testifies in behalf of the plaintiff as to transactions with a deceased person, his co-defendants may take the stand in rebuttal. *Redman v. Redman*, 70 N. Car. 257.

Where the testimony of the administrator is of a negative character, as that the transaction with his decedent did not occur within his knowledge, it will not let in the testimony of the other party concerning the alleged transaction. *In re Edwards' Estate*, 58 Iowa 431; *Rudolph v. Underwood*, 88 Ga. 664.

If the executor testifies simply to identify his testator's account books, the opposing party is not thereby rendered competent to testify generally in the case. *Sheehan v. Hennessey*, 65 N. H. 101; *Benjamin v. Dimmick*, 4 Redf. (N. Y.) 7.

4. *In re Roth's Estate*, 150 Pa. St. 261; *Hall v. Otis*, 77 Me. 122; *Burleigh v. White*, 64 Me. 23; *Williams v. Cooper*, 113 N. Car. 286; *Sumner v. Candler*, 92 N. Car. 634; *Armfield v. Colvert*, 103 N. Car. 147; *Johnson v. Heald*, 33 Md. 352; *Martin v. Hillen*,

disinterested witnesses to prove a transaction or conversation between the deceased and the opposing party to the action, is not sufficient to let in the latter's testimony concerning the same,¹

142 N. Y. 140; *Brown v. Burgett* (Supreme Ct.), 15 N. Y. Supp. 942; *Copeland v. Koontz*, 125 Ind. 126; *Hardin v. Taylor*, 78 Ky. 593; *Donlevy v. Montgomery*, 66 Ill. 227; *Connelly v. Dunn*, 73 Ill. 220; *Zane v. Fink*, 18 W. Va. 754; *Rhodes v. Pray*, 36 Minn. 392; *Clarity v. Sheridan* (Iowa, 1894), 59 N. W. Rep. 52; *McCartin v. McCartin*, 45 N. J. Eq. 265. See also *In re Brown's Estate* (Iowa, 1894), 60 N. W. Rep. 659.

In *Lewis v. Merritt*, 98 N. Y. 206, an executor sued for the conversion of certain notes which he claimed as the property of the estate; the defense being that the testatrix had given them to the defendant. The executor took the stand and testified that the notes were kept in a tin trunk under the bed of the testatrix; that he saw them there the morning before her death; that upon examining the trunk, the next morning, he found that they had been abstracted; and that they were afterward found in the possession of the defendant, who refused to surrender them. The defendant then offered to testify that he did not take the notes from any trunk or any person, and that he had possession of them several days before the death of the testatrix. It was held that he should have been permitted to give this testimony. The court said: "The excluded evidence did not purport to be admissible, nor was it offered, for the purpose of establishing an affirmative defense; but it is claimed to have been competent, as tending to overthrow a fact upon which plaintiff's cause of action solely rested, and which was testified to by the plaintiff alone. While, of course, it is not competent for a party, when called as a witness in his own behalf against one representing the deceased person, to testify affirmatively as to any transaction or communication had, personally, with such deceased person, or whether a particular interview between them took place or not, unless his adversary is first examined in reference thereto, or the evidence of the deceased person given on some former occasion is proved on the trial, yet this does not necessarily and under all circumstances exclude the evidence of the surviving party when it tends to negate or affirm the existence

of such transaction and communication. The object and intent of the restriction placed upon the survivor of those engaged in personal dealings and transactions from giving evidence in relation thereto, will be accomplished if it is limited to cases which preclude him from giving such evidence when it is offered for the purpose of establishing an affirmative cause of action or defense. It is difficult to lay down any general rule which shall cover all possible transactions, but it is safe to say, when a party gives material evidence as to extraneous facts which may or may not involve the negation or affirmation of the existence of a personal transaction or communication with a deceased person, that the adverse party, although precluded from directly proving the existence of such communication or transaction, may give evidence of extraneous facts tending to controvert his adversary's proof, although those facts may also incidentally involve the negation or affirmation of such personal communications or transactions."

Neither the representative of a deceased person, nor the guardian of an infant, should be permitted to waive the provisions of the statute otherwise than by testifying himself. *McHugh v. Dowd*, 86 Mich. 412; *Lloyd v. Kirkwood*, 112 Ill. 338; *Johnston v. Johnston*, 138 Ill. 385; *Martin v. Smith*, 25 W. Va. 587; *Rose v. Brown*, 11 W. Va. 122.

1. *Redding v. Godwin*, 44 Minn. 355; *Webster v. Le Compte*, 74 Md. 249; *McKenna v. Bolger*, 49 Hun (N. Y.) 259; *DeVerry v. Schuyler* (Supreme Ct.), 8 N. Y. Supp. 221; *Hard v. Ashley* (Supreme Ct.), 18 N. Y. Supp. 413; *Skelton v. Richardson*, 77 Ga. 546; *Bushee v. Surles*, 77 N. Car. 62; *Burnham v. Mitchell*, 34 Wis. 117; *Canaday v. Johnson*, 40 Iowa 587; *Ring v. Jamison*, 66 Mo. 425; *Brice v. Hamilton*, 12 S. Car. 32; *Ruckman v. Alwood*, 71 Ill. 163; *Fountain v. Linn* (N. J. 1895), 31 Atl. Rep. 982.

In *Miller v. Cannon*, 84 Ala. 63, the court said: "When the case falls expressly within either of the exceptions for which the statute makes provision, neither a party to the record nor anyone else having a vested pecuniary in-

though he may testify to any matters not directly involving a transaction with the deceased, in order to contradict witnesses for the other side, notwithstanding such facts may tend to prove or negative an alleged transaction with the deceased.¹

Where the personal representative introduces evidence of damaging admissions made, out of the presence of the deceased, by the surviving party to a transaction, the latter may disprove or

testify in the result of the suit can testify against the estate of a deceased party, first, as to (that is, directly relating to) any transaction with, or statement by, the deceased, involved in the issue on trial; second, that testimony whose direct office and purpose are to corroborate or weaken, strengthen or rebut, other evidence given of such transaction with, or statement by, decedent, is equally within the reason and spirit of the prohibition." *Citing Tisdale v. Maxwell*, 58 Ala. 40; *McCrary v. Rash*, 60 Ala. 374; *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566; *Boykin v. Smith*, 65 Ala. 294; *Killen v. Lide*, 65 Ala. 505; *Dismukes v. Tolson*, 67 Ala. 386; *Goodlett v. Kelly*, 74 Ala. 213.

A party will not be permitted to contradict a disinterested witness for his opponent by giving his own version of a transaction with the deceased, to which such witness has testified. *Bushee v. Surles*, 77 N. Car. 62.

And the fact that such witness acted as an interpreter for the deceased, who could not speak the language of the surviving party, is immaterial. *Burnham v. Mitchell*, 34 Wis. 117.

But if the transaction was with the executor himself, the other party may testify to it in rebuttal when the executor has proved it by a disinterested witness. *Straubher v. Mohler*, 80 Ill. 21.

And if the executor or administrator calls an agent of the deceased, through whose fraud the contract is alleged to have been procured, to prove a transaction with the deceased, the other party may testify thereto on his own behalf. *Butz v. Schwartz*, 135 Ill. 180.

In *Nebraska*, it appears that a party may testify to a personal transaction with his opponent's decedent in rebuttal of testimony thereto by a disinterested witness. Thus, in *Parrish v. McNeal*, 36 Neb. 728, the court said: "Under the provisions of section 329 of the code, a person having a direct legal interest in the result of a suit in which the adverse party is the represent-

ative of a deceased person, is precluded from testifying to any transaction or conversation had between himself and such deceased person, unless the evidence of the deceased person relating to such conversation or transaction has been taken and read on the trial by the adverse party, or unless such representative has produced a witness who has testified in regard to such transaction or conversation. This case falls within the exception of the statute. The administrator introduced evidence on the trial to show that McNeal had never paid the note; he even proved statements, made by his intestate in his lifetime, after the date of the alleged payment and not in the hearing of the plaintiff, that the note was unpaid. It was not until after such evidence had been received that the plaintiff was allowed to give the testimony complained of. It related to the identical transaction had with the deceased, which the witnesses for the administrator had testified in regard to, and was, therefore, competent."

And, in *Pennsylvania*, the survivor was made competent in rebuttal of the testimony of a third person by the act of June 11, 1891, P. L. 287. See *In re Roth's Estate*, 150 Pa. St. 269.

1. *Pinney v. Orth*, 88 N. Y. 451; *Lewis v. Merritt*, 98 N. Y. 206; *McKenna v. Bolger*, 37 Hun (N. Y.) 526; *Gorham v. Price*, 25 Hun (N. Y.) 11; *Wadsworth v. Heermans*, 85 N. Y. 639; *Haverly v. Alcott*, 57 Iowa 171; *Miller v. Dayton*, 57 Iowa 423; *Koenig v. Katz*, 37 Wis. 153.

Thus, where a witness has testified to the making of an agreement in his presence, the surviving party to the alleged agreement may testify that he never made such agreement in the presence of the witness. *Webster v. Bearinger*, 72 Mich. 630; *Pinney v. Orth*, 88 N. Y. 447.

But he may not testify that he never made the agreement at all. *Haughey v. Wright*, 12 Hun (N. Y.) 179; *Chadwick v. Fonner*, 69 N. Y. 404. See

explain them by his own testimony.¹ In some jurisdictions, however, this privilege of the survivor is confined to admissions claimed to have been made after the probate of the will, or the appointment of the administrator.² The rules above stated apply

also *supra*, this title, *Independent Facts*.

1. Smith's Appeal, 52 Mich. 415; Donlevy v. Montgomery, 66 Ill. 227; Stonecipher v. Hall, 64 Ill. 121; Cousins v. Jackson, 52 Ala. 262; Merrill v. Pinney, 43 Vt. 605.

In Penn v. Oglesby, 89 Ill. 110, it was urged that the survivor was not competent to contradict or explain the admission given in evidence because it was made in the lifetime of the intestate, but the court said the objection was untenable. To the same effect is Burnham v. Mitchell, 34 Wis. 118.

In Smith's Appeal, 52 Mich. 415, it appeared that the representatives of an estate had examined the plaintiff concerning her claim and had rejected it before she began the action. Upon the trial, they put in evidence her statements upon such examination as admissions against interest. It was held that she was competent to testify to the whole transaction concerning which such statements were made. The court said: "Where a party whose testimony, if objected to, would be excluded under the provisions of the statute (2 How. Stat., § 7545) is giving testimony in a cause, and the opposite party calls out facts equally within the knowledge of the deceased, and afterwards seeks to prove the statements so made under oath in a controversy between the same parties, as admissions, he must be held to have waived the inhibition of the statute and the witness may testify fully in respect to the subject-matter of the admission, although it be equally within the knowledge of the deceased. When, therefore, in this case, the defendant had placed the commissioners on the witness stand and proved the admissions made by Mrs. Smith in her testimony given before them relative to the payment of the note and the checks, it was competent for Mrs. Smith to testify relative to the same subject-matter that the note had not been paid, and it was error for the court to strike out such testimony, or exclude her evidence upon the points covered by such admissions."

Where the admissions were made in the presence of the deceased, and the

witnesses who testified to them are not parties to the record, parties in interest, or agents of the deceased, the surviving party is not competent to explain or disprove them. Ruckman v. Alwood, 71 Ill. 163.

Proof by an executor of admissions of his adversary tending to show his liability to the estate, does not open the way to the survivor to testify to conversations with, or admissions by, the decedent. Rhodes v. Pray, 36 Minn. 392.

2. Lincoln v. Lincoln, 12 Gray (Mass.) 45; Wade v. Hardy, 75 Mo. 400; Leeper v. Taylor, 111 Mo. 312.

A party should not be prohibited from testifying as to acts and statements attributed to him after the probate of the will or the appointment of the administrator. Brown v. Foster, 112 Mo. 297; Wade v. Hardy, 75 Mo. 400, *disapproving* Ring v. Jamison, 66 Mo. 424, and Wood v. Matthews, 73 Mo. 482, in so far as they are in conflict with this rule.

A survivor cannot be prevented from testifying as to an admission claimed to have been made by him after the appointment of an administrator, though his testimony may necessarily destroy the evidential value of an admission proved to have been made by him before such appointment. Thus, in Cronan v. Cotting, 99 Mass. 334, the court said: "At the trial, the plaintiff was examined, without objection to his competency as a witness, to testify as to matters occurring since the appointment of the defendant as administratrix. And the only objection of the defendant now open to her, is that he was permitted to testify to a fact existing before such appointment, to wit, his want of knowledge of the existence of certain errors in the accounts between himself and the intestate. The defendant relied on acknowledgments, made by the plaintiff both before and after the death of the intestate, of the balance claimed to be due from him to the estate. It was competent, if the plaintiff is to be regarded as coming within the terms of the last clause of the proviso in the statute making parties witnesses, for him to deny or explain such admissions made since the appointment of the administratrix. Gen. Stats., ch. 131, § 14.

only when the personal representative testifies voluntarily. A party who is disqualified under the statute, cannot render himself competent by calling the personal representative and examining him concerning a transaction between himself and the deceased.¹ And when the representative takes the stand voluntarily, but does not, in his examination in chief, testify to any transaction or conversation between the deceased and the opposing party, the latter cannot render himself competent to testify to matters within the inhibition of the statute, by eliciting testimony concerning the same from the witness upon cross-examination.²

q. WHERE THE DECEDENT'S TESTIMONY IS PRESERVED.—If, after issue joined, the deposition of one of the parties is taken, and he dies before the trial, the introduction of such deposition in evidence, by his personal representative, will open the way to the opposing party to testify to all matters concerning which the deponent has testified.³ And if the testimony of a party, since deceased, given at a former trial of the cause, is read in evidence against

The weight of any such admission would be entirely taken away if made in ignorance of an existing error in the account. And this fact the plaintiff may testify to, although it should incidentally impair the effect of admissions made before the death under the same conditions of ignorance. The plaintiff cannot be deprived of the right to explain the latter admissions because such explanation must necessarily qualify former statements."

In *Indiana*, the survivor is not competent to testify in denial of admissions proved against him to have been made even after the death of the testator or intestate, unless he is required by the court to testify. *Froman v. Rous*, 83 Ind. 94.

1. *Herrington v. Winn* (Supreme Ct.), 14 N. Y. Supp. 612; *Daw v. Vreeland*, 30 N. J. Eq. 542; *Joss v. Mohn*, 55 N. J. L. 407; *Harvey v. Hilliard*, 47 N. H. 551; *Terry v. Ragsdale*, 33 Gratt. (Va.) 342; *Cake v. Cake*, 162 Pa. St. 584.

But he is not bound by the testimony of his opponent even when he calls him himself, as such examination is in the nature of a cross-examination, and he may introduce disinterested witnesses to contradict him. *Mason v. Poulson*, 43 Md. 161.

2. In *Corning v. Walker*, 100 N. Y. 547, affirming 28 Hun (N. Y.) 435, the court said: "It is claimed that what plaintiff testified to on the cross-examination was necessary to explain what he had previously testified to on

his direct examination, and hence, the evidence offered was competent. We think the testimony offered was not competent on any such ground. The defendant was not required to examine the witness in order to explain his testimony upon the direct examination by introducing evidence as to the declarations of Mr. Corning, sr., and, by doing so, did not open the door to the introduction of conversations had by him with a deceased person. Even if it may be assumed that this testimony related to the same subject in regard to which the plaintiff had given evidence, it was not given by the plaintiff in his own behalf so as to authorize a contradiction of the same. It was drawn out on a cross-examination by the defendant's counsel, and cannot, therefore, be considered to have been given on behalf of the plaintiff and for that reason could not properly be contradicted. There is no rule which authorizes a party to contradict evidence given by his adversary as to a transaction with a deceased person, which he has himself introduced, and the code does not provide for any such case. The testimony being introduced by the defendant himself, he was not authorized to contradict it by showing an interview with a deceased party in relation to the same subject." To the same effect is *Williams v. Cooper*, 113 N. Car. 286.

3. *Allen v. Chouteau*, 102 Mo. 309; *Nixon v. McKinney*, 105 N. Car. 23; *Monroe v. Napier*, 52 Ga. 385; *Hatton v. Jones*, 78 Ind. 466; *Zane v. Fink*, 18

W. Va. 693; *Macdonald v. Woodbury*, 30 Hun (N. Y.) 35; *Rice v. Motley*, 24 Hun (N. Y.) 143; *Runnels v. Belden*, 51 Tex. 48; *Shruford v. Chinski* (Tex. Civ. App. 1894), 26 S. W. Rep. 141; *Bingham v. Lavender*, 2 Lea (Tenn.) 48.

In *Mumm v. Owens*, 2 Dill. (U. S.) 477, Dillon, J., said: "Johnson, before his death, was examined as a witness in his own behalf, and his examination was reduced to writing in the form of a deposition, and this deposition has been read in evidence by the plaintiff. Now, is the defendant under these circumstances precluded from testifying to the matters covered by Johnson's evidence as contained in the deposition read to the jury? Under the act of Congress of July 2, 1864 (13 Stat. at L. 351, § 3), and of March 3, 1865 (Ib. 533, § 1), it is my opinion that the defendant should be allowed to testify if the plaintiff insists upon keeping the testimony of his intestate before the jury. The first act above cited makes parties competent witnesses in all civil cases, and the second act does not pronounce an absolute disqualification against the living party when the adverse party is an administrator, but enacts that he shall not be allowed to testify against the other as to any transaction with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In this case, the intestate has testified and his testimony is before the jury. To exclude the defendant from giving his version of the same transaction would be manifestly unfair and in contravention of the purpose and spirit of the legislation of Congress."

In *Monroe v. Napier*, 52 Ga. 388, the court said: "In this case Mrs. Varner was dead but her testimony had been taken by interrogatories before her death which were offered and read in evidence by the complainant, in which she fully stated her version and understanding of the contract at the time it was made. What is the reason and spirit of this statute, and what motive had the legislature in the enactment of it? The reason, spirit and intention of the statute is, that when one of the parties to the contract is dead, and cannot give his version of the contract, the other party thereto shall not be admitted to testify in his own favor. If, however, the party who is dead did testify while in life fully in relation to the contract, as in this case, and her

testimony is read to the jury, shall the other party to the contract then be excluded from giving his version of it because the other party is dead at the time of the trial? Would such a construction of the statute be in accordance with the reason and spirit thereof? It may be within the strict letter of the statute, but it is no more within the reason and spirit of it than the law which enacted that whoever drew blood in the streets should be punished with the utmost severity, when it was held that the law did not extend to the surgeon who opened the vein of a person that fell down in the street with a fit. The drawing blood in the streets by the surgeon was within the strict letter of the law, but not within the reason or spirit of it. So, in this case, if the complainant had not offered in evidence the testimony of Mrs. Varner, taken in her lifetime, in relation to the contract, the defendants would not have been competent witnesses to testify in their own favor in relation to it. But as the complainant offered and read in evidence her testimony in relation to the contract taken in her lifetime, then to have excluded the testimony of the defendants because she was dead at the trial would not have been in accordance with the reason and spirit of the statute, and the court did not err in admitting their testimony under the facts of the case before it. It was the duty of the court to give the statute a reasonable construction."

Where an executor puts in evidence an entry in his decedent's account book, showing an advancement to a son who claims a distributive share of the estate, that is such testimony of the deceased as will qualify the son to explain the circumstances attending such advancement. *Marsh v. Brown*, 18 Hun (N. Y.) 319.

In *Keran v. Trice*, 75 Va. 690, the contrary was held. It there appeared that the deposition of one of the parties was taken and he was cross-examined by the other. The deponent died before the trial, and after his death the deposition of the other party was taken. At the trial, the deposition of the deceased party was offered and received in evidence. It was held that the deposition of the survivor was not admissible on the ground that he was incompetent when it was taken. The court intimated that the deposition might have been received if it had been taken after the amendment of the law by

the opposing party, he may be sworn in his own behalf, and may testify in rebuttal of the testimony so read.¹ But in neither case may he testify to matters of the prohibited class, except such as are contained in the testimony of the deceased.²

It has been held that where the testimony of a deceased party has been preserved, and may be used in evidence, the surviving party is competent to testify as to the matters included in the decedent's testimony;³ but, on the contrary, it has been held that he may not testify to matters within the inhibition of the statute, unless the decedent's testimony is first read in evidence.⁴

Acts 1876, 1877, ch. 198, 256, but held that those acts were not retrospective.

1. *Robbins v. Pultzs*, 48 N. Y. Super. Ct. 510; *Strickland v. Hudson*, 55 Miss. 235.

If, in an action against a firm, one of the partners dies *pendente lite* and his testimony at a former trial of the cause is read in evidence against the surviving partner, the latter may testify concerning the transaction to which such testimony related. *Potts v. Mayer*, 86 N. Y. 302.

But the surviving party cannot render himself competent by putting the former testimony of his deceased adversary in evidence. *Walker v. Taylor*, 43 Vt. 612; *Miller v. Adkins*, 9 Hun (N. Y.) 9.

And if he introduces in evidence a memorandum made by the deceased, he may not explain it by his own testimony; he must be content with its legal import. *Berry v. Stevens*, 69 Me. 290.

In *Pennsylvania*, the introduction of the testimony of a deceased party given upon a former occasion does not give the surviving party the right to take the stand and testify at the trial. But if his own testimony given before the death of his adversary has been preserved, he is entitled to have it received in evidence so far as it is material. *Pratt v. Patterson*, 81 Pa. St. 114; *Evans v. Reed*, 84 Pa. St. 254; *Lacock v. Com.*, 99 Pa. St. 207.

Where an original party to a suit died after his examination in his own behalf, the opposing party, who was not sworn, though having the opportunity during the lifetime of the deceased, was held incompetent after the revival of the suit. *Beckhaus v. Ladner*, 48 N. J. Eq. 152.

Where both parties are sworn and examined, but one of them dies before his cross-examination is had, the testi-

mony of both or neither should be considered. *Scott v. McCann*, 76 Md. 47.

Proof of the declarations of a deceased person made out of court is not putting his former testimony in evidence within the meaning of the rule. *Lyon v. Ricker*, 141 N. Y. 225.

2. *Allen v. Chouteau*, 102 Mo. 309; *Robbins v. Pultzs*, 48 N. Y. Super. Ct. 510; *Zane v. Fink*, 18 W. Va. 693; *Hatton v. Jones*, 78 Ind. 471; *Furbush v. Barker*, 38 Neb. 1; 40 Neb. 129.

But the death of a party during the trial is no ground for striking out the portion of an opposing party's testimony which was given before such death. *Comins v. Hetfield*, 80 N. Y. 261.

3. *Stone v. Hunt*, 114 Mo. 66; *Hayden v. Grillo*, 42 Mo. App. 1; *Leahy v. Rayburn*, 33 Mo. App. 55; *O'Neill v. Brown*, 61 Tex. 34. See also *Coble v. McClintock*, 10 Ind. App. 562.

4. In *Taylor v. Bunker*, 68 Mich. 258, the court said: "It is also urged by counsel for plaintiff that, inasmuch as the case had been once tried in the circuit during the lifetime of Mr. Soper, and he was allowed to cross-examine the plaintiff and testify in his own behalf, the plaintiff should be allowed to testify and leave the defendant to introduce in rebuttal the testimony of Mr. Soper given upon the former trial. These circumstances do not afford a sufficient reason for abrogating the statute. Aside from other considerations which render this proposition untenable, it must be remembered that the declaration has been amended since the former trial, so that it cannot be said that the issue is precisely the same, which, if the suggestion were permissible in any case, would render it improper in this." Compare *Monroe v. Napier*, 52 Ga. 385; *Walker v. Taylor*, 43 Vt. 612; *Barker v. Hebbard*, 81 Mich. 267; *Zane v. Fink*, 18 W. Va.

And, in another case, the intermediate ground has been taken that the error of permitting the survivor to testify is cured by the subsequent introduction, in evidence, of the decedent's deposition touching the same matters.¹ For the purpose of determining the admissibility of a party's testimony, he is, as a rule, considered as testifying at the time when his deposition is offered to be read in evidence, and, consequently, if the opposing party is dead at that time, though he were alive when the deposition was taken, and cross-examined the witness, the deposition, so far as it relates to transactions with the deceased, may not be read in evidence, unless that of the deceased has been first read.² But it has been held that where the witness was competent to testify when his deposition was taken, it was admissible in evidence, notwithstanding the opposing party was dead at the time of the trial.³

7. WHO DEEMED A REPRESENTATIVE.—Generally speaking, one who is an executor or administrator, or takes any part of the estate of a deceased person by devise or inheritance, is deemed his legal representative within the meaning of the rule excluding the testimony of the opposing party concerning transactions with the deceased.⁴ So, also, a party who derives his title to property

693; *Hewlett v. George*, 68 Miss. 703; *Park v. Lock*, 48 Ark. 133.

1. *Trow v. Shannon*, 8 Daly (N. Y.) 239; *affirmed* 78 N. Y. 446.

2. *Quick v. Brooks*, 29 Iowa 484; *St. Clair v. Orr*, 16 Ohio St. 220; *Zane v. Fink*, 18 W. Va. 752.

But where a portion of the survivor's deposition, previously taken, is introduced by the personal representative himself, the witness is then entitled to have the rest of it read so far as it is material. *Beardslee v. Reeves*, 76 Mich. 661.

3. In *Armitage v. Snowden*, 41 Md. 123, the court said: "The objection to the testimony of the appellant cannot be sustained. The admissibility of testimony depends upon the competency of the witness at the time he testifies, and cannot be affected by what may happen afterwards. When the testimony of Armitage was taken, Knell, the testator, was alive, and, under the Evidence Acts of 1864, ch. 109, and 1868, ch. 116, he was a competent witness. The fact that Knell died before the hearing cannot render the testimony thus taken inadmissible." To the same effect are *Neis v. Farquharson* (Wash. 1894), 37 Pac. Rep. 697; *McMullen v. Ritchie*, 64 Fed. Rep. 253.

4. *Lockwood v. Lockwood*, 56 Conn. 106; *Twiss v. George*, 33 Mich. 253.

The word representative means any one who has succeeded to the rights of

a deceased person by purchase, descent, or operation of law. *Wamsley v. Crook*, 3 Neb. 344.

Heirs and devisees are representatives. *Joss v. Mohn*, 55 N. J. L. 407. Also the committee of a lunatic, *Whitney v. Traynor*, 74 Wis. 289.

A widow taking under her husband's will or as next of kin is within the protection of the statute. *Peacock v. Albin*, 39 Ind. 25; *Fitzgerald v. Cox*, 39 Ind. 84; *French v. French*, 84 Iowa 655.

So where a widow takes the entire estate of her deceased husband, who has died without children, she is his personal representative within the rule. *Johnson v. Champion*, 88 Ga. 527.

A party is excluded where those opposed to him sue or defend as heirs. *Pyle v. Oustatt*, 92 Ill. 209; *McCampbell v. Henderson*, 50 Tex. 601; *Trafton v. Hawes*, 102 Mass. 533; 3 Am. Rep. 494.

The death of a trustee, the *cestui que trust*, who is the real party in interest, being alive, does not exclude the other party to the transaction. *Watson v. Russell*, 18 Iowa 79.

The prohibition does not apply where the decedent's administrator is one party and the beneficiary under the will of the decedent's heir is the opposing party. *Mower's Appeal*, 48 Mich. 441.

In an action by a ward against the sureties on his deceased guardian's

through a person since deceased, is to be regarded as the legal representative of the deceased grantor, vendor, or assignor, as the case may be.¹ In an action upon a contract made with an executor or administrator, since deceased, the surviving party may not testify thereto.² The creditors of a deceased person do not represent his estate within the meaning of the rule.³

Where an executor or administrator is a party in his own right

bond, the sureties do not defend as representatives of the guardian so as to exclude the testimony of the ward. *People v. Borders*, 31 Ill. App. 426.

But a ward may not testify to personal communications between him and his deceased guardian, when the personal representative of such guardian is the opposing party. *Owens v. Watts*, 24 S. Car. 76.

The Texas statute does not close the guardian's mouth in an action brought by the ward against him, after the ward becomes of age, to revise the guardian's accounts. *Jones v. Parker*, 67 Tex. 76. See *supra*, this title, *Persons Excluded*, where the reasons for their exclusion are also considered. Consult also the statutes of the *United States* and of the various states.

1. See *supra*, this title, *Transactions with Decedent through Whom Opponent Derives Title*.

Under section 858 of the Rev. Stats. of *United States*, it is held that the assignee in bankruptcy of one since deceased, is not his legal representative within the meaning of the rule. Thus, in *Hobbs v. McLean*, 117 U. S. 569, the court said: "The witnesses admitted by the circuit court were not excluded by the terms of this statute. The suit in which they testified was not an action by or against an executor, administrator, or guardian. But the counsel for the defendant insists that the policy of the act applies to suits by or against assignees as well as to suits by or against executors, administrators, or guardians, and that we ought to construe the act so as to include such suits. We cannot concur in this view. The purpose of the act was to remove generally the old incapacity to testify imposed on parties or persons interested in the suit. This was done by a sweeping provision subject to certain well defined exceptions; but the exceptions did not include suits by or against assignees in bankruptcy. We cannot insert the exception. When a provision is left out of a statute, either by design or mistake of the legislature,

the courts have no power to supply it. To do so would be to legislate and not to construe."

2. *Waldman v. Crommelin*, 46 Ala. 580; *Redden v. Inman*, 6 Ill. App. 55; *Kaho v. King*, 19 Mo. App. 44.

But it has been held that in an action against an administrator *de bonis non*, the defendant is not precluded from testifying to statements made by the former administrator, who is dead. *Wassell v. Armstrong*, 35 Ark. 247; *Dunne v. Deery*, 40 Iowa 251; *Palma-teer v. Tilton*, 40 N. J. Eq. 555. And the surviving party to a transaction may testify to any relevant conversation between himself and the executor, though it contains a rehearsal of the original contract between himself and the testator. *Clark v. Bell*, 61 Ga. 147; *Fogg v. Rodgers*, 84 Ky. 558.

3. *Jackson v. Lewis*, 32 S. Car. 593; *Martin v. Adams*, 29 S. Car. 597; *Matter of LeBaron's Estate*, 67 How. Pr. (N. Y. Surrogate Ct.) 346; *Champlin v. Seeber*, 56 How. Pr. (N. Y. Supreme Ct.) 46.

Where, pending garnishment proceedings, the judgment debtor died and his administrator was substituted as defendant, it was held that both the administrator and the garnishee were competent witnesses on the garnishee's behalf. *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275.

In *Nesbitt v. Parrott*, 84 Ga. 142, it was held that a surety to whom a judgment against his principal was assigned upon his payment of the debt, could not testify that a conveyance to him of the land upon the purchase of which the debt arose was not in satisfaction of his claim, where the opposing parties were the administrators of judgment creditors of his deceased principal. And in *Randall v. Randall*, 64 Vt. 419, it was held that a widow who was an annuitant under a conveyance made by her husband in his lifetime, which was sought to be impeached by his creditors, was not competent for the defense.

and does not act in his representative capacity, the opposing party is not precluded from testifying in his own behalf.¹

s. MISCELLANEOUS TRANSACTIONS.—Transactions and communications, as the words are used in evidence acts, embrace every variety of affairs which can form the subject of negotiation or interview between two persons and include every method by which one person can convey information to another.² The payment of money to or by a person, since deceased, is a transaction with him of the inhibited class.³ Thus, in an action against an

1. *Hodge v. Coriell*, 44 N. J. L. 456; *Ryle v. Ryle*, 41 N. J. Eq. 582; *Johnson v. Hall*, 9 Baxt. (Tenn.) 351; *Hamilton v. Hamilton*, 10 R. I. 538; *Titus v. O'Connor*, 57 How. Pr. (N. Y. Supreme Ct.) 391; *Hall v. Richardson*, 22 Hun (N. Y.) 444; *Prewitt v. Lambert*, 19 Colo. 6.

In *Douglass v. Snow*, 77 Me. 93, the court said: "It is objected that the plaintiff is not a competent witness. She is, unless she comes within some of the exceptions to the provisions of Rev. Stats., ch. 82, § 93. It is claimed that Chase is administrator of the estate of the plaintiff's son, who, it is claimed, is the equitable vendee of the premises. But the mere fact that he is such administrator is not sufficient. He must be a party in his official character and appear as such. He is not sued as such. He is joined in the bill simply as an individual to whom the premises were conveyed by the plaintiff's alleged equitable vendor. Neither by his answer does he appear in that capacity. His signature intimates no official character. If his allegations in the answer are true, he holds the land in his individual and not in his representative character. At most, he is the trustee of the plaintiff's son so far as this case is concerned, holding the property by a resulting trust. Our opinion, therefore, is that she is a competent witness." To the same effect are *Cahalan v. Cahalan*, 82 Iowa 416; *Durham v. Shannon*, 116 Ind. 403.

The rule of exclusion does not apply in an action against an executor or administrator for a tort committed by him. *Huff v. Latimer*, 33 S. Car. 255; *Prewitt v. Lambert*, 19 Colo. 7.

In a contest between an administrator and a judgment debtor as to whether certain property of the latter is subject to levy and sale on execution, the debtor is a competent witness in his own behalf. *Holmes v. Chester*, 27 N. J. Eq. 423.

But where a person is sued both as surety on a note and administrator of the maker, the plaintiff's testimony should be excluded. *Dixon v. Edwards*, 48 Ga. 142.

Where the executor is the real party in interest, being the sole heir and distributee, the opposing party may testify. *Chase v. Chase* (N. H. 1891), 29 Atl. Rep. 553.

2. *Holcomb v. Holcomb*, 95 N. Y. 325; *Holliday v. McKinne*, 22 Fla. 163.

3. *Rudolph v. Underwood*, 88 Ga. 664; *Mell v. Barner*, 135 Pa. St. 151; *In re DeWalt's Estate*, 21 Pittsb. L. J. N. S. 275; *Myers v. Hunt* (Supreme Ct.), 14 N. Y. Supp. 471; *Simpson v. Simpson*, 107 N. Car. 552; *Koenig v. Katz*, 37 Wis. 153; *Nau v. Brunette*, 79 Wis. 664; *Calwell v. Prindle*, 11 W. Va. 307; *Barnes v. Dow*, 59 Vt. 530; *Merritt v. Straw*, 6 Ind. App. 360; *Ewing v. White*, 8 Utah 250.

In proceedings to revive an execution by the administrator of the assignee of the judgment, the defendant may not support his defense of payment by testifying that he had placed notes in the hands of the decedent for collection. *Monts v. Koon*, 21 S. Car. 110.

Testimony that the witness addressed a package of money to the deceased, relates to a personal transaction with him. *Stuart v. Patterson*, 37 Hun (N. Y.) 113.

In an action to foreclose a mortgage, the mortgagor being dead, the mortgagee is not competent to prove that the mortgage debt has not been paid. *McMurray v. McMurray*, 63 Hun (N. Y.) 183.

In a suit by an administrator, on a promissory note, the defendant pleaded payment and put in evidence certain checks drawn by him payable to the plaintiff's intestate or bearer. It was held that the defendant might testify that he did not deliver any of said checks to any person other than the deceased, although he was incompetent

executor or administrator, to recover money alleged to have been collected by the defendant's decedent as attorney for the plaintiff, the plaintiff is incompetent to prove that he has not received the money;¹ and the debtor from whom it is alleged to have been collected is not competent to prove that he paid it to the defendant's decedent;² unless the claim is barred by the Statute of Limitations so that no recovery can be had against the debtor should the plaintiff fail to recover from the deceased attorney's estate.³

In an action by the collateral kin of a deceased person against his children and his alleged widow, to recover property which belonged to the deceased in his lifetime, on the ground that his marriage was invalid and that the plaintiffs are the true heirs at law of such decedent, the widow, being a party to the action and interested in the event thereof, is not competent to prove the fact of her marriage with the deceased.⁴ But in a contest between the collateral kin and those who claim as the children and heirs at law of a deceased person, the widow, if she is not a party to the action, is competent to prove the validity of her marriage with the deceased. She is interested only in the question at issue and not in the event of the action, since the record cannot be used as evidence for or against her in a claim for dower.⁵

to testify that he delivered them to the decedent. *McElhenney v. Hendricks*, 82 Iowa 657.

In an action by the personal representative of a deceased person, the defendant is not competent to testify as to the time and place of signing a receipt by the plaintiff's decedent in support of a plea of payment. *Sumner v. Candler*, 86 N. Car. 71.

1. *Gamble v. Whitehead*, 94 Ala. 335.

2. *Daniel v. Burts*, 72 Ga. 143.

3. *Shepherd v. Crawford*, 71 Ga. 458.

4. **Marriage.**—*Hopkins v. Bowers*, 111 N. Car. 175.

5. *Greenawalt v. McEnelley*, 85 Pa. St. 352; *Drinkhouse's Estate*, 151 Pa. St. 294.

In *Eisenlord v. Clum*, 126 N. Y. 557, Peckham, J., after a review of the authorities at common law, said: "Under the rule of the common law on the subject of interest, it is plain that the mother in this case would have been a competent witness. She had no interest in the event of the suit, as that expression has been defined by the courts, and the judgment would not have been any evidence for or against her in any action she might bring. I think the expression, 'interest in the event,' as used in our statute, was never intended to enlarge the class to be excluded under it beyond that which the common law

excluded in using the same language. All legislation on the subject has been in favor of greater liberality in the rules relating to the competency of witnesses. Upon referring to the cases which have been decided under the section of the code already referred to, we find that the rule defining what is an interest in the event is laid down in about the same terms as those used by the common law. *Hobart v. Hobart*, 62 N. Y. 80; *Nearpass v. Gilman*, 104 N. Y. 506; *Wallace v. Straus*, 113 N. Y. 238; *Connelly v. O'Connor*, 117 N. Y. 91. But the learned general term, upon the appeal in this case, has held the exclusion was proper on the ground that the judgment would furnish the witness with important evidence to establish her claim to dower in the premises described in the complaint. The cases I have cited show conclusively that such a judgment would not have been admissible in evidence at common law, in any such action, either for or against the witness, and in this respect the code has not changed the rule. . . .

The general term also thought the judgment would be evidence as a declaration or admission, by the plaintiff, of the facts, or some of them, which the witness would have to prove in her action against him for dower. Any declaration or admission made by the plaintiff as to any fact material for the witness

Facts which constitute fraud on the part of a deceased person necessarily include a personal transaction or conversation with him.¹ Intrusting money to a person, since deceased, that it might be loaned by him, is a transaction within the meaning of the statute;² and so is the delivery of a deed by one since deceased.³ Facts which are capable of proof by documentary evidence accessible to both parties to the action are not within the inhibition of the statute.⁴

VI. SWEARING THE WITNESS—1. In General.—Before a witness is examined he should be sworn by the proper officer of the court.⁵ But in case he has conscientious scruples against taking an oath,

to prove in her action is undoubtedly admissible as an admission. If found in a pleading, and it be shown that it was placed there with the knowledge and sanction of the plaintiff herein, such pleading would be admissible for the purpose of proving such admission. *Cook v. Barr*, 44 N. Y. 156. In order, however, to prove such admission, it is not necessary or proper to put in evidence the judgment in the action, for it is not the judgment which furnishes the proof, but the admission contained in the pleadings, and the judgment is not in that case the least evidence in favor of the witness in any action she might bring. The admission would exist without the judgment and regardless of it. That the witness has an interest in the question is very plain, but I am aware of no principle that would permit the introduction of this judgment as any proof for or against the witness in any other action. I see no foundation for any estoppel as against the plaintiff herein in an action brought by the witness to recover her dower. If, as I say, he has made admissions, they may be proved, but to say that he is estopped in the action for dower from denying any fact upon which the right of the plaintiff in such action depends, because in another action between himself and a third party it was necessary for him to prove the same fact, would be a great extension of the doctrine of estoppel. If, in the course of such first trial, the plaintiff had admitted by his own testimony any fact material in the dower action, it would be an admission which could be taken advantage of by proving that it was made. But if the fact had been proved by some third party instead of by the plaintiff, it is not, in that event, an admission or declaration of the plaintiff therein which renders a judgment in that action

proof against him in any future controversy with a third party. . . . Our conclusion is that the mother of the plaintiff was a competent witness to prove any or all facts of which she was cognizant and which were material and which were not inadmissible upon some ground other than the alleged interest of the witness in the event of the action."

1. *Carr v. Fife*, 44 Fed. Rep. 713; *Langford v. Broadhead* (Supreme Ct.), 17 N. Y. Supp. 290; *Paxton v. Paxton*, 38 W. Va. 616.

After the death of a judgment creditor, the judgment debtor is not competent to prove that the judgment was collusive, for the purpose of defrauding his creditors. *Prendergast v. Wiseman*, 30 Ga. 419.

2. *Altgelt v. Brister*, 57 Tex. 432.

3. *Howard v. Zimpelman* (Tex. 1890), 14 S. W. Rep. 59.

4. *Ripley v. Seligman*, 88 Mich. 177; *Moulton v. Mason*, 21 Mich. 364.

5. *Atcheson v. Everitt*, Cowp. 389; *Edmonds v. Rowe*, R. & M. 77; 21 E. C. L. 384; *Sells v. Hoare*, 7 Moore 36; *U. S. v. Coolidge*, 2 Gall. (U. S.) 304; *Gill v. Caldwell*, 1 Ill. 53; *Ballance v. Underhill*, 4 Ill. 453; *McKinney v. People*, 7 Ill. 540; *Hawks v. Baker*, 6 Me. 72.

Where, through oversight, a witness testified without being sworn and the fact was not discovered until after the trial, the verdict was set aside. *Hawks v. Baker*, 6 Me. 72.

The objection that a witness has testified to a material fact without being sworn, must be made as soon as it is discovered. *Slaughter v. Whitelock*, 12 Ind. 338; *Cady v. Norton*, 14 Pick. (Mass.) 236.

It is too late after judgment to object. *Nesbitt v. Dallam*, 7 Gill & J. (Md.) 494; 28 Am. Dec. 236.

he may be permitted to testify upon solemn affirmation.¹ At common law, no particular form of oath is essential; the witness should be sworn in the manner which he considers the most binding on his conscience, and according to the peculiar ceremonies of his own religion.² It is not, however, necessary that a witness

But in a trial upon an indictment for a felony, where a witness for the prosecution gave testimony without being sworn and the fact was discovered after a verdict of guilty, it was held that the proper course to pursue was to direct the jury to reconsider the case, dismissing from their minds the evidence of the witness not sworn. *Reg. v. James*, 6 Cox C. C. 5. But it is otherwise if the witness is the defendant's own. *Ran-kin v. Com.*, 82 Ky. 424.

If a witness is sworn before arraignment, but after the prisoner has stated his readiness to proceed in open court, it is not necessary to reswear him. *State v. Weber*, 22 Mo. 321.

A witness need be sworn but once during the trial, although called and examined on different days. *Bullock v. Koon*, 9 Cow. (N. Y.) 30.

Where a party is competent in chief, he should be sworn generally, although his examination is confined to a particular fact. *Jackson v. Parkhurst*, 4 Wend. (N. Y.) 369.

The oath should be administered in open court and by the court, through the instrumentality of some of its officers. *Reg. v. Tew*, Dears. C. C. 429; 24 L. J. M. C. 62.

It has been held that no testimony whatever can be received in criminal cases except under the sanction of an oath. *Rex v. Powell*, 1 Leach C. C. 110; *Rex v. Brasier*, 1 Leach C. C. 199; *State v. Doherty*, 2 Overt. (Tenn.) 80; *State v. Tom*, 8 Oregon 178; *People v. Frindel*, 58 Hun (N. Y.) 482.

Lord Hale, however, was of the opinion that an infant of tender years might be examined without oath where the exigencies of the case required it. 2 Hale P. C. 278 *et seq.*, and it is provided by 48 and 49 Vict., ch. 69, § 4, that in cases of criminal assault upon girls of tender age, they may be examined without oath, if possessed of sufficient intelligence to speak the truth, although too young to understand the nature of an oath. See *Reg. v. Wealand*, 20 Q. B. Div. 827; *Reg. v. Prunty*, 16 Cox C. C. 344.

1. *Wolsely v. Worthington*, 13 Ir. Ch. 341.

A witness must be sworn unless he belongs to a class permitted by statute to affirm. *Maden v. Catanach*, 7 H. & N. 360; 31 L. J. Exch. 118; 7 Jur. N. S. 1107; 10 W. R. 112.

So, where the exception is made in favor of Quakers only, no one not a Quaker can be permitted to testify upon affirmation. *U. S. v. Coolidge*, 2 Gall. (U. S.) 364.

And where the exception is allowed in favor of those who have conscientious scruples against taking an oath, a witness who has no objection to being sworn may not testify upon affirmation. *Williamson v. Carroll*, 16 N. J. L. 217.

2. *Ramkissenseat v. Barker*, 1 Atk. 19; *Omychund v. Barker*, 1 Atk. 46; *Willes* 548; *Atcheson v. Everitt*, Cowp. 389; *Edmonds v. Rowe*, R. & M. 77; 21 E. C. L. 384; *Sells v. Hoare*, 7 Moore 36; 3 Brod. & B. 232; 7 E. C. L. 425; *Rex v. Gilham*, 1 Esp. 285; 6 T. R. 265; *Rex v. Morgan*, 1 Leach C. C. 54; *Fachina v. Sabine*, 2 Stra. 1104; *Reg. v. Entrehman*, C. & M. 248; 41 E. C. L. 139; *Mildrone's Case*, 1 Leach C. C. 412; *Walker's Case*, 1 Leach C. C. 498; *Dutton v. Colt*, 2 Sid. 6; *Mee v. Reid*, Peake N. P. 23; *The Bark Merimac*, 1 Ben. (U. S.) 490.

A Jew is usually sworn on the Hebrew Bible, and with his head covered. *People v. Jackson*, 3 Park. Cr. Rep. (N. Y.) 590.

Where a Jew was sworn on the Gospels without objection, it was held that an objection to his testimony came too late after the verdict, and that the oath was binding on the witness, as it would subject him to the penalties of perjury if he had sworn falsely. *Sells v. Hoare*, 7 Moore 36; 3 Brod. & B. 232; 7 E. C. L. 425.

A Scottish Covenanter may give evidence on being sworn according to the custom of his sect without kissing the book. *Mildrone's Case*, 1 Leach C. C. 412.

So a Mohammedan may be sworn on the Koran. *Rex v. Morgan*, 1 Leach C. C. 54. And a Chinaman was sworn as follows, it appearing to be the form of oath most binding on his conscience: Upon getting into the witness box he

brought into court under a subpoena *duces tecum* be sworn. He may be compelled to produce the document without being sworn.¹

2. **Through Interpreters.**—If the witness cannot understand the English language, an interpreter should be called and sworn. The oath is then administered in English by an officer of the court, and translated by the interpreter into the vernacular of the witness.²

VII. EXAMINATION OF WITNESSES.—This branch of the subject was written up as a part of this article, but, in order to avoid repetition, it was thought best by the publishers to transfer it to the "Encyclopædia of Pleading and Practice."³

VIII. CREDIBILITY—1. **A Question for the Jury.**—Inasmuch as the jury are the judges of the facts, and must determine the issues of fact from the evidence submitted to them, it necessarily follows that the force of a witness's testimony is a matter strictly within their province.⁴ The court may caution them concerning the

knelt down, and, a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The oath was then administered in these words: "You shall tell the truth and the whole truth. The saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer." *Reg. v. Entrehman, C. & M. 248; 41 E. C. L. 139.*

1. *Perry v. Gibson, 3 N. & M. 462; 1 Ad. & El. 48; 28 E. C. L. 32; Davies v. Dale, M. & M. 514; Summers v. Moseley, 2 C. & M. 477; 4 Tyr. 158.*

And if he is sworn by mistake, and a question is put to him which he does not answer, the opposite party has no right to cross-examine him. *Rush v. Smith, 1 C. M. & R. 94; 2 D. P. C. 687; 4 Tyr. 675.* See also *SUBPŒNA*, vol. 24, p. 178, where other cases will be found.

2. *Reg. v. Entrehman, C. & M. 248; 41 E. C. L. 139; Norberg's Case, 4 Mass. 81.*

The interpreter must first be sworn. *Amory v. Fellowes, 5 Mass. 226.*

3. See "Encyclopædia of Pleading and Practice," title, *Examination of Witnesses.*

The treatment of the subject as prepared for this article includes the General Rules of Examination; Cross-Examination; Redirect Examination; Recross-Examination; Recalling Witnesses; Rebuttal and Surrebuttal; Responsiveness of Answer; and Refreshing the Memory.

4. *Smith v. State, 92 Ala. 69; Skeggs v. Horton, 82 Ala. 352; Finch v. State, 81 Ala. 41; Moore v. State, 68 Ala. 360;*

*Moore v. Jones, 13 Ala. 296; Hodgkins v. State, 89 Ga. 761; Nolen v. Heard, 87 Ga. 293; Ratteree v. State, 78 Ga. 335; McCoy v. State, 78 Ga. 490; Whitten v. State, 47 Ga. 297; Western, etc., R. Co. v. Carlton, 28 Ga. 180; Terry v. State, 13 Ind. 70; Hollingsworth v. Pickering, 24 Ind. 435; Eggers v. Eggers, 57 Ind. 461; Stampofski v. Steffens, 79 Ill. 303; Bowers v. People, 74 Ill. 418; Paton v. Stewart, 78 Ill. 481; Union R., etc., Co. v. Kallaher, 114 Ill. 325; Louisville, etc., R. Co. v. Hurst (Ky. 1892), 20 S. W. Rep. 817; Hammill v. Louisville, etc., R. Co., 93 Ky. 343; Brown v. Com. (Ky. 1891), 17 S. W. Rep. 220; VanTassel v. New York, etc., R. Co. (C. Pl.), 20 N. Y. Supp. 708; Virginia Nat. Bank v. Mills, 99 N. Y. 656; People v. O'Brien, 68 Mich. 468; Howell Lumber Co. v. Campbell, 38 Neb. 567; Harrison v. Brock, 1 Munf. (Va.) 22; Lyles v. Com., 88 Va. 396; State v. Patrick, 107 Mo. 147; Haynes v. Trenton, 123 Mo. 326; Mechelke v. Bramer, 59 Wis. 57; U. S. v. Hughes, 34 Fed. Rep. 732. See also *Curry v. Curry, 114 Pa. St. 367; Tallon v. Grand Portage Copper Min. Co., 55 Mich. 147; Moore v. Pieper, 51 Mo. 157; Meyers v. Union Trust Co., 82 Mo. 237; Coudy v. St. Louis, etc., R. Co., 85 Mo. 79; Rosecrans v. Wabash, etc., R. Co., 83 Mo. 678; Hill v. Sutton, 8 Mo. App. 353; Hitchler v. Voelker, 8 Mo. App. 492; Greenwood v. Harris, 8 Mo. App. 603; Mechanics' Sav. Inst. v. Potthoff, 9 Mo. App. 574; State v. Kinney, 81 Mo. 101; Seal v. State, 28 Tex. 491; Doe v. Fulgham, 2 Murph. (N. Car.) 364.**

testimony of a witness whose credibility has been successfully attacked;¹ but no court has a right to lay down rules whereby the jury shall determine the force of evidence irrespective of the credence they actually give it in their own minds.² It is reversible error for the court thus to invade the province of the jury.³

Though the jury are the judges of the credibility of the witnesses, they have no right arbitrarily to disbelieve the testimony of an unimpeached witness, unless they are convinced that he has willfully sworn falsely to some material fact in the case.⁴ And the testimony of a witness who has been discredited by impeaching evidence should not be wholly disregarded when it is sustained by the evidence of other witnesses or by corroborating circumstances.⁵ When an attempt has been made to impeach a

1. *Mack v. State*, 48 Wis. 271; *Engmann v. Immel*, 59 Wis. 249; *Gibson v. Troutman*, 9 Ill. App. 94.

Where it is plain that a witness has willfully perjured himself, it is the duty of the court to admonish the jury on the subject. *Dunlop v. Patterson*, 5 Cow. (N. Y.) 246. *Compare Newell v. Wright*, 8 Conn. 319.

"We think the tendency of the recent opinions of the most learned courts is to leave this subject of the credibility of the witness to the jury, under proper instructions and cautions from the court, notwithstanding he may have made contradictory statements under oath or be an accomplice of the accused. The reasons for holding to this rule would be as potent in this state as in any other, since the legislature has seen fit to declare that even a man convicted of perjury shall be a competent witness, leaving his credibility to the jury under all the circumstances of the case." *Taylor, J.*, in *Mack v. State*, 48 Wis. 286.

2. *Cooley, C. J.*, in *People v. Wallin*, 55 Mich. 497, citing *People v. Jenness*, 5 Mich. 305; *People v. Schweitzer*, 23 Mich. 301; *People v. Superior Ct.*, 5 Wend. (N. Y.) 126; *Durham v. Holeman*, 30 Ga. 627; *Phillips v. Williams*, 39 Ga. 597. *Compare Stamposki v. Steffens*, 79 Ill. 303; *Haines v. People*, 82 Ill. 430; *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y. Ct. App.) 238; *Isely v. Illinois Cent. R. Co.*, 88 Wis. 453; *Dill v. State* (Tex. Crim. App. 1894), 28 S. W. Rep. 950; *White v. Ross* (Fla. 1895), 17 So. Rep. 640.

3. *People v. Wallace*, 89 Cal. 167; *People v. Fong Ching*, 78 Cal. 169; *Corley v. State*, 28 Ala. 22; *Norris v. State*, 87 Ala. 85; *Smith v. State*, 92 Ala. 69; *Skeggs v. Horton*, 82 Ala.

352; *Moore v. State*, 68 Ala. 360; *Ex p. Warrick*, 73 Ala. 57; *McCoy v. State*, 78 Ga. 490; *Dick v. Marble* (Ill. 1895), 39 N. E. Rep. 602; *Clevenger v. Curry*, 81 Ill. 432; *People v. Wallin*, 55 Mich. 497; *Lawrence v. Maxwell*, 58 Barb. (N. Y.) 511; *Virginia Nat. Bank v. Mills*, 99 N. Y. 656; *Kintner v. State*, 45 Ind. 175; *Holloway v. Com.*, 11 Bush (Ky.) 344; *Delvec v. Boardman*, 20 Iowa 446; *Willey v. Gatling*, 70 N. Car. 410.

4. *Evans v. George*, 80 Ill. 53; *Wickliffe v. Lynch*, 36 Ill. 210; *Hartford L., etc., Ins. Co. v. Gray*, 80 Ill. 28; *Drew v. Watertown F. Ins. Co.* (S. Dak. 1894), 61 N. W. Rep. 34.

If the testimony of such a witness cannot be reconciled with other evidence which the jury find to be true, it must give way to the better evidence. *Shove v. Rowe*, 42 Ill. App. 150.

On the other hand, the law imposes on a juror no obligation to believe a witness who is unimpeached, but leaves his testimony to operate on the mind of each juror with such force as it may naturally have in producing belief. It is, therefore, error for the judge to instruct the jury that they are bound to believe a witness who has not been impeached. *State v. Smallwood*, 75 N. Car. 104; *Noland v. McCracken*, 1 Dev. & B. (N. Car.) 594; *Lovell v. Davis*, 52 Mo. App. 342.

A verdict is not to be set aside as against evidence, though it be given against the positive testimony of a witness not impeached, where there are circumstances in evidence tending to lessen the probability that such testimony is true. *Wait v. M'Neil*, 7 Mass. 261; *Harding v. Brooks*, 5 Pick. (Mass.) 248.

5. *Smith v. Grimes*, 43 Iowa 356; *Green v. Cochran*, 43 Iowa 544; *Wilson*

witness, his testimony is before the jury, and the presiding judge has no legal authority to tell them they should disregard it if they believe he has been successfully impeached. The question of his credibility rests with the jury, even though he has been discredited.¹

2. General Rules for the Guidance of the Jury.—In weighing the testimony of a witness, the jury should consider how far it is corroborated by other evidence, the nature, probability and consistency of his story, his manner of giving it, and all the ordinary circumstances which make for or against his credibility so far as they appear at the trial.² But no juror should make use of his personal knowledge of facts affecting the credibility of a witness, unless he has himself been sworn as a witness, and has testified to such facts in the progress of the trial.³ Nothing to the contrary appearing, it is to be presumed that an unimpeached witness testified truly and not falsely.⁴ This, however, is not a presumption of law in a technical sense, but rather one of fact drawn from our experience and knowledge of human veracity.⁵ If, in a civil case, the jury are not able to arrive at a conclusion as to whether the testimony of a witness is true or false, they should give such a verdict as they would render if his testimony were stricken out.⁶

3. Memory and Means of Information.—The fact that a witness remembers some occurrences, and fails to remember others con-

v. Patrick, 34 Iowa 367; *Callanan v. Shaw*, 24 Iowa 446; *State v. Stout*, 31 Mo. 406.

1. *Chester v. State*, 1 Tex. App. 707; *Macon City Bank v. Kent*, 57 Ga. 283; *Central R., etc., Co. v. Phinazee*, 93 Ga. 488.

Where a party's own witnesses contradict each other, it is for the jury to say how far each shall be believed. *State v. Potts*, 9 N. J. L. 31; 17 Am. Dec. 449.

Where a witness impeaches himself by damaging admissions, his testimony, though uncontradicted, is not conclusive. The weight of it is a question for the jury. *Kennedy v. McQuaid*, 56 Minn. 450.

2. *U. S. v. Ybanez*, 53 Fed. Rep. 540; *U. S. v. Kessler*, Baldw. (U. S.) 22; *U. S. v. Reeves*, 38 Fed. Rep. 409; *Central R., etc., Co. v. Attaway*, 90 Ga. 656; *McRae v. Lawrence*, 75 N. Car. 289; *Mendota First Nat. Bank v. Haight*, 55 Ill. 191; *Fox v. Mathews*, 33 Miss. 433.

In *Carver v. Louthain*, 38 Ind. 530, it was held that the testimony of an unimpeached witness who was examined in open court, subject to all the

tests of credibility, was entitled to more weight than the evidence of a witness embodied in a deposition taken in private, where all of such tests could not be applied.

3. *Wharton v. State*, 45 Tex. 2; *Collins v. State* (Ga. 1894), 19 S. E. Rep. 243; *Chattanooga, etc., R. Co. v. Owen*, 90 Ga. 265 (*overruling* *Anderson v. Tribble*, 66 Ga. 584; *Head v. Bridges*, 67 Ga. 236; *Howard v. State*, 73 Ga. 84).

4. *Comstock v. Rayford*, 12 Smed. & M. (Miss.) 369; *State v. Jones*, 77 N. Car. 520.

In case of an apparent conflict of evidence, it is the duty of the jury to reconcile the testimony, if possible, so as not to impute perjury to any witness. *Durham v. Holeman*, 30 Ga. 626.

5. *State v. Jones*, 77 N. Car. 521; *State v. Smallwood*, 75 N. Car. 104.

6. *Ruffin, C. J.*, in *Miller v. Richardson*, 2 Ired. (N. Car.) 252; *Anderson v. Collins*, 6 Ala. 783.

Where there are no witnesses, except the two parties, who flatly contradict each other, and neither of them is impeached or corroborated, there is no preponderance of evidence in favor of the plaintiff. *Anderson v. Collins*, 6

nected therewith, is not of itself sufficient to discredit him,¹ unless such matters were so inseparably connected that he must remember all or none of them.² On the other hand, a witness may very seriously impair his credibility by swearing positively and minutely to occurrences long past, which were not of such a nature as to impress themselves forcibly upon his memory.³ Where a witness swears to a fact as of his own knowledge, it will be presumed that he had competent means of information, nothing to the contrary appearing.⁴ But if he swears to a fact without actual knowledge, he is guilty of legal false swearing, even though the fact be actually true.⁵ And where it appears that he has so testified, he is unworthy of belief.⁶ Where, from the business or occupation of a witness, he has peculiar knowledge of the matter in controversy, the jury are justified in giving more weight to his testimony than to that of a witness whose occupation does not afford equal means of information.⁷ The weight to be given the testimony of a witness frequently depends upon the opportunity he had to observe the facts to which he has sworn.⁸

4. **Improbability.**—A mere abstract improbability of the facts stated by an otherwise unimpeached witness, is not sufficient to discredit him where no impossibility is shown.⁹ To have that effect, the improbability must arise from facts appearing upon the trial, and must not rest wholly in the minds of the court and jury.¹⁰

Ala. 783; *Sanborn v. Babcock*, 33 Wis. 400.

1. *McClaskey v. Barr*, 54 Fed. Rep. 781; *Jackson v. M'Vey*, 18 Johns. (N. Y.) 330; *State v. Cowan*, 7 Ired. (N. Car.) 239.

2. *Gibbons v. Potter*, 30 N. J. Eq. 204.

3. *Willett v. Fister*, 18 Wall. (U. S.) 91; *Parker v. Chambers*, 24 Ga. 518; *Chandler v. Hough*, 7 La. Ann. 441.

4. *Kottwitz v. Bagby*, 16 Tex. 656; *Willey v. Portsmouth*, 35 N. H. 303.

But the contrary may appear from the nature of the fact testified to. *McNally v. Meyer*, 5 Ben. (U. S.) 239.

5. *Com. v. Cornish*, 6 Binn. (Pa.) 249; *Carroll v. Charter Oak Ins. Co.*, 1 Abb. App. Dec. (N. Y.) 316.

6. *Slade v. Joseph*, 5 Daly (N. Y.) 189.

7. *Jacksonville, etc., R. Co. v. Caldwell*, 21 Ill. 75; *Tucker v. Williams*, 2 Hilt. (N. Y.) 562.

8. *Barrett v. Williamson*, 4 McLean (U. S.) 589; *Hitt v. Rush*, 22 Ala. 563; *Durham v. Holeman*, 30 Ga. 626.

9. *Barrett's Succession*, 43 La. Ann. 61; *Bunn v. Third Nat. Bank*, 38 Ill. App. 76; *Dunn v. Weir*, 34 Ill. App.

612; *Asbach v. Chicago, etc., R. Co.*, 86 Iowa 101; *Newton v. Pope*, 1 Cow. (N. Y.) 110; *Lomer v. Meeker*, 25 N. Y. 361; *Elwood v. Western Union Transp. Co.*, 45 N. Y. 553; 6 Am. Rep. 140; *Stillwell v. Carpenter*, 2 Abb. N. Cas. (N. Y. Ct. App.) 257.

Thus, the testimony of a former slave that he is 117 years old, does not affect his credibility as a witness. *Davis v. Meaux* (Ky. 1893), 22 S. W. Rep. 324.

But a gross improbability of the facts stated by an interested witness may affect his credibility, though he is neither contradicted nor impeached. *Elwood v. Western Union Transp. Co.*, 45 N. Y. 553; 6 Am. Rep. 140; *Stillwell v. Carpenter*, 2 Abb. N. Cas. (N. Y. Ct. App.) 257; *Blankman v. Vallejo*, 15 Cal. 639.

10. "In all cases the positive testimony of an otherwise unimpeached witness can only be disregarded when its improbability or inconsistency furnishes a reasonable ground for doing so, and this improbability or inconsistency must appear from facts and circumstances disclosed by the evidence in the case. It cannot be arbitrarily disregarded by either court or jury for reasons resting

5. **Bias**—*a.* IN GENERAL.—The fact that a witness manifests a partiality for the party who calls him is a proper matter for the consideration of the jury in estimating the value of his testimony, and it is competent to prove facts and circumstances which naturally tend to create bias in the mind of a witness, for the purpose of affecting his credibility.¹

b. RELATIONSHIP.—With the exception of the relation of husband and wife, the mere relationship of a witness to the party who called him was no ground of disqualification at common law. But, in the very nature of things, near relatives of a party, especially in criminal cases, generally come to the witness stand with strong feelings of sympathy and bias which may give color to their testimony, however truthful they may try to be. Consequently, such relationship is a proper matter for the consideration of the jury in estimating the value of their testimony, and the court may so instruct the jury.² But as the relatives of a

wholly in their own minds, and not based upon anything appearing on the trial." *Mitchell, J.*, in *Winona Second Nat. Bank v. Donald*, 56 Minn. 491. To the same effect is *Clark v. McGrath* (Tex. Civ. App. 1893), 22 S. W. Rep. 527.

1. *People v. Webster*, 139 N. Y. 73; *Miles v. Sackett*, 30 Hun (N. Y.) 68; *People v. Keating*, 61 Hun (N. Y.) 260; *Drum v. Harrison*, 83 Ala. 384; *Burger v. State*, 83 Ala. 36; *Futch v. State*, 90 Ga. 472; *Mears v. Cornwall*, 73 Mich. 78; *State v. Merriman*, 34 S. Car. 16; *Crist v. State*, 21 Tex. App. 361; *Daffin v. State*, 11 Tex. App. 76; *Cameron v. Montgomery*, 13 S. & R. (Pa.) 131; *Edwards v. Sullivan*, 8 Ired. (N. Car.) 302; *U. S. v. Schindler*, 10 Fed. Rep. 547; *Davis v. Roby*, 64 Me. 427.

Where a witness, otherwise unimpeached, testifies under circumstances calculated to create a strong bias, and he states what is, in its nature, incredible, his testimony is not necessarily to be believed. *Woodruff, J.*, in *The Helen R. Cooper*, 7 Blatchf. (U. S.) 384, *quoted*, with approval, by *Blatchford, J.*, in *U. S. v. Borger*, 7 Fed. Rep. 198.

A witness may be asked if he did not leave home to entitle the party calling him to obtain a continuance. *Sage v. State*, 127 Ind. 15.

The fact that a physician was employed to examine a party for the express purpose of becoming a witness in the case, may be considered by the jury as affecting his credibility. *Jones v. Portland*, 88 Mich. 604.

The rule is not changed by the fact that the circumstances which tend to create bias may prejudice the jury against the party calling the witness. *State v. McGahey*, 3 N. Dak. 293; *Crist v. State*, 21 Tex. App. 366.

It has been held that evidence of the business relations between a witness and the party calling him is admissible to show bias. *Totten v. Burhans* (Mich. 1894), 61 N. W. Rep. 58.

The voluntary appearance of a witness without a subpoena is not of itself sufficient to discredit him. *State v. Keys*, 53 Kan. 674. But the fact that he attends voluntarily may, under some circumstances, betray his feeling in the case, and it is in the discretion of the court to permit him to be cross-examined as to that matter. *Wabash R. Co. v. Ferris*, 6 Ind. App. 30.

The fact that a witness and the party who calls him are both knights of labor, is not admissible to show bias. *Constable v. Lefever* (Supreme Ct.), 21 N. Y. Supp. 38. But where it appeared that there was a secret society organized to repress the class or sect to which the defendant belonged, it was held proper to ask a witness for the prosecution if he was a member of such secret society. *People v. Christie*, 2 Park. Cr. Rep. (N. Y.) 579.

2. *U. S. v. Ford*, 33 Fed. Rep. 861; *Wallace v. State*, 28 Ark. 540; *Jernigan v. Flowers*, 94 Ala. 508; *People v. Bush*, 71 Cal. 602; *Allen v. Kirk*, 81 Iowa 658; *Brown v. Walker*, 32 Ill. App. 199; *State v. Nash*, 8 Ired. (N. Car.) 35; *State v. Byers*, 100 N. Car.

party are not, on that account, incompetent as witnesses in his behalf, the court has no right to withdraw their testimony from the consideration of the jury.¹

c. EMPLOYEES.—In an action against a master for the negligence of his servants, the latter are competent witnesses for the defendant. The relation of master and servant, and the incentive of the servants to exonerate themselves from blame, go to their credit, however, and the court may inform the jury of their right to consider these matters in that connection.² But the judge should not give an instruction based on the assumption that a

512; *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431; *State v. Bacon*, 13 Oregon 143; 57 Am. Rep. 8; *Coyle v. Metropolitan L. Ins. Co. (C. Pl.)*, 25 N. Y. Supp. 90; *State v. Miller (Del. 1892)*, 32 Atl. Rep. 137.

In *State v. Ellington*, 7 Ired. (N. Car.) 66, Ruffin, C. J., said: "It also seems to the court that the prisoner can take no benefit from his other exception. His Honor did not express an opinion upon any fact in controversy, but merely applied a rule of law to an admitted fact. It was not disputed that the witnesses were the mother and sister of the prisoner, and the court, therefore, did not err in so considering them; nor was there error in telling the jury that their relation to the prisoner affected their credit. That is a proposition of reason and law. The law takes notice that some relations are so close that persons standing in them, though they might tell the truth, cannot be trusted in general, and, therefore, it excludes them altogether. That rule does not, indeed, embrace parents and children, or brethren. Yet all writers upon evidence say that, though it does not make them incompetent, it goes to their credit, because we know that such relations create a strong bias, and that it is an infirmity of human nature sometimes, in instances of great peril to one of the parties, to yield to the bias produced by the depth of sympathy and identity of interests between persons so closely connected. How far these witnesses adhered to their integrity or were drawn aside by the ties of nature between them and the prisoner, in other words, the degree in which the relation actually affected their veracity, was a question for the jury, and his Honor left it to them explicitly. It was proper to let them know that they might legally take the relation into their consideration in estimating the

credit to be given to their testimony, and there was nothing improper in stating, also, the reason on which the rule of law rests."

1. *Kavanagh v. Wilson*, 70 N. Y. 177; *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329; *In re Gangwere's Estate*, 14 Pa. St. 417; 53 Am. Dec. 554; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Nelson v. Vorce*, 55 Ind. 455.

Where, in a criminal case, the wife of the accused testifies in his behalf, her credibility is to be tested by the same rules which apply to other witnesses, and it is error to instruct the jury that her testimony should be examined with peculiar care. *State v. Bernard*, 45 Iowa 234; *State v. Rankin*, 8 Iowa 355; *State v. Guyer*, 6 Iowa 263; *State v. Collins*, 20 Iowa 85.

But it is proper to instruct the jury that they may consider the fact that the witness is the wife of the accused. *State v. Nash*, 10 Iowa 81; *State v. Parker*, 39 Mo. App. 116.

2. *Ellis v. Lake Shore, etc., R. Co.*, 138 Pa. St. 506; 21 Am. St. Rep. 914; *Illinois Cent. R. Co. v. Haskins*, 115 Ill. 300; *Central R., etc., Co. v. Maltsby*, 90 Ga. 630; *Central R. Co. v. Mitchell*, 63 Ga. 173; *Bond v. Frost*, 8 La. Ann. 297; *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 483. *Contra*: In *Marquette, etc., R. Co. v. Kirkwood*, 45 Mich. 53; 40 Am. Rep. 453, the court said: "While there may appear on the trial, on direct or cross-examination, such bias or behavior as would authorize comment by counsel to the jury, we think it is not within the province of a court to instruct a jury or suggest to them that any suspicion attaches to the testimony of agents or servants of a corporation, or individual, by reason of their employment, or that they have any such interest as requires them to be dealt with differently from other witnesses."

witness stands in fear of being discharged by his employer, unless there is evidence in the case tending to show that fact.¹

6. **Hostility.**—The hostility of a witness towards a party against whom he is called to testify is always a matter to be considered as affecting his credibility and may be proved by any competent evidence. It may be shown by the cross-examination of the witness himself, or other witnesses may be called who can swear to facts showing it.² It is not a collateral matter regarding which a party is bound by the answer of the witness on cross-examination. If he denies that he entertains any hostility of feeling, other witnesses may be called to contradict him.³ It is, however, so far collateral that a witness will not be permitted to

1. *St. Louis, etc., R. Co. v. Walker*, 39 Ill. App. 388.

It is allowable to introduce such evidence for the purpose of affecting the credibility of the witness. *Pyne v. Broadway, etc., R. Co. (C. Pl.)*, 19 N. Y. Supp. 217.

2. *People v. Brooks*, 131 N. Y. 325; *Garnsey v. Rhodes*, 138 N. Y. 461; *People v. Webster*, 139 N. Y. 85; *Nation v. People*, 6 Park. Cr. Rep. (N. Y.) 258; *Starks v. People*, 5 Den. (N. Y.) 106; *Starr v. Cragin*, 24 Hun (N. Y.) 177; *Polk v. State*, 62 Ala. 237; *Carpenter v. State*, 98 Ala. 31; *Salm v. State*, 89 Ala. 56; *Yarbrough v. State*, 71 Ala. 376; *Martin v. Martin*, 25 Ala. 201; *McHugh v. State*, 31 Ala. 317; *Day v. Stickney*, 14 Allen (Mass.) 255; *Swett v. Shumway*, 102 Mass. 369; *Com. v. Putnam*, 2 Allen (Mass.) 301; *Com. v. Byron*, 14 Gray (Mass.) 31; *Brewer v. Crosby*, 11 Gray (Mass.) 29; *Gibson v. State (Miss. 1894)*, 16 So. Rep. 298; *People v. Anderson*, 105 Cal. 32; *People v. Gardner*, 98 Cal. 127; *People v. Gillis*, 97 Cal. 542; *People v. Goldenson*, 76 Cal. 328; *Louisville, etc., R. Co. v. Berry (Ky. 1895)*, 29 S. W. Rep. 449; *Daggett v. Tallman*, 8 Conn. 168; *Stewart v. Kindel*, 15 Colo. 539; *Eldridge v. State*, 27 Fla. 162; *Bishop v. State*, 9 Ga. 121; *State v. Jones*, 106 Mo. 302; *State v. Montgomery*, 28 Mo. 594; *Pettit v. State*, 135 Ind. 393; *Bersch v. State*, 13 Ind. 434; 74 Am. Dec. 263; *Stone v. State*, 97 Ind. 345; *Robertson v. McPherson*, 4 Ind. App. 595; *John Morris Co. v. Burgess*, 44 Ill. App. 27; *Consaul v. Sheldon*, 35 Neb. 247; *Denton v. Smith*, 61 Mich. 431; *Hitchcock v. Moore*, 70 Mich. 112; *Pierce v. Gilson*, 9 Vt. 216; *Bonnard v. State*, 25 Tex. App. 173; *Daffin v. State*, 11 Tex. App. 76; *Sager v. State*, 11 Tex. App. 110; *People v.*

Thiede (Utah, 1895), 39 Pac. Rep. 837.

In a trial for homicide, it is competent to show the hostility of a witness for the defendant towards the deceased. *Newcomb v. State*, 37 Miss. 383; *Bishop v. State*, 9 Ga. 124; *Com. v. Weber*, 167 Pa. St. 153.

So, also, in a criminal prosecution, it is competent to show the hostility of a witness for the defendant towards the prosecuting witness. *Patman v. State*, 61 Ga. 379.

Where it appears that a witness is actuated by malice, the jury should look with caution and distrust upon his evidence; but still it is for them to say how much credit should be given to it. *Com. v. Putnam*, 2 Allen (Mass.) 301; *Com. v. Downing*, 4 Gray (Mass.) 29.

In a trial for murder, a witness for the prosecution may be asked if the deceased was not her lover. *People v. Worthington*, 105 Cal. 166.

A female witness who testifies in support of the contention that an alleged widow was not the wife of the deceased, may be cross-examined respecting her own improper relations with him. *Ingersol v. McWillie (Tex. Civ. App. 1895)*, 30 S. W. Rep. 56.

3. *McGuire v. McDonald*, 99 Mass. 49; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *McHugh v. State*, 31 Ala. 317; *Atwood v. Welton*, 7 Conn. 66; *Beardsley v. Wildman*, 41 Conn. 515; *Schultz v. Third Ave. R. Co.*, 89 N. Y. 249; *Gale v. New York Cent., etc., R. Co.*, 76 N. Y. 594; *Newton v. Harris*, 6 N. Y. 345; *Nation v. People*, 6 Park. Cr. Rep. (N. Y.) 258; *Eldridge v. State*, 27 Fla. 162; *Selph v. State*, 22 Fla. 537; *Lucas v. Flinn*, 35 Iowa 14; *Scott v. State*, 64 Ind. 400; *Robertson v. McPherson*, 4 Ind. App. 595; *Johnson v. Wiley*, 74 Ind. 233; *Ford v. State*,

state the cause of his hostility,¹ though sufficient latitude should be allowed in the examination to develop the nature and intensity of his animosity.² It is not necessary to examine the witness himself concerning his hostility of feeling before calling other witnesses to prove it,³ but an attempt to discredit a witness by proof of independent facts intended to show hostility on his part is not allowable, unless the facts sought to be proved imply of themselves a bad or revengeful feeling.⁴ Where witnesses are called to discredit another witness in this manner, they should state his hostile declarations or the facts which imply hostility. It is not permissible for them to state their own conclusions on the subject.⁵ The evidence should show also that the ill feeling exists at the time of the trial, though no rule can be laid down as to what remoteness in point of time would be sufficient to exclude it.⁶

112 Ind. 373; *Stone v. State*, 97 Ind. 345; *Staser v. Hogan*, 120 Ind. 220; *Phenix v. Castner*, 108 Ill. 207; *Titus v. Ash*, 24 N. H. 319; *Folsom v. Brawn*, 25 N. H. 114; *Martin v. Farnham*, 25 N. H. 195; *Drew v. Wood*, 26 N. H. 363; *Hutchinson v. Wheeler*, 35 Vt. 330; *Langhorne v. Com.*, 76 Va. 1012; *State v. Jones*, 106 Mo. 311; *McFarlin v. State*, 41 Tex. 23.

1. *Polk v. State*, 62 Ala. 237; *Cornelius v. State*, 12 Ark. 782; *Butler v. State*, 34 Ark. 480; *Bishop v. State*, 9 Ga. 121; *Conyers v. Field*, 61 Ga. 258; *Patman v. State*, 61 Ga. 379; *Chelton v. State*, 45 Md. 564; *State v. Glynn*, 51 Vt. 577.

2. *State v. Dee*, 14 Minn. 35; *State v. Collins*, 33 Kan. 77; *Batdorff v. Farmers' Nat. Bank*, 61 Pa. St. 179; *McFarlin v. State*, 41 Tex. 23; *Stewart v. Kindel*, 15 Colo. 541.

3. *State v. Dee*, 14 Minn. 35.
In *People v. Brooks*, 131 N. Y. 325, Earl, C. J., said: "The hostility of a witness towards a party against whom he is called may be proved by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. There can be no reason for holding that the witness must first be examined as to his hostility, find that then, and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice, and, as that may be proved by any competent evidence, we see no

reason for holding that he must first be examined as to his hostility, and such, we think, is the drift of the decisions in this state and elsewhere." *Citing* *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.) 90; *Starr v. Cragin*, 24 Hun (N. Y.) 177; *People v. Moore*, 15 Wend. (N. Y.) 419; *People v. Thompson*, 41 N. Y. 6; *Schultz v. Third Ave. R. Co.*, 89 N. Y. 242; *Ware v. Ware*, 8 Me. 56; *Tucker v. Welsh*, 17 Mass. 160; 9 Am. Dec. 137; *Day v. Stickney*, 14 Allen (Mass.) 255; *Martin v. Barnes*, 7 Wis. 239; *Robinson v. Hutchinson*, 31 Vt. 443; *New Portland v. Kingfield*, 55 Me. 172; *Hedge v. Clapp*, 22 Conn. 262; 58 Am. Dec. 424; *Cook v. Brown*, 34 N. H. 460.

The case of *Edwards v. Sullivan*, 8 Ired. (N. Car.) 304, is not in harmony with the other authorities on this point. There the court proceeded on the mistaken hypothesis that the object was to discredit the witness by contradicting him, whereas the real object is to show the state of his feelings in respect to the parties.

4. *Carpenter v. State*, 98 Ala. 31; *Morgan v. State*, 88 Ala. 223; *Moore v. State*, 68 Ala. 360; *Cooley v. Norton*, 4 Cush. (Mass.) 93.

5. See cases cited in the two preceding notes.

6. *Higham v. Gault*, 15 Hun (N. Y.) 383.

In *State v. Dee*, 14 Minn. 35, it was objected to the introduction of evidence of a threat made by a witness to kill a party against whom he was called to testify, that the threat was too remote in the point of time to show hostility at the time of the trial, having been made

7. Parties to Civil Actions.—The common-law incompetency of parties being removed by statute, the interest which they have in the result of the trial is a matter to be considered by the jury in weighing their testimony and determining what force it shall have;¹ and the jury are not bound to give credit to the statements of a party, though he is uncontradicted and unimpeached.² On the other hand, it cannot be affirmed as a matter of law that the jury are bound to give more weight to the testimony of one witness than they accord to that of another, on the ground of interest in the one and a lack of it in the other.³ The testimony of a party in interest, as that of any other witness, must be submitted to the jury, for whom it is to say how far his interest shall affect his credibility.⁴ But it is error for the court to refuse to instruct the jury that they have a right to consider the interest of a party when weighing his testimony.⁵

8. Interest in the Event of the Suit.—The fact that a witness is directly interested in the event of the suit in which he is called to testify, being no longer a ground of incompetency, is a circumstance which the jury may consider as affecting his credibility.⁶

in November preceding the trial in October of the next year. The court said: "While we do not hold that there may not be cases where the expression of hostile feelings was made at a date too remote to furnish any reasonable ground for inferring that such feelings continue to exist at the time of the trial, we are of opinion that in this case the testimony offered should have been submitted to the jury. There is no principle or presumption, so far as we are aware, which would authorize a court to say that the feelings which found expression in a threat to kill the defendant in November had ceased to exist in or influence the mind of the witness in October following."

1. *O'Neill v. Third Ave. R. Co.*, 78 Hun (N. Y.) 183; *Olsen v. Ensign* (C. Pl.), 28 N. Y. Supp. 38; *Goldsmith v. Coverly*, 75 Hun (N. Y.) 48; *Vannatter v. Burns*, 76 Hun (N. Y.) 3; *Meeteer v. Manhattan R. Co.*, 63 Hun (N. Y.) 535; *Nicholson v. Conner*, 8 Daly (N. Y.) 212; *Uransky v. Dry-Dock, etc., R. Co.* (Supreme Ct.), 13 N. Y. Supp. 670; *Ract v. Duviard-Dime* (Supreme Ct.), 4 N. Y. Supp. 156; *Klason v. Rieger*, 22 Minn. 59; *Lovell v. Davis*, 52 Mo. App. 342; *Stewart v. Kindel*, 15 Colo. 539; *Pridgen v. Walker*, 40 Tex. 135; *Cornelius v. Hambay*, 150 Pa. St. 359; *Metropolitan R. Co. v. Jones*, 1 App. Cas. (D. C.) 200; *Barmby v. Wolfe* (Neb. 1895), 62 N. W. Rep. 318.

2. *Elwood v. Western Union Transp. Co.*, 45 N. Y. 549; 6 Am. Rep. 140; *Wolf v. Farley* (C. Pl.), 16 N. Y. Supp. 168; *Kavanagh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 N. Y. 609; *Goldsmith v. Coverly*, 75 Hun (N. Y.) 50; *Nicholson v. Conner*, 8 Daly (N. Y.) 215; *Kearney v. New York*, 92 N. Y. 621; *Dean v. Van Nostrand*, 23 N. Y. Wkly. Dig. 97; *Wilson v. Wyandance Springs Imp. Co.* (C. Pl.), 24 N. Y. Supp. 557; *Olsen v. Ensign* (C. Pl.), 28 N. Y. Supp. 39; *Reid v. New York* (Supreme Ct.), 22 N. Y. Supp. 623; *Prowattain v. Tindall*, 80 Pa. St. 295.

3. *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68; *Metropolitan R. Co. v. Jones*, 1 App. Cas. (D. C.) 208; *Reid v. New York* (Supreme Ct.), 22 N. Y. Supp. 623. See also *Sullivan v. Collins*, 18 Iowa 228; *Bonnell v. Smith*, 53 Iowa 281; *Greer v. State*, 53 Ind. 420.

4. *Prowattain v. Tindall*, 80 Pa. St. 295; *Honegger v. Wettstein*, 94 N. Y. 261.

5. *Hill v. Sprinkle*, 76 N. Car. 353; *Meeteer v. Manhattan R. Co.*, 63 Hun (N. Y.) 533; *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540.

6. *Jernigan v. Flowers*, 94 Ala. 508; *Gould v. Stafford*, 91 Cal. 146; *Brown v. Walker*, 32 Ill. App. 199; *Marschall v. Laughran*, 47 Ill. App. 29; *Archer v. Helm*, 70 Miss. 874; *Cady v. Bradshaw*, 116 N. Y. 188; *Cleveland Co. v. Nellis Co.* (C. Pl.), 18 N. Y. Supp. 448;

Thus, an attorney whose fee is contingent upon his success in the cause, cannot be considered a disinterested witness when he is called by his client.¹ And the same is true of a witness whose testimony tends to shield him from a criminal prosecution.²

9. Accomplices — (See *infra*, this title, *Corroboration*). — An accomplice being a competent witness either for or against the accused, his credibility is, at common law, a question for the jury the same as that of any other witness.³ And, in the absence of a statute to the contrary, the prisoner may be legally convicted on the unsupported testimony of a confederate in crime.⁴ Such

Goodman v. Myers (C. Pl.), 32 N. Y. Supp. 239; *Eldridge v. State*, 27 Fla. 162; *Litten v. Wright School Tp.*, 127 Ind. 81; *Dailey v. State*, 28 Ind. 285; *State v. Lingle* (Mo. 1895), 31 S. W. Rep. 20; *Shannon v. Tama City*, 74 Iowa 22; *Mathilde v. Levy*, 24 La. Ann. 421; *Hanson v. Red Rock Tp.* (S. Dak. 1895), 63 N. W. Rep. 156; *Trinity County Lumber Co. v. Denham* (Tex. 1895), 30 S. W. Rep. 856 (*reversing* (Tex. 1894), 29 S. W. Rep. 553).

The fact that a witness has laid a wager on the result of the trial, is a circumstance which goes to his credibility. *People v. Parker*, 137 N. Y. 535. So, also, the fact that a witness is a bondsman of one of the parties, may be shown as affecting his credibility. *State v. Calkins*, 73 Iowa 128.

The testimony of the general manager of a corporation, who contracted the indebtedness for which it was sued, was held to be subject to discredit as that of an interested witness. *Cleveland Co. v. Nellis Co.* (C. Pl.), 18 N. Y. Supp. 448.

In *Bevan v. Atlanta Nat. Bank*, 142 Ill. 308, it was claimed that the fact that a witness was in a like situation in respect to another claim as that of the party calling him, was a fact which should be considered by the jury as affecting his credibility. The court said: "Several of the witnesses of the plaintiff were asked, on cross-examination, whether they held notes signed by Pratt and Mrs. Williams, where the genuineness of her signature was disputed, or were interested in any bank which held such notes, and the court excluded the evidence. It is not claimed that the holding of such a note, or having an interest in a bank which held such a note, would disqualify the witnesses from testifying in the case, but the claim is that the witnesses were interested, and the evidence was compe-

tent as affecting their credibility. It is always competent to show, on cross-examination, that a witness is interested in the result of the suit, but here the witnesses had no direct interest in the result of the suit. The interest, if any, was so remote that we do not regard the ruling of the court in rejecting the evidence as erroneous."

1. *Harrington v. Hamburg*, 85 Iowa 272; *Stewart v. Kindel*, 15 Colo. 539.

2. *Wohlfahrt v. Beckett*, 92 N. Y. 490; 44 Am. Rep. 406; *Elwood v. Western Union Transp. Co.*, 45 N. Y. 549; 6 Am. Rep. 140.

In *Robinson v. New York Cent., etc., R. Co.*, 20 Blatchf. (U. S.) 340, Wallace, J., said: "It is doubtless the general rule that where unimpeached witnesses testify distinctly and positively to facts which are uncontradicted, their testimony suffices to overcome a mere presumption. But when, as here, the testimony proceeds from persons who would be guilty of a criminal fault unless they vindicated themselves from the presumption arising from the transaction, a question of credibility is presented for the jury."

In a prosecution for larceny, it was held that the fact that a witness for the prosecution was under arrest for stealing the property in question was a proper matter for the consideration of the jury in determining his credibility. *State v. Burpee*, 65 Vt. 4.

3. *People v. Haynes*, 55 Barb. (N. Y.) 453; *People v. Costello*, 1 Den. (N. Y.) 83; *People v. Hare*, 57 Mich. 505; *White v. State*, 52 Miss. 216; *Keithler v. State*, 10 Smed. & M. (Miss.) 172; *Fitzcox v. State*, 52 Miss. 923; *State v. Brown*, 3 Strobb. (S. Car.) 508; *State v. Wolcott*, 21 Conn. 272; *State v. Litchfield*, 58 Me. 270; *State v. Banks*, 40 La. Ann. 736.

4. *People v. Haynes*, 55 Barb. (N. Y.) 453; *People v. Costello*, 1 Den. (N.

evidence, however, should be received with great caution, and should be carefully and doubtingly scrutinized, and it is proper for the court so to instruct the jury,¹ except in jurisdictions where the court has no authority to give any instructions on the weight of evidence.² The fact that an accomplice testifies under a promise of leniency, makes strongly against his credibility and may always be shown for the purpose of weakening the force of his testimony.³

10. Detectives and Informers.—A detective who enters into communication with criminals without any felonious intent on his part, but for the purpose of discovering and making known their secret designs and crimes, and acts throughout with this original

Y.) 83; *Haskins v. People*, 16 N. Y. 344; *People v. Dyle*, 21 N. Y. 578; *Wixson v. People*, 5 Park. Cr. Rep. (N. Y.) 120; *People v. Davis*, 21 Wend. (N. Y.) 309; *Com. v. Bosworth*, 22 Pick. (Mass.) 397; *State v. Stebbins*, 29 Conn. 463; 79 Am. Dec. 223; *State v. Wolcott*, 21 Conn. 272; *State v. Litchfield*, 58 Me. 270; *White v. State*, 52 Miss. 216; *Fitzcox v. State*, 52 Miss. 923; *State v. Hardin*, 2 Dev. & B. (N. Car.) 407; *State v. Haney*, 2 Dev. & B. (N. Car.) 390; *State v. Miller*, 97 N. Car. 484; *State v. Barber*, 113 N. Car. 711; *Allen v. State*, 10 Ohio St. 287; *State v. Betsall*, 11 W. Va. 703; *State v. Thompson*, 21 W. Va. 757; *State v. Potter*, 42 Vt. 495; *State v. Dana*, 59 Vt. 614; *State v. Crab*, 121 Mo. 554; *State v. Watson*, 31 Mo. 361; *State v. Harkins*, 100 Mo. 666; *State v. Jackson*, 106 Mo. 174; *State v. Minor*, 117 Mo. 302; *Dawley v. State*, 4 Ind. 128; *Stocking v. State*, 7 Ind. 326; *Brown v. Com.*, 2 Leigh (Va.) 769; *Woods v. Com.*, 86 Va. 929; *Bacon v. State*, 22 Fla. 51; *Jenkins v. State*, 31 Fla. 196; *State v. Prater*, 26 S. Car. 198, 613; *People v. Gallagher*, 75 Mich. 512; *People v. O'Brien*, 60 Mich. 8; *State v. Patterson*, 52 Kan. 335; *Lamb v. State*, 40 Neb. 312; *Collins v. People*, 98 Ill. 584; 38 Am. Rep. 105; *Earl v. People*, 73 Ill. 329; *Wisdom v. People*, 11 Colo. 170; *Solander v. People*, 2 Colo. 48; *Ingalls v. State*, 48 Wis. 647; *Edwards v. State*, 2 Wash. 306.

1. *People v. Haynes*, 55 Barb. (N. Y.) 453; *People v. Costello*, 1 Den. (N. Y.) 83; *Haskins v. People*, 16 N. Y. 344; *People v. Dyle*, 21 N. Y. 578; *Wixson v. People*, 5 Park. Cr. Rep. (N. Y.) 120; *White v. State*, 52 Miss. 216; *Keithler v. State*, 10 Smed. & M. (Miss.) 192; *Fitzcox v. State*, 52 Miss.

923; *State v. Jones*, 64 Mo. 391; *State v. Crab*, 121 Mo. 554; *Com. v. Chase*, 147 Mass. 599; *Com. v. Holmes*, 127 Mass. 424; *People v. Hare*, 57 Mich. 505; *State v. Dana*, 59 Vt. 614; *State v. Miller*, 97 N. Car. 484; *State v. Barber*, 113 N. Car. 711; *Wisdom v. People*, 11 Colo. 170; *Solander v. People*, 2 Colo. 48; *State v. Stebbins*, 29 Conn. 463; 79 Am. Dec. 223; *Earl v. People*, 73 Ill. 329; *Ingalls v. State*, 48 Wis. 647; *U. S. v. Ybanez*, 53 Fed. Rep. 536.

The court may comment upon the nature of such testimony, and point out the various grounds of suspicion which may attach to it, call the jury's attention to the situation and temptation under which the witness may be placed, explain the motives by which he may be actuated, etc., but should not instruct the jury that they are bound to believe or disbelieve him in any particular. *People v. Hare*, 57 Mich. 505. *Citing People v. Jenness*, 5 Mich. 305; *People v. Schweitzer*, 23 Mich. 301; *People v. Annis*, 13 Mich. 511; *Hamilton v. People*, 29 Mich. 173; *People v. Lyons*, 49 Mich. 78; *Knowles v. People*, 15 Mich. 408. To the same effect is *State v. Hing*, 16 Nev. 307.

2. *State v. Betsall*, 11 W. Va. 703; *State v. Thompson*, 21 W. Va. 757; *State v. Miller*, 24 W. Va. 807. *Compare Brown v. Com.*, 2 Leigh (Va.) 769.

3. *Tong's Case*, Kel. 18; *Black v. State*, 59 Wis. 471; *Vaughan v. State*, 57 Ark. 1; *State v. Burpee*, 65 Vt. 1; *People v. Hare*, 57 Mich. 505.

It is error for the court to refuse to allow the cross-examination of an accomplice, in regard to his expectation of relief from further prosecution in the event of a conviction of the prisoner. *Allen v. State*, 10 Ohio St. 287; *People v. Christy*, 65 Hun (N. Y.)

purpose, is not to be regarded as an accomplice, though his conduct must, in some degree, impair his credibility.¹ The fact that a detective employs falsehood, artifice, and fraud to obtain a confession from a person suspected of crime, is not sufficient of itself to exclude his testimony, but it very seriously affects his credibility.² Again, a person who buys intoxicating liquor which is sold in violation of law is not an accomplice of the vendor;³ but if he buys it for the express purpose of prosecuting the vendor, the court may well instruct the jury that his testimony ought to be received with great caution and distrust,⁴ though a less vigorous charge will meet the requirements of the law. Thus, it is sufficient if the court directs the attention of the jury to the conduct of the prosecuting witness, and tells them that it is a matter for their consideration in weighing his testimony.⁵ The testimony of a private detective employed to watch

349; *People v. Langtree*, 64 Cal. 256. See *State v. Kent* (N. Dak. 1895), 62 N. W. Rep. 631.

1. *Rex v. Despard*, 28 How. St. Tr. 346, per Lord Ellenborough; *Campbell v. Com.*, 84 Pa. St. 187; *State v. McKean*, 36 Iowa 343; 14 Am. Rep. 530; *People v. Barric*, 49 Cal. 342; *People v. Farrell*, 30 Cal. 316; *Wright v. State*, 7 Tex. App. 574; 32 Am. Rep. 599; *DeLong v. Giles*, 11 Ill. App. 33; *Burns v. People*, 45 Ill. App. 70; *State v. Miller* (Del. 1892), 32 Atl. Rep. 137.

But the fact that an official post-office detective made use of decoy letters to detect one suspected of using the mails for the circulation of obscene literature, is not sufficient to discredit his testimony. *U. S. v. Slenker*, 32 Fed. Rep. 691.

2. *State v. Brooks*, 92 Mo. 577; *State v. Patterson*, 73 Mo. 695; *State v. Phelps*, 74 Mo. 128; *Hickey v. State*, 12 Neb. 490.

In *Heldt v. State*, 20 Neb. 492, the court said: "A man who will deliberately ingratiate himself into the confidence of another for the purpose of betraying that confidence, and while with words of friendship upon his lips he is seeking by every means in his power to obtain an admission which can be tortured into a confession of guilt which he may blazon to the world, as a means to accomplish the downfall of one for whom he professes great friendship, cannot be possessed of a very high sense of honor or of moral obligation. Hence, the law looks with suspicion on the testimony of such witnesses, and the jury should be specially instructed that in weighing their testimony great-

er care is to be exercised than in the case of witnesses wholly disinterested. *Pruit v. People*, 5 Neb. 377. The weight to be given to such evidence is a question for the jury and cannot be urged against its admissibility. The confession, however, seems to have been voluntary, although made to one who deliberately and repeatedly deceived and made false statements to the plaintiff to obtain it. It is doubtful if anything is really gained in the administration of the law from the admission of such testimony and the consequent encouragement of the courts of the practice. If it is answered that confessions are thus obtained which otherwise could not be had, it may be said in reply that the same is true of the rack and wheel by means of which confessions were formerly forced from its victims but which experience showed were entirely unreliable. So far as appears, the plaintiff confided in this man as his friend and was betrayed by this professed benefactor. The testimony of such a man may be entitled to but very little credence, yet it must be submitted to the jury."

3. *Com. v. Willard*, 22 Pick. (Mass.) 476; *People v. Smith*, 28 Hun (N. Y.) 626; *affirmed*, on the opinion of the general term, 92 N. Y. 665; *State v. Hoxsie*, 15 R. I. 1; 2 Am. St. Rep. 838. Compare *Com. v. Baker*, 155 Mass. 287.

4. *Com. v. Downing*, 4 Gray (Mass.) 29. See also *People v. Rice* (Mich. 1894), 61 N. W. Rep. 540; *People v. Whitney* (Mich. 1895), 63 N. W. Rep. 765.

5. *Com. v. Mason*, 135 Mass. 555; *Com. v. Trainor*, 123 Mass. 414; *Com. v. Ingersoll*, 145 Mass. 231.

a husband or wife, with a view to learning facts upon which to base a suit for a divorce, is to be received with great caution, and should be carefully and minutely scrutinized.¹ It is competent to show that a witness is a professional detective, hired by private individuals to work up the case. The jury have a right in weighing the evidence to know the influences which operate upon the witnesses.²

11. Relative Value of Positive and Negative Testimony.—Ordinarily a witness who testifies positively to an affirmative is entitled to greater credit than one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen, but it is not possible to remember a thing that never existed.³ The applicability of the rule to

In *State v. Hoxsie*, 15 R. I. 4; 2 Am. St. Rep. 838, it appeared that certain witnesses called for the state were employed at so much compensation a day in that and other cases, and that they made it their business to procure illegal sales of intoxicating liquors for the purpose of prosecuting the sellers. The defendants requested the judge to charge the jury, in regard to these witnesses, that the testimony of spotters is to be received with great caution and distrust. The judge, however, refused, and instructed the jury that they must weigh all testimony with caution, especially where they saw any reason to doubt its truth or to discredit it. Of this instruction the court said: "We do not see any error in this. The credibility of witnesses is a question for the jury. Counsel are always permitted to argue it to the jury as a matter peculiarly within their province. Without doubt, it is proper for the court to direct the attention of the jury to anything in the conduct or character of witnesses which affects their credibility, and we think the court below, though it might, doubtless, have expressed itself more pointedly without fault, did all it was necessary for it to do. A spotter is not, in contemplation of law, an accomplice."

1. Anonymous, 17 Abb. Pr. (N. Y. Super. Ct.) 48; *Blake v. Blake*, 70 Ill. 618.

In *Ciocci v. Ciocci*, 26 Eng. L. & Eq. 613, Dr. Lushington said: "Whenever persons of this description, such as Owen and others, are employed, for money, to procure evidence to establish any fact, all that they do or say must be watched with great vigilance and for divers reasons. Such persons are

naturally anxious to attain their object, and generally, to a certain extent, their pecuniary reward depends, or is by them supposed to depend, on their success; and the very nature of their employment, the constant mixing with the lowest characters, does not tend to make them the most scrupulous agents. Great care and caution, therefore, is necessary; but such caution must not be carried to an extravagant length, for we all know that upon evidence so procured the lives of many men formerly depended, and even at this day all but life does frequently depend."

2. *Rivers v. State*, 97 Ala. 72; *Hollingsworth v. State*, 53 Ark. 387; *State v. Carroll*, 85 Iowa 1; *State v. Tosney*, 26 Minn. 262.

In *Needham v. People*, 98 Ill. 278, the following instruction was approved by the supreme court: "The evidence of professional detectives and policemen, upon disputed questions of fact arising in criminal cases, should always be received with a large degree of caution. From the nature of their business and their frequent and constant association with members of the criminal classes, their minds are oftentimes unduly biased and prejudiced against those accused of crime and in whose arrest they have been instrumental, and their testimony thereby colored against them."

3. *Stitt v. Huidekoper*, 17 Wall. (U. S.) 384; *Horn v. Baltimore, etc.*, R. Co., 54 Fed. Rep. 301; *Kansas City, etc., R. Co. v. Lane*, 33 Kan. 702; *Chicago, etc., R. Co. v. Stafford County*, 36 Kan. 127; *Missouri Pac. R. Co. v. Pierce*, 39 Kan. 391; *Allen v. Bond*, 112 Ind. 523; *Pool v. Devers*, 30 Ala. 672; *Matthews v. Poythress*, 4 Ga. 287;

any state of facts must depend upon whether the negative testimony can be attributed to inattention, defect of memory or inadequate means of knowledge.¹ Consequently, testimony may be negative in form, though in fact not so within the meaning of the rule. Thus, where one witness swears that a certain thing took place, and another of equal credibility and means of knowledge swears positively that it did not, there is a flat contradiction and the rule does not apply.²

Johnson v. State, 14 Ga. 55; *Woodcock v. Bennet*, 1 Cow. (N. Y.) 711; *Hepburn v. Citizens' Bank*, 2 La. Ann. 1007; 46 Am. Dec. 564; *Auld v. Walton*, 12 La. Ann. 129; *Gorham v. Peyton*, 3 Ill. 363; *Delk v. State*, 3 Head (Tenn.) 79; *Coles v. Perry*, 7 Tex. 109; *Ralph v. Chicago, etc., R. Co.*, 32 Wis. 177; 14 Am. Rep. 725.

The testimony of a witness who speaks positively to a fact is entitled to more consideration than that of several witnesses whose statements are merely negative. *Kennedy v. Kennedy*, 2 Ala. 616; *Todd v. Hardie*, 5 Ala. 698.

Where, after the lapse of forty-eight years, fifteen witnesses testified that a soldier who served in the revolutionary army had survived the war, and one witness testified that he fell in battle during the war, the latter witness being corroborated by documentary evidence, the court refused to disturb a verdict founded on the testimony of the one witness thus corroborated. *Jackson v. Loomis*, 12 Wend. (N. Y.) 27.

1. *Reeves v. Poindexter*, 8 Jones (N. Car.) 308; *Berg v. Chicago, etc., R. Co.*, 50 Wis. 426; *Urbanek v. Chicago, etc., R. Co.*, 47 Wis. 59; *Johnson v. Whidden*, 32 Me. 230; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381.

In *Johnson v. Scribner*, 6 Conn. 185, which was an action of slander for defamatory language alleged to have been uttered in a ballroom, where there was a dancing assembly and the music of a violin, three witnesses for the plaintiff testified positively to the speaking of the words charged; and eleven witnesses for the defendant testified that they were in the room at the time and heard no such language and that, in their opinion, they would have heard it if it had been uttered. The verdict was for the defendant, and the court granted a new trial on the ground that the verdict was against the weight of evidence. *Hosmer, C. J.*, said: "If, in a comparison between the witnesses in respect of the means and opportunity which they

have had of ascertaining the facts which they testify, it turns out that the one has had more competent and adequate means of information than the other, or that, under the circumstances of the case, the attention of the witness testifying that he did not see or hear, was not so likely to be so fully excited and particularly directed to the facts as that of the one who swears affirmatively, this principle coöperates with the one first stated in all cases where there is room for error and mistake. It is true that evidence of a negative nature may, under particular circumstances, not only be equal but superior to positive evidence. This must always depend on the question, whether the negative testimony may be attributed to inattention, deficient means of knowledge, error or defect of hearing. . . .

The witnesses who have sworn that they did not hear may have testified truly, perhaps through deficient means of knowledge, or inattention to the conversation relative to which they have given evidence. And this presumption, founded as it is in law and common candor, is powerfully enforced from the noise and tumults and attractions with which they were surrounded, and the still further probability that they were not within earshot of the defendant's conversation. The inference is unquestionable that the verdict is manifestly and palpably against the weight of evidence, and the facts ought to be submitted to another jury."

Whether negative testimony as to blowing a whistle or ringing a bell is to be brought within this rule, will depend upon the situation of the witness and the attention he is giving at the time in question. *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 236, *distinguishing Chicago, etc., R. Co. v. Still*, 19 Ill. 499; 71 Am. Dec. 236, where it appeared that the witnesses who testified that they did not hear the sound, were not in a position where they would necessarily have heard it.

2. *Reeves v. Poindexter*, 8 Jones (N.

12. *Falsus in Uno, Falsus in Omnibus*.—It is a maxim well-known to the profession that if a witness willfully and corruptly swears falsely to any material fact in the case, the jury are at liberty to disregard the whole of his testimony.¹ But to authorize the application of the maxim, it is not sufficient that the testimony of the witness is in some particular simply untrue or that he has even willfully sworn falsely to an immaterial fact; it must appear that he has willfully and knowingly sworn falsely to a material fact.² Again, it is simply a maxim and not a rule of the law of evidence by virtue of which the judge may withdraw the testimony from the jury or direct them to disregard it. The proper

Car.) 308; *Coughlin v. People*, 18 Ill. 266; 68 Am. Dec. 541; *State v. Gates*, 20 Mo. 405; *Harris v. Bell*, 27 Ala. 520; *Sobey v. Thomas*, 39 Wis. 317.

In *Coughlin v. People*, 18 Ill. 268; 68 Am. Dec. 541, there was a contradiction as to whether the defendant struck the prosecuting witness with a deadly weapon. The court said: "Those witnesses, if they had the same opportunity of knowing what the defendant did do on the occasion, and were equally faithworthy and likely to know and remember the facts with those who testified that the defendant did strike the blow, were entitled to equal credit, and their statements should have had equal weight and consideration. Their testimony was as positive, as to the fact in controversy, as the testimony of the people's witnesses, and if they had equal honesty, ability and opportunity of knowing what did transpire, and memory, their testimony would have had the same weight on a mind seeking to ascertain truth."

1. *The Santissima Trinidad*, 7 Wheat. (U. S.) 338; *Strauss v. Abrahams*, 32 Fed. Rep. 310; *Mann v. Arkansas Valley Land, etc., Co.*, 24 Fed. Rep. 261; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45; *Frazier v. State*, 56 Ark. 242; *Follett v. Territory (Arizona, 1893)*, 33 Pac. Rep. 869; *Diamond v. Brooklyn City R. Co. (City Ct.)*, 29 N. Y. Supp. 318; *Morgenthau v. Walker (C. Pl.)*, 21 N. Y. Supp. 936; *Welke v. Welke (Supreme Ct.)*, 17 N. Y. Supp. 298; *State v. Mix*, 15 Mo. 153; *Gillett v. Wimer*, 23 Mo. 77; *Paulette v. Brown*, 40 Mo. 52; *Kelly v. U. S. Express Co.*, 45 Mo. 428; *State v. Dwire*, 25 Mo. 553; *Brown v. Hannibal, etc., R. Co.*, 66 Mo. 588; *Church v. Chicago, etc., R. Co.*, 119 Mo. 203; *Seligman v. Rogers*, 113 Mo. 642; *State v. Gee*, 85 Mo. 647; *State v. Buchler*, 103 Mo. 203;

People v. Flynn, 73 Cal. 511; *Minich v. People*, 8 Colo. 452; *Speight v. State*, 80 Ga. 512; *James v. Mickey*, 26 S. Car. 270; *Dell v. Oppenheimer*, 9 Neb. 454; *State v. Baker (Iowa, 1893)*, 56 N. W. Rep. 425; *Blotcky v. Caplan (Iowa, 1894)*, 59 N. W. Rep. 204; *Judge v. Jordan*, 81 Iowa 519; *Winter v. Central Iowa R. Co.*, 80 Iowa 443; *Sandwich v. Dolan*, 141 Ill. 430; *Reynolds v. Greenbaum*, 80 Ill. 416; *Gullihier v. People*, 82 Ill. 145; *Bevelot v. Lestrade*, 153 Ill. 625; *U. S. Express Co. v. Hutchins*, 58 Ill. 44; *Anderson v. People*, 34 Ill. App. 86; *Badder v. Keefer*, 100 Mich. 272; *Cole v. Lake Shore, etc., R. Co.*, 95 Mich. 77; *O'Rourke v. O'Rourke*, 43 Mich. 58; *Hamilton v. People*, 29 Mich. 173; *State v. Thompson*, 21 W. Va. 746; *State v. Freidrich*, 4 Wash. 204; *Allen v. Murray*, 87 Wis. 41.

An instruction that if the jury find that a witness has testified falsely, as to any material fact in the case, they are at liberty to reject and disbelieve all his testimony, clearly and sufficiently states the law upon the subject, and it is not necessary in applying this rule to call the attention of the jury to any particular witness. *Fraser v. Haggerty*, 86 Mich. 521.

2. *Pierce v. State*, 53 Ga. 365; *Fishel v. Lockard*, 52 Ga. 632; *Day v. Crawford*, 13 Ga. 508; *Skipper v. State*, 59 Ga. 65; *Ivey v. State*, 23 Ga. 576; *Childs v. State*, 76 Ala. 93; *People v. Strong*, 30 Cal. 151; *People v. Sprague*, 53 Cal. 491; *Hall v. Renfro*, 3 Metc. (Ky.) 52; *Moresi v. Swift*, 15 Nev. 216; *Chicago, etc., R. Co. v. Boger*, 1 Ill. App. 472; *Quinn v. Rawson*, 5 Ill. App. 130; *Pope v. Dodson*, 58 Ill. 360; *Swan v. People*, 98 Ill. 610; *Otmer v. People*, 76 Ill. 149; *Gullihier v. People*, 82 Ill. 146; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Linck v. Whipple*, 31 Ill. App. 155; *Spencer v. Dougherty*, 23 Ill. App.

instruction, therefore, is that the jury may disregard the whole of the testimony of such a witness, and it is reversible error to instruct them that they must do so. Such an instruction is clearly an invasion of the province of the jury, who are the exclusive judges of the credibility of the witnesses.¹

399; *Murtaugh v. Murphy*, 30 Ill. App. 59; *State v. Mix*, 15 Mo. 153; *Shenuit v. Breuggestratt*, 8 Mo. App. 46; *Gillett v. Wimer*, 23 Mo. 78; *State v. Elkins*, 63 Mo. 159; *Henry v. Wabash Western R. Co.*, 109 Mo. 488; *State v. Buchler*, 103 Mo. 203; *Blitt v. Heinrich*, 33 Mo. App. 243; *State v. Beaucleugh*, 92 Mo. 490; *Barney v. Dudley*, 40 Kan. 247; *Kay v. Noll*, 20 Neb. 380; *Callanan v. Shaw*, 24 Iowa 444; *Gottlieb v. Hartman*, 3 Colo. 53; *Hillman v. Schwenk*, 68 Mich. 293; *Bonnie v. Earll*, 12 Mont. 239; *Frazier v. State*, 56 Ark. 242; *State v. Freidrich*, 4 Wash. 204; *Little v. Superior Rapid Transit R. Co.*, 88 Wis. 402; *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195.

But in *Huber v. Teuber*, 3 McArthur (D. C.) 484; 36 Am. Rep. 110, it was held that a witness who swears to a falsehood in relation to a matter the truth of which he must have known, is not to be believed in any part of his testimony, even when the fact is not material in the case.

1. *People v. Sprague*, 53 Cal. 494; *People v. Hicks*, 53 Cal. 354; *People v. Soto*, 59 Cal. 369; *People v. Strong*, 30 Cal. 156; *Jordan v. State*, 81 Ala. 20; *Clapp v. Bullard*, 23 Ill. App. 609; *Blanchard v. Pratt*, 37 Ill. 243; *Crabtree v. Hagenbaugh*, 25 Ill. 233; 79 Am. Dec. 324; *Pollard v. People*, 69 Ill. 148; *Otmer v. People*, 76 Ill. 149; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Reynolds v. Greenbaum*, 80 Ill. 416; *Knowles v. People*, 15 Mich. 408; *Fisher v. People*, 20 Mich. 147; *Hall v. Renfro*, 3 Metc. (Ky.) 52; *Letton v. Young*, 2 Metc. (Ky.) 559; *Senter v. Carr*, 15 N. H. 351; *Lewis v. Hodgdon*, 17 Me. 267; *Finley v. Hunt*, 56 Miss. 221; *Jones v. People*, 2 Colo. 351; *Mead v. McGraw*, 19 Ohio St. 55; *Mercer v. Wright*, 3 Wis. 645; *Shellabarger v. Nafus*, 15 Kan. 547, *overruling* *Campbell v. State*, 3 Kan. 488; *Russell v. State*, 11 Kan. 322; *Gannon v. Stevens*, 13 Kan. 461; *Hill v. West End St. R. Co.*, 158 Mass. 460; *Com. v. Wood*, 11 Gray (Mass.) 85; *Com. v. Billings*, 97 Mass. 405.

In *Georgia*, the rule is that where a witness knowingly and willfully swears

falsely in a material matter his testimony should be rejected entirely, unless it be corroborated by the facts and circumstances of the case, or by other credible evidence. *Pierce v. State*, 53 Ga. 365; *Skipper v. State*, 59 Ga. 63; *Jackson v. State*, 64 Ga. 348; *Williams v. State*, 69 Ga. 34; *Day v. Crawford*, 13 Ga. 508.

In *New York*, there has been much confusion on this point. In *Dunlop v. Patterson*, 5 Cow. (N. Y.) 243, it was held that the testimony of a witness who contradicted himself on a material point should be withdrawn from the consideration of the jury. The correctness of this decision was questioned in *Dunn v. People*, 29 N. Y. 528; 86 Am. Dec. 319, where Denio, C. J., said that the testimony should remain in the case to be considered by the jury in connection with the other evidence, under such prudential instructions as might be given by the court. But in *People v. Evans*, 40 N. Y. 5, the court returned to the doctrine of *Dunlop v. Patterson*, 5 Cow. (N. Y.) 243. But in *Pease v. Smith*, 61 N. Y. 483, it was held that the trial court had no power, under the maxim, to instruct the jury that they ought not to consider the testimony of such a witness, and it was there said that the jury are clearly at liberty to believe the witness, though they may, if they see fit, disregard his testimony. This decision, however, did not set the matter at rest, as the court admitted that there might be an exception where it was shown that the witness had been guilty of perjury, though not convicted of the offense. Again, in *Place v. Minster*, 65 N. Y. 103, it was said, by the commission of appeals, "the cases which go to show that the testimony of a witness who contradicts himself, or who is impeached by the testimony of others, must be rejected by the judge, cannot be regarded as law in this state." Citing *Dunn v. People*, 29 N. Y. 523; 86 Am. Dec. 319; *White v. McLean*, 57 N. Y. 670; *Wilkins v. Earle*, 44 N. Y. 172; 3 Am. Rep. 655; *Pease v. Smith*, 61 N. Y. 477; *Warren v. Haight*, 62 Barb. (N. Y.) 490.

Notwithstanding this clear statement

If, in the application of this maxim, the judge were authorized to withdraw the testimony of the witness from the jury, or to direct them to disregard it, the distinction between competency and credibility would, to that extent, be obliterated, and a witness might, in effect, be rendered incompetent upon his own confession of perjury, without a trial or conviction, and thus the judge could, by an instruction on the credibility of the witness, accomplish what he would be powerless to do when acting in the capacity of judge of the competency of the witness.¹

there remained some doubt as to the power of the court where a witness had willfully perjured himself, as will be seen by consulting *Deering v. Metcalf*, 74 N. Y. 501; *People v. Petmecky*, 99 N. Y. 423.

The legislature, however, came to the relief of the court and entirely removed incompetency occasioned by conviction of crime, perjury not excepted. See *New York Penal Code*, § 714; *New York Code Civ. Proc.*, § 832. And now the law in that state is as laid down in the text. See *People v. Chapleau*, 121 N. Y. 276.

In *People v. O'Neil*, 109 N. Y. 251, Andrews, J., said: "The refusal of the court to charge that if the jury should find that the witnesses Fullgraff and Duffy had, in the testimony before the Senate committee in respect to the same matters, committed willful perjury, the jury should wholly disregard their testimony given on the trial, raises a question which, prior to the enactment of section 714 of the Penal Code, was open to doubt under the decisions in this state. The cases were fully reviewed in *Deering v. Metcalf*, 74 N. Y. 501, and the question was again referred to in the recent case of *People v. Petmecky*, 99 N. Y. 421. Under the Rev. Stats. (2 R. S. 681), a person convicted of perjury was not permitted to be a witness in any cause or matter until his conviction was reversed. While this statute was in force, there was much reason certainly in the contention that where a witness, by his own confession on the stand, in the presence of the jury, admitted that he had willfully perjured himself on a former occasion in respect to the same matter, his testimony ought to be wholly disregarded to the same extent as though his perjury had been judicially established by conviction. But now, by section 714 of the Penal Code, no conviction for crime disqualifies a witness, and the section expressly

makes a person convicted of crime, not excepting perjury, a competent witness in any cause or proceeding, civil or criminal, but allows the conviction to be proved for the purpose of affecting the weight of his testimony. It would be manifestly absurd, in the light of this statute, now to hold that an unconvicted perjurer was an incompetent witness whose evidence could not be considered by the jury, when, under the statute, if he had been convicted, his evidence must be received and weighed by the jury. In view of the present statute, whatever doubts may have heretofore existed, the true rule is that stated by Judge Denio in *Dunn v. People*, 29 N. Y. 529; 86 Am. Dec. 319, and which was followed on the trial of this case, that the testimony of a witness who has committed perjury in the same matter on a prior occasion, whether the perjury is established by a conviction or by his confession, or is found by the jury, 'must be considered by the jury in connection with the other evidence under such prudential instructions as may be given by the court, and subject to the determination of the court having a jurisdiction to grant new trials in cases of verdicts against evidence.'"

1. In *Rex v. Teal*, 11 East 307, a witness admitted that she had before sworn falsely upon the particular point to which she was then called to testify, and it was strongly urged, upon the authority of the cases of *Titus Oates*, 4 St. Tr. 47, and *Elizabeth Canning*, 10 St. Tr. 390, that her evidence should be rejected by the court, though she had not been convicted of perjury, and this, upon the analogy of a witness who admits himself to be an infidel. But Lord Ellenborough, C. J., observed that an infidel cannot admit the obligation of an oath at all, and cannot, therefore, give evidence under the sanction of it. 'But,' said he, "though a person may prove on his own showing, or by other

IX. IMPEACHMENT—1. Direct Contradiction.—It is scarcely necessary to state that a party has a right to call witnesses to contradict material evidence, given by a witness for his adversary.¹ As has been said by a learned judge, if a witness fabricate a story and circumstances, the disproof of the circumstances is generally the only possible way of disproving the material facts.² Consequently, where the witness has given testimony which is material to the issue on trial, he is subject to direct contradiction upon any fact or circumstance which tends to corroborate and strengthen his testimony.³ So, also, his credit may be attacked by proof of

evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath, though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether; but still, that would not warrant the rejection of the evidence by the judge. It only goes to the credit of the witness, on which the jury are to decide." And, after quoting some passages from Lord Chief Baron Gilbert, the learned Chief Justice observed that those passages, contrasted with others, pointed out the distinction between competency and credibility.

In *State v. Williams*, 2 Jones (N. Car.) 257, it was insisted, upon the supposed authority of *State v. Jim*, 1 Dev. (N. Car.) 509, that, where a witness had committed willful perjury, the court should instruct the jury, as a rule of law, that his whole testimony should be disregarded. But Pearson, J., after an elaborate review of the authorities, arrived at the conclusion stated in the text. He said: "The result is that the construction put on *State v. Jim*, 1 Dev. (N. Car.) 509, has no other support but *Dunlop v. Patterson*, 5 Cow. (N. Y.) 243, and that stands by itself as the only instance in which a court of common law has converted the maxim, '*falsum in uno*, etc.,' into a rule of the law of evidence to be enforced by the court, and is opposed by all the decisions that have ever been made in any other common-law court. Next, as to analogy. If a witness admits that he has committed murder or burglary, *State v. Valentine*, 7 Ired. (N. Car.) 225; or felony, in stealing a slave, *State v. Haney*, 2 Dev. & B. (N. Car.) 390, he is, nevertheless, a competent witness, and his testimony is to be weighed by the jury, and they may convict upon it, provided it 'carries

to their minds full and entire conviction of its truth.' Where is the difference between a witness who confesses that he has been guilty of these crimes, and one who confesses that he has committed perjury? The idea that the latter was a confession of the *crimen falsi* is suggested by Cockell, in *Rex v. Teal*, 11 East 307, but the court said there was nothing in it, because murder, burglary, etc., are crimes of a higher nature, and include not merely a disregard of truth, but a disregard of all obligations and a total depravity and wickedness of heart, consequently, a system of law would not be true to itself which permitted the testimony of the former to be weighed by the jury, but required the testimony of the latter to be withdrawn from their consideration. This must be so, according to the maxim, 'the greater includes the less.' All the writers upon evidence treat of the evidence of an accomplice and the impeachment of a witness, by his confession or by contradictory statements, in the same connection."

1. *Frank v. Manny*, 2 Daly (N. Y.) 92; *People v. De France* (Mich. 1895), 62 N. W. Rep. 709.

The mere contradiction of a witness does not warrant the disregarding of his whole testimony for want of corroboration. *Louisville, etc., R. Co. v. Kelly*, 63 Fed. Rep. 407.

2. *Thompson, C. J.*, in *Batdorff v. Farmers' Nat. Bank*, 61 Pa. St. 184.

3. *Riddell v. Thayer*, 127 Mass. 489; *Com. v. Goodnow*, 154 Mass. 487; *Whitney v. Boston*, 98 Mass. 312; *Com. v. Smith* (Mass. 1895), 40 N. E. Rep. 189; *Grimes v. Hill*, 15 Colo. 365; *Davis v. California Powder-Works*, 84 Cal. 617; *East Tennessee, etc., R. Co. v. Daniel*, 91 Ga. 768; *Butler v. Cornell*, 148 Ill. 276; *Southern Bell Telephone, etc., Co. v. Watts*, 66 Fed. Rep. 460.

independent facts and circumstances which are inconsistent with his testimony.¹

2. **Conduct Inconsistent with Testimony.**—The acts and conduct of the witness, relative to the matter in controversy, and inconsistent with his testimony, may always be proved for the purpose of weakening the force of his evidence.²

3. **Previous Contradictory Statements**—*a.* **LAYING FOUNDATION**—(1) *In General.*—As we shall presently see, a witness may be impeached by proof that he has, upon some material point, made verbal statements out of court which contradict his testimony at the trial, though such statements are not admissible as independent evidence on the merits of the case. But before the evidence of such contradictory statements can be received, it is necessary to prepare the way for its reception by cross-examining the witness concerning the supposed contradictions which are to be brought forward against him, and such cross-examination must extend not only to the particulars of the conversation, upon which it is intended to contradict the witness, but also to the time when, the place where, and the person or persons to whom, the witness is supposed to have made such statement.³ The direct tendency of

1. *People v. Freeman*, 92 Cal. 359; *Pharo v. Beadleston* (C. Pl.), 21 N. Y. Supp. 989; *Little v. Lichkoff*, 98 Ala. 321.

2. *Whitney v. Butts*, 91 Ga. 124; *Yeaw v. Williams*, 15 R. I. 20; *Stillwell v. Farewell*, 64 Vt. 286; *Hyland v. Milner*, 99 Ind. 308; *Miller v. Baker*, 160 Pa. St. 172.

3. *Carpenter v. Wall*, 11 Ad. & El. 803; 39 E. C. L. 234; *Angus v. Smith*, M. & M. 473; 22 E. C. L. 360; *Crowley v. Page*, 7 C. & P. 789; 32 E. C. L. 737; *Conrad v. Griffey*, 16 How. (U. S.) 38; *Payne v. State*, 60 Ala. 80; *Cooper v. State*, 90 Ala. 641; *Gilyard v. State*, 98 Ala. 59; *Hester v. State* (Ala. 1894), 15 So. Rep. 857; *Jones v. State*, 58 Ark. 390; *Lee v. Chadsey*, 2 Keyes (N. Y.) 543; *Sprague v. Cadwell*, 12 Barb. (N. Y.) 518; *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *Budlong v. Van Nostrand*, 24 Barb. (N. Y.) 25; *Briggs v. Wheeler*, 16 Hun (N. Y.) 583; *Gorgen v. Balzhouser*, 2 N. Y. Wkly. Dig. 529; *Boyd v. Boyd* (City Ct.), 27 N. Y. Supp. 942; *Weymouth v. Broadway, etc.*, R. Co. (Super. Ct.), 22 N. Y. Supp. 1047; *McCulloch v. Dobson*, 133 N. Y. 114; *Provost v. New York* (C. Pl.), 3 N. Y. Supp. 531; *Sandford v. Shafer* (Supreme Ct.), 2 N. Y. Supp. 357; *State v. Wright*, 75 N. Car. 439; *Hooper v. Moore*, 3 Jones (N. Car.) 428; *State v. Patterson*, 2 Ired. (N. Car.) 352; 38 Am. Dec. 699;

Birch v. Hale, 99 Cal. 299; *People v. Nonella*, 99 Cal. 333; *Young v. Brady*, 94 Cal. 128; *Salle v. Mayer*, 91 Cal. 165; *Brown v. State*, 72 Md. 468; *Waters v. Waters*, 35 Md. 532; *State v. Jones*, 44 La. Ann. 961; *State v. Johnson*, 35 La. Ann. 871; *State v. O'Kean*, 35 La. Ann. 901; *State v. Callegari*, 41 La. Ann. 578; *State v. Johnson*, 41 La. Ann. 574; *Hunter v. Gibbs*, 79 Wis. 70; *Welch v. Abbot*, 72 Wis. 512; *Baker v. State*, 69 Wis. 40; *Siebert v. Amunson*, 78 Wis. 679; *Cohn v. Heimbsauch*, 86 Wis. 176; *Skelton v. Fenton Electric Light, etc., Co.*, 100 Mich. 87; *Carder v. Primm*, 52 Mo. App. 102; *Spohn v. Missouri Pac. R. Co.*, 116 Mo. 617; 122 Mo. 1; *State v. Parker*, 96 Mo. 382; *Browning v. Gosnell* (Iowa, 1894), 59 N. W. Rep. 340; *Richmond v. Sundburg*, 77 Iowa 255; *Neeb v. McMillan* (Iowa, 1894), 60 N. W. Rep. 612; *Georgia R., etc., Co. v. Smith*, 85 Ga. 530; *Gardner v. State*, 81 Ga. 144; *Richardson v. Kelly*, 85 Ill. 491; *Miner v. Phillips*, 42 Ill. 130; *Root v. Wood*, 34 Ill. 286; *Quincy Horse R., etc., Co. v. Gnuse*, 137 Ill. 264 (*reversing* 38 Ill. App. 212); *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481; 23 Am. St. Rep. 688; *Aneals v. People*, 134 Ill. 401; *Boeker v. Hess*, 34 Ill. App. 332; *Robinson v. Savage* (Ill. 1888), 15 N. E. Rep. 850; *Robinson v. Com.* (Ky. 1889), 11 S. W. Rep. 81; *Diffenderfer v. Scott*, 5 Ind. App. 243; *State v. Cleary*, 40 Kan. 287; *Howe Mach. Co. v. Clark*, 15

the evidence being to impeach the veracity of the witness by contrasting his present statement with that supposed to have been made by him to some other person, common justice requires that he be given an opportunity of declaring whether he ever made such a statement to that person, and of explaining, in the reëxamination, the nature and particulars of the conversation, under what circumstances the statement was made, from what motives, and with what design.¹

Kan. 492; U. S. v. Fuller, 4 N. Mex. 358; Kirchner v. Laughlin (N. Mex. 1892), 28 Pac. Rep. 505; Horton v. Chadbourn, 31 Minn. 322; Watson v. St. Paul City R. Co., 42 Minn. 46; Granning v. Swenson, 49 Minn. 381; Wood River Bank v. Kelley, 29 Neb. 590; International, etc., R. Co. v. Dyer, 76 Tex. 156; Clapp v. Engledow, 72 Tex. 252; Smith v. Jones (Tex. Civ. App. 1895), 31 S. W. Rep. 306; State v. Goodwin, 32 W. Va. 177; Unis v. Charlton, 12 Gratt. (Va.) 484; Holbrook v. Holbrook, 30 Vt. 433.

The time and place of the conversation, and the person with whom it was held, should be specified with sufficient definiteness to enable the witness clearly to identify it. Standard Oil Co. v. Van Etten, 107 U. S. 325; Koehler v. Buhl, 94 Mich. 496; Hanscom v. Burmood, 35 Neb. 504; Bartlett v. Cheesebrough, 32 Neb. 339; Bonelli v. Bowen, 70 Miss. 142; Jones v. State, 65 Miss. 179; Fulton v. Hughes, 63 Miss. 61; Clark v. State (Miss. 1891), 9 So. Rep. 820; Zebble v. Storey, 117 Pa. St. 478; State v. Hunsaker, 16 Oregon 497; Stepp v. National L., etc., Assoc., 37 S. Car. 417; Hamilton v. Rich Hill Coal Min. Co., 108 Mo. 364; Mahaney v. St. Louis, etc., R. Co., 108 Mo. 191; Whitaker v. State, 79 Ga. 87; Floyd v. State, 82 Ala. 16; Barkly v. Copeland, 74 Cal. 1; 5 Am. St. Rep. 413; Esterly v. Eppelsheimer, 73 Iowa 260; Neeb v. McMullan (Iowa, 1894), 60 N. W. Rep. 612; Montgomery v. Knox, 23 Fla. 595; State v. Dickerson, 98 N. Car. 708; Pence v. Waugh, 135 Ind. 143; Jackson v. Swope, 134 Ind. 111; Hill v. Gust, 55 Ind. 45; Quincy Horse R., etc., Co. v. Gnuse, 137 Ill. 264; Da Lee v. Blackburn, 11 Kan. 190; Henderson v. State, 1 Tex. App. 432; Treadway v. State, 1 Tex. App. 668; Ledbetter v. State (Tex. Crim. App. 1895), 29 S. W. Rep. 1084.

In laying the foundation it is not necessary to use the exact words of the statement intended to be proved.

Donahoo v. Scott (Tex. Civ. App. 1895), 30 S. W. Rep. 385.

In *Massachusetts*, a declaration made out of court, contrary to, or inconsistent with, the testimony of a witness in any material matter, may be proved by other testimony, either with or without a previous inquiry to the witness thus contradicted. Tucker v. Welsh, 17 Mass. 160; 9 Am. Dec. 137; Com. v. Hawkins, 3 Gray (Mass.) 463; Harrington v. Lincoln, 2 Gray (Mass.) 133; Hathaway v. Crocker, 7 Met. (Mass.) 266; Day v. Stickney, 14 Allen (Mass.) 260; Weeks v. Needham, 156 Mass. 289; Carville v. Westford (Mass. 1895), 40 N. E. Rep. 893; Day v. Cooley, 118 Mass. 524; Brooks v. Weeks, 121 Mass. 433; Com. v. Moinehan, 140 Mass. 463; Hosmer v. Groat, 143 Mass. 16; Tobin v. Jones, 143 Mass. 448; Hastings v. Livermore, 15 Gray (Mass.) 10; Com. v. Smith (Mass. 1895), 40 N. E. Rep. 189.

But the matter upon which the witness is thus impeached must be material to the issue on trial. Com. v. Buzzell, 16 Pick. (Mass.) 153; Com. v. Sacket, 22 Pick. (Mass.) 394; Tucker v. Welsh, 17 Mass. 160; 9 Am. Dec. 137; Brackett v. Bartholomew, 6 Met. (Mass.) 399; Hathaway v. Crocker, 7 Met. (Mass.) 266.

1. 2 Phil. Ev. 959; Angus v. Smith, 1 M. & N. 473; Crowley v. Page, 7 C. & P. 789; 32 E. C. L. 737; The Charles Morgan, 115 U. S. 69; Carder v. Primm, 52 Mo. App. 108; Spohn v. Missouri Pac. R. Co., 116 Mo. 617; Ryan v. People (Colo. 1895), 40 Pac. Rep. 775.

In *The Queen's Case*, 2 Brod. & B. 299; 6 E. C. L. 154, the House of Lords put the following question to the judges: "If in the courts below a witness examined in chief, on the part of the plaintiff, being asked whether he remembered a quarrel taking place between A and B, answered that he did not remember it; and such witness was not asked on his cross-ex-

Where the contradictory statements were reduced to writing by the witness, or by another and signed by him, the necessity of laying a foundation for the reception of impeaching evidence still remains, but for obvious reasons the limitation as to the time and place of making the statements does not apply.¹ It is sufficient to show the witness the paper or read it to him and question him concerning its genuineness. If he admits that it is in his handwriting, or that he has signed it in its present form, it may, at the proper season, be received in evidence.²

amination whether he had or had not made a declaration stated in the question respecting such quarrel; and in the progress of the defense the counsel for the defendant proposed to examine a witness to prove that the other witness had made such a declaration, in order to prove that he must remember it: according to the practice of the courts below, would such proof be received?"

In answer to this question, Abbott, C. J., delivering the opinion of all the judges, said: "It must be in the knowledge and experience of every man that a slight hint or suggestion of some particular matter connected with a subject, puts the faculties of the mind in motion, and raises up in the memory a long train of ideas connected with the subject, which, until that hint or suggestion was given, were wholly absent from it. For this reason, the proof that, at a time past, a witness has spoken on any subject, does not, in our opinion, lead to a legitimate conclusion that such witness, at the time of his examination, had that subject present in his memory; and to allow the proof of his former conversation to be adduced without first interrogating him to that conversation, and reminding him of it, would, in many cases, have an unfair effect upon him and upon his credit, and would deprive him of that reasonable protection which it is in my opinion the duty of every court to afford to every person who appears as a witness on the one side and on the other. According, therefore, to the practice of the courts below, a witness is asked, on cross-examination, whether he has made a declaration or held a conversation; and such previous question is considered as a necessary foundation for the contradictory evidence of the declaration or conversation to be adduced on the other side. I must, however, my lords, take the liberty to add, that in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the neces-

sary foundation in the way which I have mentioned, the court would, of its own authority, call back the witness in order to give the counsel an opportunity of laying the required foundation, by putting his questions to the witness, although the counsel had not before asked them; it being much better to permit the order and regularity of the proceedings, as to time and season, to be broken in upon, than to allow irrelevant or incompetent evidence to be received."

1. *Romertae v. East River Bank*, 49 N. Y. 577; *Doud v. Donnelly* (Supreme Ct.), 12 N. Y. Supp. 396; *Clapp v. Wilson*, 5 Den. (N. Y.) 285; *Hammond v. Dike*, 42 Minn. 273.

2. *Georgia R., etc., Co. v. Smith*, 85 Ga. 530; *Boeker v. Hess*, 34 Ill. App. 332; *Simmons v. State*, 32 Fla. 387; *Morrison v. Myers*, 11 Iowa 538; *Honstine v. O'Donnell*, 5 Hun (N. Y.) 472; *Gaffney v. People*, 50 N. Y. 416; *Clapp v. Wilson*, 5 Den. (N. Y.) 287; *Lightfoot v. People*, 16 Mich. 511; *State v. Tickel*, 13 Nev. 502; *Ecker v. McAllister*, 45 Md. 291; *U. S. v. Fuller*, 4 N. Mex. 358; *People v. Ching Hing Chang*, 74 Cal. 389; *Gunter v. State*, 83 Ala. 96.

It is not allowable, in cross-examination in the statement of a question to a witness, to represent the contents of a letter and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without first having shown the witness the letter, and asking him if he wrote that letter. Two or three lines of a letter may be exhibited to a witness without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited, but if the witness denies that he wrote such part, he cannot be examined as to the contents of the letter. Opinion of the judges in *The Queen's Case*, 2 Brod. & B. 286; 6 E. C. L. 148.

A written contract is admissible in evidence for the purpose of impeaching a witness after he has admitted that he

Where a witness, who is also a party to the action, has made material statements out of court, which are in conflict with his testimony, the opposing party may prove them without first laying a foundation for the reception of the evidence upon the cross-examination of the witness. The fact that a party chooses to take the witness stand in his own behalf, can in no way limit or restrict the right of the opposing party to prove his admissions against interest,¹ and the same is true when the witness is the agent of a party, provided the contradictory statements were made in reference to a matter in which the agent had authority to bind the principal.² It has been held, however, that when a party's contradictory statements are offered for the sole purpose of impeaching him as a witness, and not as admissions against interest, the proper foundation should be laid on cross-examination as in the impeachment of other witnesses.³

The cross-examining party has a right to lay a foundation for the impeachment of a witness who has given material evidence against him, and it is reversible error to deny him the privilege.⁴

(2) *Where the Witness Is Not Present to Testify.*—If a party

signed the contract as a party thereto. *Drew v. Wadleigh*, 7 Me. 94.

A witness is not bound to answer as to matters reduced to writing by himself or by another and subscribed by him, until the writing has been produced and read or shown to him. *Newcomb v. Griswold*, 24 N. Y. 298; *Belling v. People*, 8 Wend. (N. Y.) 595.

The deposition of a witness may be received in evidence for the purpose of discrediting his testimony, only so far as the contents thereof were called to his attention during his examination at the trial. *Stephens v. People*, 19 N. Y. 549; *Grosse v. State*, 11 Tex. App. 364; *Hammond v. Dike*, 42 Minn. 273.

It is not proper, on the cross-examination of a witness for the counsel, in order to contradict him, to read from what purports to be a deposition previously given by him, and then to ask him whether he has so testified. The correct rule in such case is first to prove the deposition to be his, and then to read it as part of the evidence in the case. After this has been done the witness may be cross-examined as to any supposed discrepancies between his testimony in court and the deposition. *Cropsey v. Averill*, 8 Neb. 151.

1. *Where a Party Testifies.*—*Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277; *Rose v. Otis*, 18 Colo. 59; *Meyer v. Campbell* (C. Pl.), 20 N. Y. Supp. 705; *Kennedy v. Wood*, 52 Hun (N. Y.) 46; *Collins v. Mack*, 31

Ark. 694; *Klug v. State*, 77 Ga. 734; *Wilson v. Wilson*, 137 Pa. St. 269; *McCoy v. People*, 71 Ill. 111. Compare *State v. Freeman* (S. Car. 1895), 20 S. E. Rep. 974; *Logan v. Com.* (Ky. 1895), 29 S. W. Rep. 632.

If, in a criminal case, such contradictory statements of the defendant are in fact confessions, the court should first pass upon their admissibility, precisely as if the impeachment of the defendant as a witness was not involved. *State v. Barrett*, 40 Minn. 65.

2. *Louisville, etc., R. Co. v. Lawson*, 88 Ky. 496.

But the contradictory statement must have been made concerning a matter within the scope of the witness's authority as agent, otherwise the necessary foundation must be laid for his impeachment. *Stone v. North Western Sleigh Co.*, 70 Wis. 585.

3. *Conway v. Nicol*, 34 Iowa 536; *Browning v. Gosnell* (Iowa, 1894), 59 N. W. Rep. 340.

But no foundation need be laid, even where this rule applies, if the declaration of a party is introduced as an admission of a fact and not for the purpose of impeaching him as a witness. *Lucas v. Flinn*, 35 Iowa 14; *State v. Hamilton*, 32 Iowa 574.

4. *Stacy v. Milwaukee, etc., R. Co.*, 72 Wis. 331; *Pruitt v. Brockman*, 46 Ind. 56; *McFarlin v. State*, 41 Tex. 23; *Turney v. State*, 9 Tex. App. 192. See also *Miller v. Baker*, 160 Pa. St. 179.

admits, for the purpose of avoiding a continuance, that an absent witness would, if present, testify to certain material facts, he will not be allowed to adduce proof of counter declarations made by the witness at another time and place. To admit such evidence would be a violation of the rule requiring a foundation to be laid before introducing the impeaching evidence.¹ And the same is true where the testimony has been taken under a commission, and no predicate was laid for the impeachment of the witness at the time of his examination.² Where a witness makes statements at variance with his testimony, after the taking of his deposition, the only way to take advantage of such statements is to sue out a second commission and lay the requisite foundation for their reception in evidence.³ Where the contradictory declarations were made before the taking of the deposition, and the attention of the witness was not, at that time, called to them, they cannot be received in evidence to discredit his testimony after death has placed him beyond the power of explanation;⁴ and it appears that if a witness testify in a cause, and subsequently make contradictory statements, evidence of such statements cannot be received at a second trial of the cause, though the witness is dead, and the party against whom his testimony is read has had no opportunity of laying a foundation for impeaching him.⁵

1. *Pool v. Devers*, 30 Ala. 672; *St. Louis, etc., R. Co. v. Sweet*, 57 Ark. 287; *State v. Bartley*, 48 Kan. 421; *State v. Carter*, 8 Wash. 272; *North Chicago St. R. Co. v. Cottingham*, 44 Ill. App. 46.

In *Montana*, it has been held that in such cases the right to impeach the witness may be reserved. *State v. Gibbs*, 10 Mont. 212, 213.

Where the testimony of an absent witness, given at a former trial, is put in evidence, it cannot be discredited by evidence of contradictory statements of the witness, *Pruitt v. State*, 92 Ala. 41; but such evidence is subject to direct contradiction, the same as if the witness had testified in open court. *U. S. v. Taylor*, 35 Fed. Rep. 484.

Where the testimony of a witness who has become insane since the former trial is put in evidence, proof of contradictory statements made by him after the first trial is not admissible. *Stewart v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 203.

2. *Conrad v. Griffey*, 16 How. (U. S.) 38; *Howell v. Reynolds*, 12 Ala. 128; *Hubbard v. Briggs*, 31 N. Y. 536; *Fitch v. Kennard* (City Ct.), 19 N. Y. Supp. 468; *Unis v. Charlton*, 12 Gratt. (Va.) 484; *Runyan v. Price*, 15 Ohio St. 1; 86 Am. Dec. 459.

Where two depositions of the same witness have been taken in the same case, the first one cannot be introduced for the purpose of impeaching the second, when no foundation was laid at the taking of the second, by calling the attention of the witness to the contradictory statements made in the first. *Samuels v. Griffith*, 13 Iowa 103. A contrary view has been taken in *Colorado*. *Thompson v. Gregor*, 11 Colo. 531.

3. *Kimball v. Davis*, 19 Wend. (N. Y.) 437; *Brown v. Kimball*, 25 Wend. (N. Y.) 259; *Stacy v. Graham*, 14 N. Y. 492; *Conrad v. Griffey*, 16 How. (U. S.) 47.

In *Georgia*, it is held that the former deposition cannot be introduced for the purpose of impeaching the latter, but the difficulty can be met by suing out interrogatories and therein calling the attention of the witness to the discrepancies, thus laying the foundation for impeaching him, and that a continuance may be had for this purpose. *Georgia R., etc., Co. v. Smith*, 85 Ga. 534; *Killian v. Augusta, etc., R. Co.*, 79 Ga. 234; 11 Am. St. Rep. 410.

4. *Ayers v. Watson*, 132 U. S. 394; *Hubbard v. Briggs*, 31 N. Y. 536; *Epert v. Hall*, 133 Ind. 417; *Sharp v. Hicks* (Ga. 1894), 21 S. E. Rep. 208.

5. *Mattox v. U. S.*, 156 U. S. 237

b. INTRODUCTION OF IMPEACHING EVIDENCE—(1) Of Verbal Statements of the Witness—(a) Where Witness Admits Making the Statement.—If, upon cross-examination, the witness admits that he made the statement, by proof of which it is proposed to impeach him, that ends the matter, and no further proof of it is necessary or allowable.¹

(b) Where He Denies Having Made the Statement.—If a witness is cross-examined with the particularity above described in regard to any material statement, supposed to have been made by him at some other time, which is in conflict with his present testimony, and he denies having made such statement, the proper predicate or foundation is thus laid for impeaching him; and it is the privilege of the cross-examining party to call other witnesses to contradict him.²

(Shiras, Gray and White, JJ., *dissenting*); Runyan v. Price, 15 Ohio St. 1; 86 Am. Dec. 459 (Ranney and Wilder, JJ., *dissenting*); Craft v. Com., 81 Ky. 250; 50 Am. Rep. 160.

In *Pennsylvania*, the rule is otherwise. Thus, where a witness, after the taking of his deposition, admitted that he had made a mistake in his testimony, and died before the trial, it was held that such admission might be proved at the trial, notwithstanding no foundation was laid for impeaching the witness.

1. Crowley v. Page, 7 C. & P. 789; 32 E. C. L. 737; State v. Baldwin, 36 Kan. 1; Rodriguez v. State, 23 Tex. App. 503; Lightfoot v. People, 16 Mich. 507; State v. Tickel, 13 Nev. 502.

2. Delaware, etc., R. Co. v. Converse, 139 U. S. 469; Allen v. State, 87 Ala. 107; Cotton v. State, 87 Ala. 75; Burney v. Torrey, 100 Ala. 157; Holley v. State (Ala. 1895), 17 So. Rep. 102; Billings v. State, 52 Ark. 303; Little Rock, etc., R. Co. v. Voss (Ark. 1892), 18 S. W. Rep. 172; Carpenter v. Ward, 30 N. Y. 243; Patterson Gas. Governor Co. v. Lichtenstein Bros. Co. (C. Pl.), 29 N. Y. Supp. 279; Schell v. Plumb, 55 N. Y. 592; People v. McCallam, 103 N. Y. 587; Patchin v. Astor Mut. Ins. Co., 13 N. Y. 268; People v. Schuyler, 106 N. Y. 298; Sitterly v. Gregg, 90 N. Y. 686; Quincy v. Warner, 78 Hun (N. Y.) 286; Dudley v. Satterlee (City Ct.), 28 N. Y. Supp. 741; Frankel v. Wolf (C. Pl.), 27 N. Y. Supp. 328; Humes v. Proctor, 73 Hun (N. Y.) 265; Barrett v. Manhattan R. Co. (Supreme Ct.), 18 N. Y. Supp. 71; Palmeri v. Manhattan R. Co. (Supreme Ct.), 14 N. Y. Supp. 468; Woodrick v. Woodrick, 141 N. Y. 457; Hathaway v. Crocker, 7 Met.

(Mass.) 262; Gould v. Norfolk Lead Co., 9 Cush. (Mass.) 338; 57 Am. Dec. 50; Brigham v. Clark, 100 Mass. 430; Parkenson v. Bemis, 153 Mass. 280; Liddle v. Old Lowell Nat. Bank, 158 Mass. 15; Com. v. Werntz, 161 Pa. St. 591; Frack v. Gerber, 167 Pa. St. 316; Dampman v. Pennsylvania R. Co. (Pa. 1895), 31 Atl. Rep. 244; Dick v. People, 47 Ill. App. 223; State v. Lewis, 44 La. Ann. 958; Duckett v. Pool, 34 S. Car. 311; Judd v. Claremont (N. H. 1891), 23 Atl. Rep. 427; Hess v. Redding, 2 Ind. App. 199; Staser v. Hogan, 120 Ind. 207; State v. Crane, 110 N. Car. 530; Ellis v. Harris, 106 N. Car. 395; Langworthy v. Green Tp., 95 Mich. 93; Stackable v. Stackable, 65 Mich. 515; Swift Electric Light Co. v. Grant, 90 Mich. 469; Johnston Harvester Co. v. Miller, 72 Mich. 265; 16 Am. St. Rep. 536; McClellan v. Ft. Wayne, etc., R. Co. (Mich. 1895), 62 N. W. Rep. 1025; Milford v. Veazie (Me. 1888), 14 Atl. Rep. 730; Turnbull v. Maddux, 68 Md. 579; State v. Barrett, 40 Minn. 65; Leahey v. Cass Ave., etc., R. Co., 97 Mo. 165; 10 Am. St. Rep. 300; Spohn v. Missouri Pac. R. Co., 101 Mo. 417; Trauerman v. Lippincott, 39 Mo. App. 478; State v. Higgins (Mo. 1894), 28 S. W. Rep. 178; Joseph v. Com. (Ky. 1886), 1 S. W. Rep. 4; People v. Murray, 85 Cal. 350; Mimms v. State, 16 Ohio St. 221; State v. Walters, 7 Wash. 246; Welch v. Abbot, 72 Wis. 512; A. C. Conn Co. v. Little Suamico Lumber Mfg. Co., 74 Wis. 652; Hedges v. Chicago, etc., R. Co., 74 Wis. 239; Cross v. McKinley, 81 Tex. 332; Texas, etc., R. Co. v. Brown, 78 Tex. 397; Levy v. State, 28 Tex. App. 203; Hawkins v. State, 27 Tex. App. 273;

(c) **Where the Witness Neither Admits nor Denies.**—There has been some conflict of English authority as to whether it is admissible to prove a previous statement of the witness in conflict with his testimony, where he says that he has no recollection of having made the statement. It has been held that the statement may not be proved unless he expressly denies that he made it;¹ but it appears to be the better opinion that, where the suggested statement is a contradiction of the testimony of the witness upon the stand, it may be proved, unless he admits that he made it, when he is questioned about it, provided always that such statement is material to the matter at issue.² The latter rule has generally been

Welch v. Franklin Ins. Co., 23 W. Va. 303.

A statement made by another in the presence of a witness, and assented to and adopted by him, may be proved for the purpose of impeaching him, if it contradicts his testimony in a material part, and he denies that it was made. State v. McGaffin, 36 Kan. 315; Easterwood v. State (Tex. Crim. App. 1895), 31 S. W. Rep. 204.

A mere denial by a witness that he made a material statement imputed to him will not give the cross-examining party a right to prove it, unless it tends to contradict the evidence given by the witness. Lamb v. Ward, 114 N. Car. 255; Hall v. Young, 37 N. H. 134; Martin v. Farnham, 25 N. H. 195; Hall v. Simmons, 24 Tex. 227.

Intentionally False.—The credibility of a witness may be affected by evidence of contradictory statements without showing that they were intentionally false. Craig v. Rohrer, 63 Ill. 325.

The subsequent denial by a witness that he made the contradictory statement proved, will cure the error of its admission without a proper foundation. Hartsfield v. State (Tex. Crim. App. 1895), 29 S. W. Rep. 777.

1. So held, by Lord Abinger, in Long v. Hitchcock, 9 C. & P. 619, and by Tindal, C. J., in Pain v. Beeston, 1 M. & Rob. 20.

2. In Crowley v. Page, 7 C. & P. 789; 32 E. C. L. 737, Parke, B., said: "Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony; but it is only such statements as are relevant that are admissible, and in order to lay a foundation for the admission of such contradictory statements, and to

enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice, and if it were not so, you could never contradict a witness who said he could not remember."

And upon this subject, Mr. Phillips remarks: "It is true, the proof of the statement imputed to the witness, which he says he does not remember to have made, is not admissible as a contradictory statement, for, until further inquiry be made, there is no apparent contradiction, but still, it seems, the evidence should be admitted, for the imputed statement, when proved, may be such as to amount to a direct contradiction of the witness, and may also possibly convince the jury that the witness did not speak truth in saying he did not remember making the statement. If the rule were otherwise, it might happen that, under the pretense of not remembering, a witness who has made a false statement, and who knows it to be false, would escape contradiction and exposure. If the ruling of Parke, B., is adopted, and the statement imputed to the witness should appear on inquiry to contradict his evidence in court, it would evidently be proper to give him

preferred where the question has been raised in American courts;¹ though there are some cases in which it was held that evidence of the imputed statement should not be received where the witness said he had no recollection of having made it.²

(2) *Of Written Statements.*—The proper foundation having been laid, it is competent to impeach a witness by putting in evidence any material statement in contradiction of his testimony, which he may have reduced to writing, or which may have been written by another, and subscribed by him. This is most frequently done by the introduction of letters written by the witness,³ but any other form of written statement is equally admissible. Thus, an affidavit of the witness is admissible for this purpose,⁴ so, also, is a written report of railroad employees.⁵ A party who has testified in the case may be contradicted by the allegations in his verified pleadings,⁶ or by statements in his petition for a new trial.⁷ And in a criminal case the prosecuting witness may be impeached by the statements in his sworn complaint against the defendant.⁸ In a suit against a municipal corporation, to recover

an opportunity on reëxamination to make any explanation in his power as to the apparent contradiction." 2 Phil. Evidence 960.

1. *Payne v. State*, 60 Ala. 80; *Holbrook v. Holbrook*, 30 Vt. 432; *Bressler v. People*, 117 Ill. 422; *Ray v. Bell*, 24 Ill. 444; *Wood v. Shaw*, 48 Ill. 273; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481; 23 Am. St. Rep. 688; *Nute v. Nute*, 41 N. H. 60; *Heddles v. Chicago, etc., R. Co.*, 77 Wis. 228; *Smith v. State* (Tex. Crim. App. 1892), 20 S. W. Rep. 554; *Gonzales v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 1091; *Edwards v. Osman*, 84 Tex. 656; *Fuller v. State*, 30 Tex. App. 559; *People v. Jackson*, 3 Park. Cr. Rep. (N. Y.) 590; *Palmeri v. Manhattan R. Co.* (Supreme Ct.), 14 N. Y. Supp. 468; *Chapman v. Coffin*, 14 Gray (Mass.) 454; *Elmer v. Fessenden*, 154 Mass. 428; *Gibbs v. Linabury*, 22 Mich. 479; 7 Am. Rep. 675; *Gregg Tp. v. Jamison*, 55 Pa. St. 468; *Janeway v. State*, 1 Head (Tenn.) 130; *Sealy v. State*, 1 Ga. 213; 44 Am. Dec. 641; *Wren v. Louisville, etc., R. Co.* (Ky. 1892), 20 S. W. Rep. 215; *State v. Sullivan* (S. Car. 1895), 21 S. E. Rep. 4; *State v. Johnson* (La. 1895), 17 So. Rep. 789.

2. *Wiggins v. Holman*, 5 Ind. 502; *McVey v. Blair*, 7 Ind. 590; *Robinson v. Pitzer*, 3 W. Va. 335.

3. *De Sailly v. Morgan*, 2 Esp. 691; *The Queen's Case*, 2 Brod. & B. 288; 6 E. C. L. 149; *Sharp v. Hall*, 86 Ala. 110; 11 Am. St. Rep. 28; *People v.*

Hayes, 140 N. Y. 484; *People v. Cassidy* (Supreme Ct.), 14 N. Y. Supp. 349; *Perishable Freight Transp. Co. v. O'Neill*, 41 Ill. App. 423; *Western Manufacturers' Mut. Ins. Co. v. Boughton*, 136 Ill. 317, *affirming* 37 Ill. App. 183; *Foster v. Worthing*, 146 Mass. 607; *Anthony v. Jones*, 39 Kan. 529; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191; 3 Am. Dec. 535; *Prentis v. Bates*, 88 Mich. 567; *Barrett v. Dodge*, 16 R. I. 740; *State v. Tall*, 43 Minn. 273; *Tabor v. Judd*, 62 N. H. 288; *Dooley v. Miller* (Tex. Civ. App. 1893), 21 S. W. Rep. 157.

A letter written by another person is not admissible to impeach a witness. *Prentis v. Bates*, 93 Mich. 234. Neither is his own letter admissible, unless his attention has been called to it and an opportunity given him to explain it. *Burleson v. Collins* (Tex. Civ. App. 1895), 28 S. W. Rep. 898.

4. *U. S. v. Pagliano*, 53 Fed. Rep. 1001; *Tucker v. U. S.*, 151 U. S. 164; *People v. Samonset*, 97 Cal. 448; *Hine v. Cushing*, 53 Hun (N. Y.) 519; *Trinity County Lumber Co. v. Denham* (Tex. 1895), 30 S. W. Rep. 856.

5. *Freel v. Market St. Cable R. Co.*, 97 Cal. 40; *Chicago, etc., R. Co. v. Artery*, 137 U. S. 507.

6. *Floyd v. Thomas*, 108 N. Car. 93; *Solari v. Snow*, 101 Cal. 387; *Com. v. Mosier*, 135 Pa. St. 221; *Smith v. Traders' Nat. Bank*, 74 Tex. 457.

7. *Bellows v. Sowles*, 59 Vt. 63.

8. *Com. v. Snee*, 145 Mass. 351.

damages resulting from a change in the grade of a street, the written report of the viewers is admissible to impeach their trial evidence.¹ In respect to the time when such papers may be put in evidence, it is the orderly course for the cross-examining party to introduce them after he has opened his case,² though they may be read in connection with the cross-examination of the witness sought to be impeached, but in either case they are a part of the evidence of the party who introduces them.³

(3) *Proof of Former Testimony*.—The proper foundation having been laid on the cross-examination, it is competent to impeach the witness by proving that his testimony differs materially from that given by him at another time, relative to the same matter;⁴ and his testimony at the former trial may be proved by any competent witness who heard the same and recollects it.⁵ If the former testimony is in the form of a deposition, regularly taken, signed and certified, it is undoubtedly the best evidence of what the testimony was and is admissible for the purpose of impeaching him.⁶ But minutes of the testimony in the nature of a pri-

1. *Dawson v. Pittsburgh*, 159 Pa. St. 317.

2. *The Queen's Case*, 2 Brod. & B. 288; 6 E. C. L. 149.

3. *The Queen's Case*, 2 Brod. & B. 288; 6 E. C. L. 149; *Nichol v. Laumeister*, 102 Cal. 658; *Bernheim v. Lyon*, 5 Tex. Civ. App. 716; *Plyer v. German American Ins. Co.* (Supreme Ct.), 1 N. Y. Supp. 395; *Wilder v. Peabody*, 21 Hun (N. Y.) 376.

4. *Toplitz v. Hedden*, 146 U. S. 252; *U. S. v. Pagliano*, 53 Fed. Rep. 1001; *U. S. v. Smith*, 47 Fed. Rep. 501; *Elmer v. Fessenden*, 154 Mass. 427; *Tobin v. Jones*, 143 Mass. 448; *Cole v. State*, 59 Ark. 50; *People v. Bushnton*, 80 Cal. 160; *Williams v. State*, 69 Ga. 11; *Brown v. State*, 76 Ga. 623; *Bennett v. Syndicate Ins. Co.*, 43 Minn. 45; *Tisch v. Utz*, 142 Pa. St. 186; *Hibbard v. Zenor*, 82 Iowa 505; *Henry v. Sioux City*, etc., R. Co., 75 Iowa 84; *Birnbaum v. Lord* (City Ct.), 27 N. Y. Supp. 135; *Lustig v. New York*, etc., R. Co., 65 Hun (N. Y.) 547; *Wren v. Louisville*, etc., R. Co. (Ky. 1892), 20 S. W. Rep. 215; *Waterman v. Chicago*, etc., R. Co., 82 Wis. 613; *Sherard v. Richmond*, etc., R. Co., 35 S. Car. 467; *State v. Jones*, 29 S. Car. 201; *Galveston*, etc., R. Co. v. *Porfert*, 1 Tex. Civ. App. 716; *Jackson v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 194; *Rippey v. State*, 29 Tex. App. 37; *Clanton v. State*, 13 Tex. App. 139; *Scott v. State*, 23 Tex. App. 521; *Floyd v. State*, 82 Ala. 16; *Graham v. Myers*, 67 Mich.

277; *People v. Oblaser* (Mich. 1895), 62 N. W. Rep. 732; *New York*, etc., R. Co. v. *Kellan*, 83 Va. 853.

It matters not that the testimony was given by the witness in another suit. *Tisch v. Utz*, 142 Pa. St. 186.

In laying the foundation for such impeachment, it is not necessary to produce the record in the former trial upon the cross-examination. *Oderkirk v. Fargo*, 61 Hun (N. Y.) 418.

Such former testimony may be used to impeach the witness only when he is present to testify. *Adams v. Thornton*, 82 Ala. 260.

5. *Brown v. State*, 76 Ga. 626; *Williams v. State*, 69 Ga. 11; *State v. McDonald*, 65 Me. 466; *Phares v. Barber*, 61 Ill. 272.

6. *Rex v. Oldroyd*, R. & R. C. C. 88; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481; *Southern Kansas R. Co. v. Painter*, 53 Kan. 414; *People v. Devine*, 44 Cal. 452; *Stephens v. People*, 19 N. Y. 549; *Ecker v. McAllister*, 45 Md. 291; *Jarvis-Conklin Mortg. Trust Co. v. Harrell* (Tex. Civ. App. 1894), 26 S. W. 447.

Where the testimony before the coroner is taken in the form of a deposition and subscribed by the witness and certified by the coroner, the record should, if possible, be produced where it is sought to impeach the witness by proof of his testimony before the coroner. *Cole v. State*, 59 Ark. 50.

And in such case the whole of the testimony should be produced; the wit-

vate memorandum, are not admissible to impeach the witness, although the person who made them may use them to refresh his memory when called to the witness stand to prove the former testimony.¹

c. MATERIALITY OF THE EVIDENCE—(1) *In General*.—In order to impeach a witness by proof of contradictory statements made by him, it is essential that such statements have reference to some matter which is relevant and material to the issue on trial.² Or, to state the rule in another form, the cross-examining party is concluded by the answer which a witness gives to a question concerning a collateral matter, and no contradiction will be allowed, even for the purpose of impeaching the witness.³ This

ness has a right to the benefit of any explanations which may be contained in any part of it. *Carden v. State*, 84 Ala. 417; *Kennedy v. State*, 85 Ala. 326; *Dunbar v. McGill*, 69 Mich. 297.

1. *State v. Adams*, 78 Iowa 292; *Phares v. Barber*, 61 Ill. 272; *People v. Considine* (Mich. 1895), 63 N. W. Rep. 196.

Minutes of evidence, taken before the grand jury or before a committing magistrate, are not admissible to impeach a witness who there testified. *State v. Hayden*, 45 Iowa 14; and it is not necessary to produce such minutes. The foundation may be laid by cross-examining the witness without the use of them. *Sanders v. State* (Ala. 1895), 16 So. Rep. 935.

2. *Crowley v. Page*, 7 C. & P. 789; 2 E. C. L. 737; *U. S. v. Dickinson*, 2 McLean (U. S.) 325; *Marx v. Bell*, 48 Ala. 497; *Burney v. Torrey*, 100 Ala. 157; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Hussey v. State*, 87 Ala. 121; *Washington v. State*, 63 Ala. 189; *Jones v. Malvern Lumber Co.*, 58 Ark. 125; *Territory v. Clanton* (Arizona, 1889), 20 Pac. Rep. 94; *People v. Nonella*, 99 Cal. 333; *People v. Tiley*, 84 Cal. 651; *People v. Webb*, 70 Cal. 120; *People v. Furtado*, 57 Cal. 345; *Denver Tramway Co. v. Owens* (Colo. 1894), 36 Pac. Rep. 848; *Torris v. People*, 19 Colo. 438; *Futch v. State*, 90 Ga. 472; *Elkhart v. Witman*, 122 Ind. 538; *Robbins v. Spencer*, 121 Ind. 594; *Simons v. Busby*, 119 Ind. 13; *Fogleman v. State*, 32 Ind. 145; *Hoover v. Cary*, 86 Iowa 494; *Madden v. Koester*, 52 Iowa 692; *Swanson v. French* (Iowa, 1894), 61 N. W. Rep. 407; *State v. Blakesly*, 43 Kan. 250; *State v. Ray*, 54 Kan. 160; *Com. v. Hourigan*, 89 Ky. 305; *Randolph v. Com.* (Ky. 1889), 11 S. W. Rep. 813; *State v. Spencer*, 45 La. Ann. 1;

State v. Benner, 64 Me. 267; *Davis v. Keyes*, 112 Mass. 436; *Kaler v. Builders Mut. F. Ins. Co.*, 120 Mass. 333; *Com. v. Jones*, 155 Mass. 170; *Com. v. Schaffner*, 146 Mass. 512; *Alexander v. Kaiser*, 149 Mass. 321; *Wise v. Ackerman*, 76 Md. 375; *Langworthy v. Green Tp.*, 95 Mich. 93; *People v. Hillhouse*, 80 Mich. 580; *Howard v. Patrick*, 43 Mich. 121; *Paddock v. Kappahan*, 41 Minn. 528; *State v. Staley*, 14 Minn. 105; *State v. Spaulding*, 34 Minn. 361; *Garman v. State*, 66 Miss. 196; *McFadin v. Catron*, 120 Mo. 252; *Goltz v. Griswold*, 113 Mo. 144; *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 348; *Harper v. Indianapolis, etc.*, R. Co., 47 Mo. 567; 4 Am. Rep. 353; *McDuffie v. Bentley*, 27 Neb. 380; *Morris v. Atlantic Ave. R. Co.*, 116 N. Y. 552; *People v. Fleming* (Supreme Ct.), 14 N. Y. Supp. 200; *Schwabeland v. Holahan* (C. Pl.), 30 N. Y. Supp. 910; *Gandolfo v. Appleton*, 40 N. Y. 533; *Patterson v. Wilson*, 101 N. Car. 594; *Clinton v. State*, 33 Ohio St. 27; *Goodall v. State*, 1 Oregon 333; *Hill v. State*, 91 Tenn. 521; *Battaglia v. Thomas*, 5 Tex. Civ. App. 563; *Turner v. State* (Tex. Crim. App. 1894), 25 S. W. Rep. 635; *Sutor v. Wood*, 76 Tex. 403; *McCoy v. State*, 27 Tex. App. 415; *Johnson v. State*, 27 Tex. App. 163; *Henderson v. State*, 1 Tex. App. 432; *Brite v. State*, 10 Tex. App. 368; *Rogers v. Cook*, 8 Utah 123; *State v. Goodwin*, 32 W. Va. 177.

3. *Atty. Gen'l v. Hitchcock*, 1 Exch. 91; *Spenceley v. De Willott*, 7 East 108; *Rex v. Watson*, 2 Stark. 116; 3 E. C. L. 341; *Harris v. Tippet*, 2 Campb. 637; *U. S. v. White*, 5 Cranch C. C. 38; *Union Pac. R. Co. v. Reese*, 56 Fed. Rep. 288; *Rosenbaum v. State*, 33 Ala. 354; *Blakey v. Blakey*, 33 Ala. 611; *Seale v. Chambliss*, 35 Ala. 19;

rule, however, is confined to evidence drawn out on the cross-examination. A party who draws from his own witness irrelevant testimony which is prejudicial to the opposing party, ought not to be heard to object to its contradiction on the ground of its irrelevancy.¹ The test as to whether a matter is collateral within the meaning of the rule, is this: that the cross-examining party be entitled to prove it in support of his case.² It must be remembered also that this test applies to the subject-matter of the inquiry, and not to the admissibility of the evidence offered in proof of it. If the witness is not a party to the action, his declarations out of court are merely hearsay, and cannot be received as evidence in chief.³ Proof of such declarations is confined

Haley v. State, 63 Ala. 83; Barkly v. Copeland, 86 Cal. 483; People v. Collins, 105 Cal. 504; Young v. Brady, 94 Cal. 128; People v. McKeller, 53 Cal. 65; People v. Bell, 53 Cal. 119; Faulkner v. Rondoni, 104 Cal. 140; Beckman v. Skaggs, 59 Cal. 541; McKeone v. People, 6 Colo. 346; Winton v. Meeker, 25 Conn. 456; Eldridge v. State, 27 Fla. 162; Allgood v. State, 87 Ga. 668; Wilkinson v. Davis, 34 Ga. 549; Lake Erie, etc., R. Co. v. Morain, 140 Ill. 117; Moore v. People, 108 Ill. 484; Pennsylvania Co. v. Bray, 125 Ind. 229; State v. Cokely, 4 Iowa 477; State v. Falconer, 70 Iowa 416; Atchison, etc., R. Co. v. Townsend, 39 Kan. 115; Cornelius v. Com., 15 B. Mon. (Ky.) 539; State v. Lewis, 44 La. Ann. 958; State v. Donelon, 45 La. Ann. 744; Woodroffe v. Jones, 83 Me. 21; Ware v. Ware, 8 Me. 42; Davis v. Roby, 64 Me. 427; State v. Reed, 60 Me. 550; Goodhand v. Benton, 6 Gill & J. (Md.) 481; Sloan v. Edwards, 61 Md. 105; Wolfe v. Hauver, 1 Gill (Md.) 84; Com. v. Jones, 155 Mass. 170; Com. v. Farrer, 10 Gray (Mass.) 6; Harrington v. Lincoln, 2 Gray (Mass.) 133; People v. Hillhouse, 80 Mich. 580; People v. Knapp, 42 Mich. 267; 36 Am. Rep. 438; McDonald v. McDonald, 67 Mich. 122; Madden v. State, 65 Miss. 176; Iron Mountain Bank v. Murdock, 62 Mo. 70; Curran v. Percival, 21 Neb. 434; Carter v. State, 36 Neb. 481; Tibbetts v. Flanders, 18 N. H. 284; Dewey v. Williams, 43 N. H. 384; Sumner v. Crawford, 45 N. H. 416; Seavy v. Dearborn, 19 N. H. 351; Herson v. Henderson, 23 N. H. 498; Plato v. Reynolds, 27 N. Y. 586; People v. Murphy, 135 N. Y. 450; McCallan v. Brooklyn City R. Co. (Supreme Ct.), 1 N. Y. Supp. 289; Carpenter v. Ward, 30 N. Y. 243;

People v. Ware, 92 N. Y. 653; Morgan v. Frees, 15 Barb. (N. Y.) 352; Rosenweig v. People, 63 Barb. (N. Y.) 635; Green v. Rice, 33 N. Y. Super. Ct. 292; People v. Cox, 21 Hun (N. Y.) 47; Stape v. People, 21 Hun (N. Y.) 399; Hilsley v. Palmer, 32 Hun (N. Y.) 472; Crounse v. Fitch, 1 Abb. App. Dec. (N. Y.) 475; Sherman v. Delaware, etc., R. Co., 106 N. Y. 542; State v. Morris, 109 N. Car. 820; State v. Hawn, 107 N. Car. 810; Clark v. Clark, 65 N. Car. 655; State v. Elliott, 68 N. Car. 124; State v. Patterson, 74 N. Car. 157; State v. Roberts, 81 N. Car. 605; State v. Ballard, 97 N. Car. 443; State v. McGahey, 3 N. Dak. 293; Hildeburn v. Curran, 65 Pa. St. 59; Hester v. Com., 85 Pa. St. 139; Reading Second Nat. Bank v. Wentzel, 151 Pa. St. 142; State v. Wyse, 33 S. Car. 582; Rocco v. Parczyk, 9 Lea (Tenn.) 328; Hill v. State, 91 Tenn. 521; Surrell v. State, 29 Tex. App. 321; Gulf, etc., R. Co. v. Coon, 69 Tex. 730; Davis v. State (Tex. Crim. App. 1893), 20 S. W. Rep. 923; Rogers v. Cook, 8 Utah 123; State v. Thibeau, 30 Vt. 100; Langhorne v. Com., 76 Va. 1012; Nuckols v. Jones, 8 Gratt. (Va.) 275; State v. Goodwin, 32 W. Va. 177.

1. State v. Sargent, 32 Me. 429. See *supra*, this title, *Direct Contradiction*.

2. Atty. Gen'l v. Hitchcock, 1 Exch. 91; Welch v. State, 104 Ind. 347; South Bend v. Hardy, 98 Ind. 577; 49 Am. Rep. 792; Staser v. Hogan, 120 Ind. 207; Hildeburn v. Curran, 65 Pa. St. 63; Hart v. State, 15 Tex. App. 202; 49 Am. Rep. 188; Johnson v. State, 22 Tex. App. 206; Drake v. State, 29 Tex. App. 265.

3. Law v. Fairfield, 46 Vt. 425; Patterson Gas Governor Co. v. Lichtenstein Bros. Co. (C. Pl.), 29 N. Y. Supp. 279; Frankel v. Wolf (C. Pl.), 27 N.

strictly to the question of credibility, and the court should so instruct the jury.¹ Where the witness is also a party to the action, his admissions against interest are of course admissible as evidence in chief, but that affords no ground of objection to their reception for the purpose of impeaching him as a witness.²

(2) *Interest, Bias, and Hostility*.—Where a witness denies the making of statements or the existence of facts which show that he is interested in the event of the suit or is influenced by bias or hostility, the cross-examining party may call other witnesses to contradict him.³ Thus, it is competent to prove that he attempted to suborn another witness in the cause to give false testimony.⁴ Or attempted to dissuade him from attending the trial.⁵ So, also, it is competent, after laying the proper foundation, to prove that a witness proposed, for a certain consideration, to leave the jurisdiction, and not to testify in the case.

Y. Supp. 328; *Tyler v. Old Colony R. Co.*, 157 Mass. 336; *Trauerman v. Lipincott*, 39 Mo. App. 478; *Catlin v. Michigan Cent. R. Co.*, 66 Mich. 358.

1. *Law v. Fairfield*, 46 Vt. 425; *Hicks v. Stone*, 13 Minn. 434; *Davis v. Hardy*, 76 Ind. 272; *Seller v. Jenkins*, 97 Ind. 430; *Drake v. State*, 25 Tex. App. 293.

2. *Winchell v. Winchell*, 100 N. Y. 159; *Ankersmit v. Tuch*, 114 N. Y. 51; *Milligan v. Butcher*, 23 Neb. 683.

3. *McGuire v. McDonald*, 99 Mass. 49; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; *Emerson v. Stevens*, 6 Allen (Mass.) 112; *Polk v. State*, 62 Ala. 237; *Butler v. State*, 34 Ark. 480; *Cornelius v. State*, 12 Ark. 782; *Bishop v. State*, 9 Ga. 121; *Conyers v. Field*, 61 Ga. 258; *Patman v. State*, 61 Ga. 379; *Atwood v. Welton*, 7 Conn. 66; *Beardsley v. Wildman*, 41 Conn. 515; *Schultz v. Third Ave. R. Co.*, 89 N. Y. 249; *Newton v. Harris*, 6 N. Y. 345; *Starks v. People*, 5 Den. (N. Y.) 108; *Teets v. Middletown*, 106 N. Y. 651; *Gale v. New York Cent., etc., R. Co.*, 76 N. Y. 594; *Nation v. People*, 6 Park. Cr. Rep. (N. Y.) 258; *Eldridge v. State*, 27 Fla. 162; *Selph v. State*, 22 Fla. 537; *Lucas v. Flinn*, 35 Iowa 14; *Scott v. State*, 64 Ind. 400; *Robertson v. McPherson*, 4 Ind. App. 595; *Skinner v. State*, 120 Ind. 127; *Johnson v. Wiley*, 74 Ind. 233; *Stone v. State*, 97 Ind. 345; *Ford v. State*, 112 Ind. 373; *Staser v. Hogan*, 120 Ind. 220; *Phenix v. Castner*, 108 Ill. 207; *Titus v. Ash*, 24 N. H. 319; *Folsom v. Brawn*, 25 N. H. 114; *Drew v. Wood*, 26 N. H. 363; *Chelton v. State*, 45 Md. 564; *Hutchinson v. Wheeler*, 35 Vt. 330; *State v. Glynn*,

51 Vt. 577; *Langhorne v. Com.*, 76 Va. 1012; *State v. Jones*, 106 Mo. 311; *McFarlin v. State*, 41 Tex. 23; *Blum v. Jones* (Tex. Civ. App. 1893), 23 S. W. Rep. 844; *Helwig v. Lascowski*, 82 Mich. 619.

To the same effect are *Thomas v. David*, 7 C. & P. 350; 32 E. C. L. 537; *Tolbert v. Burke*, 89 Mich. 132; *Matter of Mason*, 63 Hun (N. Y.) 627; 19 N. Y. Supp. 1006; *Effray v. Masson*, 28 Abb. N. Cas. (N. Y. C. Pl.) 207; *Matter of Snelling's Will*, 136 N. Y. 515; *Day v. Stickney*, 14 Allen (Mass.) 255; *Tullis v. State*, 39 Ohio St. 200; *People v. Murray*, 85 Cal. 350; *Schuster v. State*, 80 Wis. 107; *Prince v. State*, 100 Ala. 144; *Haralson v. State*, 82 Ala. 47; *People v. Kilvington* (Cal. 1894), 36 Pac. Rep. 13.

In a criminal case, a witness for the prosecution may be contradicted on any fact which casts suspicion on him as the perpetrator of the crime. *People v. Williams*, 18 Cal. 187; *Gaines v. Com.*, 50 Pa. St. 319.

It is not, however, permissible to prove the cause of the enmity or unfriendliness of the witness, or the details of any particular quarrel between him and the party against whom he is called. *Munden v. Bailey*, 70 Ala. 63.

4. *Stafford's Case*, 7 How. St. Tr. 1400; *The Queen's Case*, 2 Brod. & B. 312; 6 E. C. L. 160; *Williams v. Dickenson*, 28 Fla. 108; *Morgan v. Frees*, 15 Barb. (N. Y.) 352; *O'Connor v. National Ice Co.*, 56 N. Y. Super. Ct. 410; *Bates v. Holladay*, 31 Mo. App. 169.

5. *Fitzpatrick v. Riley*, 163 Pa. St. 65; *State v. Hack*, 118 Mo. 92.

The contrary was ruled in *Harris v.*

Such proposal is not a collateral matter; it goes directly to show that the witness is corrupt.¹

(3) *Matters of Opinion*.—The statement of a witness upon which he may be impeached must not only be relevant to the issue, it must also be of a matter of fact, and not merely a former opinion of the witness in relation to the matter at issue, which is inconsistent with the conclusion which the facts he testifies to tend to establish,² unless the matter in question be one upon which the opinion of the witness is admissible in evidence. In that case the opinion is material to the matter at issue, and the witness may be contradicted by proof that he has expressed a contrary opinion out of court.³

d. DEGREE OF CONTRADICTION.—It is the rule that the former statement of a witness, to be admissible for the purpose of impeaching him, must tend to contradict him in some material particular.⁴ But its admissibility does not depend on the degree of variance between it and the subsequent testimony; that is a matter for the consideration of the jury in estimating the weight of the impeaching evidence.⁵

4. *Material Additions to Former Statement*.—Where a witness has made a previous statement of the transaction in regard to which he testifies, under such circumstances that he was called upon as a matter of duty or interest to state the whole truth as to the transaction, the court may, in its discretion, allow the introduction of

Tippett, 2 Campb. 637, but it is a *nisi prius* decision, and does not seem to have had much consideration. It is criticised in Morgan v. Frees, 15 Barb. (N. Y.) 354, where the court said it was undoubtedly wrongly decided.

1. State v. Downs, 91 Mo. 19; Jenkins v. State (Tex. Crim. App. 1895), 29 S. W. Rep. 1078.

The same is true of an agreement by the witness to suppress the testimony which he afterwards gives at the trial. Barkly v. Copeland, 86 Cal. 483.

2. Elton v. Larkins, 5 C. & P. 385; 24 E. C. L. 372; Com. v. Mooney, 110 Mass. 99; McFadin v. Catron, 120 Mo. 252; People v. Stackhouse, 49 Mich. 76; Drake v. State, 29 Tex. App. 265; Phipps v. State (Tex. Crim. App. 1895), 31 S. W. Rep. 657; Holmes v. Anderson, 18 Barb. (N. Y.) 422; Schell v. Plumb, 55 N. Y. 599; Rucker v. Beaty, 3 Ind. 70; City Bank v. Young, 43 N. H. 457; State v. Maxwell, 42 Iowa 208.

Where the opinion is of such a nature as to show the hostility of the witness, and is offered for that purpose, it seems that it may be received. Dudley v. Satterlee (City Ct.), 28 N. Y. Supp. 741.

Acts Showing a Contrary Opinion.—If a witness who is not called as an expert has testified to facts tending to show that a party to a contract was, at the time of making it, incompetent to contract by reason of mental imbecility, and his own opinion is not asked for or given in evidence, it is not competent to show, by way of contradiction of his testimony, that he has done acts indicating that he considered such party of sound mind. Hubbell v. Bissell, 2 Allen (Mass.) 196.

3. Sanderson v. Nashua, 44 N. H. 492; Lane v. Bryant, 9 Gray (Mass.) 247; 69 Am. Dec. 282; Cochran v. Amsden, 104 Ind. 282; Dalton's Appeal, 59 Mich. 352; Daniels v. Conrad, 4 Leigh (Va.) 401. Compare Ripon v. Bittel, 30 Wis. 619; Beaubien v. Cicotte, 12 Mich. 460.

4. Lamb v. Ward, 114 N. Car. 255; Hall v. Young, 37 N. H. 134; Martin v. Farnham, 25 N. H. 195; Sellar v. Jenkins, 97 Ind. 430; Hall v. Simmons, 24 Tex. 227.

5. Elmer v. Fessenden, 154 Mass. 428; Sellar v. Jenkins, 97 Ind. 430; Tinklepaugh v. Rounds, 24 Minn. 298; Craig v. Rohrer, 63 Ill. 325.

evidence to show that he then omitted material parts of the transaction to which he now testifies. The fact that he did not then state such material facts may afford some presumption that they did not happen, and thus tend to contradict his testimony.¹

5. **Attacking the Reputation of the Witness**—*a.* IN GENERAL.—When a witness has reached the bad eminence of notoriety as a liar in the community where he lives, he is liable to direct impeachment by proof of his general reputation for truth and veracity.² The extent of the permissible inquiry into the character of a witness sought to be impeached has been the subject of much discussion and contrariety of opinion. There are many decisions in which it has been held that the impeaching party is not confined to evidence of the general reputation of the witness for truth and veracity, but may, also, offer proof in derogation of his general moral character.³ It is believed, however, that the better and safer rule is that impeaching evidence of this kind, except

1. *Perry v. Breed*, 117 Mass. 165; *Hayden v. Stone*, 112 Mass. 346; *Com. v. Harrington*, 152 Mass. 488; *Becker v. Haynes*, 29 Fed. Rep. 443; *State v. Turner*, 36 S. Car. 534; *Bickford v. Menier* (Supreme Ct.), 9 N. Y. Supp. 775; *Cowan v. Third Ave. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 610; *People v. Chapleau*, 121 N. Y. 266; *Territory v. Clayton*, 8 Mont. 1; *Wheeler v. Van Sickle*, 37 Neb. 651; *Briggs v. Taylor*, 35 Vt. 57.

It has been held that a witness cannot be impeached in this manner unless the previous omissions were so made as to be substantially a denial of the omitted facts; as where the witness was questioned concerning such facts, or was cautioned to tell all he knew about the matter, and then failed or refused to state the facts which he afterwards supplied. *Hyden v. State*, 31 Tex. Crim. Rep. 404; *Williams v. State*, 24 Tex. App. 637; *Lewis v. State*, 15 Tex. App. 647.

2. *Knobe v. Williamson*, 17 Wall. (U. S.) 586; *U. S. v. Hughes*, 34 Fed. Rep. 732; *Bates v. Barber*, 4 Cush. (Mass.) 107; *People v. Markham*, 64 Cal. 163; 49 Am. Rep. 700; *People v. Bentley*, 77 Cal. 7; 11 Am. St. Rep. 225; *State v. Barrett*, 40 Minn. 65; *Watson v. Roode*, 30 Neb. 264; *Browder v. State*, 30 Tex. App. 614.

3. *Rex v. Bispham*, 4 C. & P. 392; 19 E. C. L. 437; *Mitchell v. State*, 94 Ala. 68; *McInerny v. Irvin*, 90 Ala. 275; *Ward v. State*, 28 Ala. 53; *DeKalb County v. Smith*, 47 Ala. 407; *Holland v. Barnes*, 53 Ala. 83; 25 Am. Rep. 595;

Byers v. State (Ala. 1894), 16 So. Rep. 716; *Motes v. Bates*, 80 Ala. 382; *Yarbrough v. State* (Ala. 1894), 16 So. Rep. 758; *State v. Stallings*, 2 Hayw. (N. Car.) 300; *State v. Boswell*, 2 Dev. (N. Car.) 209; *Blue v. Kibby*, 1 T. B. Mon. (Ky.) 195; 15 Am. Dec. 95; *Noel v. Dickey*, 3 Bibb (Ky.) 268; *Tackett v. May*, 3 Dana (Ky.) 79; *Evans v. Smith*, 5 T. B. Mon. (Ky.) 363; 17 Am. Dec. 74; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785; *Hume v. Scott*, 3 A. K. Marsh. (Ky.) 260; *Peck v. State*, 86 Tenn. 259; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Gilliam v. State*, 1 Head (Tenn.) 38; 73 Am. Dec. 161; *State v. Shields*, 13 Mo. 236; 53 Am. Dec. 147; *Day v. State*, 13 Mo. 422; *State v. Hamilton*, 55 Mo. 520; *State v. Breed-en*, 58 Mo. 507; *State v. Clinton*, 67 Mo. 380; 29 Am. Rep. 506; *State v. Miller*, 71 Mo. 590; *State v. Grant*, 76 Mo. 239; *State v. Rugan*, 5 Mo. App. 592; *State v. Raven*, 115 Mo. 419; *State v. Rider*, 95 Mo. 486; *State v. Shroyer*, 104 Mo. 441; 24 Am. St. Rep. 344.

In other jurisdictions, this rule has been adopted by statute. *Kilburn v. Mullen*, 22 Iowa 503; *State v. Kirkpatrick*, 63 Iowa 554; *State v. Hart*, 67 Iowa 142; *State v. Froelick*, 70 Iowa 213; *Majors v. State*, 29 Ark. 112; *Lawson v. State*, 32 Ark. 220; *Anderson v. State*, 34 Ark. 262; *Cline v. State*, 51 Ark. 143; *Morrison v. State*, 76 Ind. 335.

In *California*, it is provided by statute that the inquiry may extend to general reputation for truth, honesty,

where it comes from the witness himself, on cross-examination, should be confined to proof of the general reputation of the witness for truth and veracity at his present or recent place of residence. By a strict adherence to this rule a witness who is notorious for his disregard of truth may always be successfully impeached, and, at the same time, the confusion which arises from a multiplicity of collateral issues may be avoided. This view is well supported by authority as well as by reason.¹

b. EXAMINATION OF IMPEACHING WITNESSES—(1) Direct Examination.—Whenever a witness is called to impeach the credit of another in this manner he must know what is generally said of the witness whose credit is impeached, by those among whom the latter resides, in order that he may be able to answer the inquiry, either as to his general character in the broad sense, or as to his general reputation for truth and veracity. It is, therefore, a pre-

and integrity. *People v. Markham*, 64 Cal. 163; 49 Am. Rep. 700; *Heath v. Scott*, 65 Cal. 548.

Such evidence must have some tendency to show a want of veracity. For example, it is not competent to prove that a witness is a rash, turbulent and dangerous man when under the influence of liquor. *State v. Nelson*, 101 Mo. 464.

1. *Teese v. Huntingdon*, 23 How. (U. S.) 2; *Gass v. Stinson*, 2 Sumn. (U. S.) 610; *U. S. v. Vansickel*, 2 McLean (U. S.) 219; *U. S. v. Masters*, 4 Cranch (C. C.) 479; *U. S. v. White*, 5 Cranch (C. C.) 38; *Patriotic Bank v. Coote*, 3 Cranch (C. C.) 169; *People v. Abbott*, 97 Mich. 487; *Michigan Pipe Co. v. North British, etc., Ins. Co.*, 97 Mich. 493; *State v. Randolph*, 24 Conn. 368; *Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.) 257; *Com. v. Moore*, 3 Pick. (Mass.) 194; *Shaw v. Emery*, 42 Me. 59; *State v. Bruce*, 24 Me. 71; *Phillips v. Kingfield*, 19 Me. 375; 36 Am. Dec. 760; *State v. Howard*, 9 N. H. 485; *Atwood v. Impson*, 20 N. J. Eq. 150; *Frye v. Illinois Bank*, 11 Ill. 367; *Dimick v. Downs*, 82 Ill. 570; *Crabtree v. Kile*, 21 Ill. 180; *Taylor v. Clendening*, 4 Kan. 524; *Carter v. Cavenaugh*, 1 Greene (Iowa) 171; *Newman v. Mackin*, 21 Miss. 383; *Smith v. State*, 58 Miss. 867; *Perkins v. Mobley*, 4 Ohio St. 668; *Craig v. State*, 5 Ohio St. 605; *Ketchingman v. State*, 6 Wis. 426; *State v. Smith*, 7 Vt. 141; *State v. Robertson*, 26 S. Car. 117; *State v. Alexander*, 2 Mill (S. Car.) 171; *Clark v. Bailey*, 2 Strobb. Eq. (S. Car.) 143; *Jackson v. Lewis*, 13 Johns. (N. Y.) 504; *Bakeman v. Rose*, 14

Wend. (N. Y.) 110; *Gilbert v. Sheldon*, 13 Barb. (N. Y.) 623; *Rixey v. Bayse*, 4 Leigh (Va.) 330; *Uhl v. Com.*, 6 Gratt. (Va.) 706; *Boon v. Weathered*, 23 Tex. 675; *Kennedy v. Upshaw*, 66 Tex. 442; *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 657.

In *Rudsdill v. Slingerland*, 18 Minn. 380, the court said: "The only object in inquiring into the character of a witness is to ascertain whether his statements in themselves are entitled to credit. If he is a truthful person, they are, otherwise they are not. A witness, therefore, in coming into court would perhaps properly be considered as asserting his character for truthfulness to be good and be charged with notice to defend it; but we are unable to see why a witness should be held responsible to answer for or be required to meet an attack upon his character in any other respect. A man may indulge in vices which destroy his general character, yet his truthfulness and his reputation for truthfulness may be unimpeachable. An inquiry, in such a case, as to his moral character, would mislead instead of assist in arriving at the object of the investigation, namely, his credibility. It would, in any event, be an unnecessary attack and exposure of him to contempt and disgrace. Further, by such general inquiry as to character, the administration of justice would be hindered and delayed by collateral issues and be more easily made the channel of venting private hatred and malice. For these, among other reasons, we think the better general rule is that in impeaching the character of a witness in this mode the inquiry in

liminary step in the examination of such a witness to inquire if he is in possession of this knowledge.¹ If he answers in the affirmative he may then be asked what is the witness's general reputation for morality or for truth and veracity, as the rule of the jurisdiction requires, and if he answers that it is bad, he may next be asked whether from his knowledge of such general reputation he would believe the impeached witness under oath.²

chief must be restricted to his credibility; that is, his general reputation for truth and veracity."

1. Teese v. Huntingdon, 23 How. (U. S.) 13; Sorrelle v. Craig, 9 Ala. 534; Ward v. State, 28 Ala. 53; Hadjo v. Gooden, 13 Ala. 721; Nelson v. State, 32 Fla. 244; Cole v. State, 59 Ark. 50; Foulk v. Eckert, 61 Ill. 318; Eason v. Chapman, 21 Ill. 33; Cook v. Hunt, 24 Ill. 536; State v. Hart, 67 Iowa 142; Bates v. Barber, 4 Cush. (Mass.) 107; Wetherbee v. Norris, 103 Mass. 566; Kelley v. Proctor, 41 N. H. 139; People v. Rodrigo (Cal.), 8 Crim. L. Mag. 645; Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596; Young v. Com., 6 Bush (Ky.) 312; State v. Speight, 69 N. Car. 75; State v. Parks, 3 Ired. (N. Car.) 296; State v. O'Neale, 4 Ired. (N. Car.) 88.

If the witness says he has no knowledge of the general reputation of the person sought to be impeached, he ought to be told to stand aside. Counsel have no right to cross-examine their own witness to elicit impeaching testimony. State v. Perkins, 66 N. Car. 126; Com. v. Lawler, 12 Allen (Mass.) 585; Young v. Com., 6 Bush (Ky.) 312; Sorrelle v. Craig, 9 Ala. 534.

But a witness who is competent to testify to any fact is competent to testify to reputation for truth. There is no preliminary question of competency to be decided by the court as in the case of experts. The amount of information and means of knowledge of a witness to reputation are matters for the consideration of the jury. Bates v. Barber, 4 Cush. (Mass.) 108.

2. Mawson v. Hartsink, 4 Esp. 104; Carlos v. Brook, 10 Ves. Jr. 50; U. S. v. Masters, 4 Cranch C. C. 479; U. S. v. Vansickle, 2 McLean (U. S.) 219; Sorrelle v. Craig, 9 Ala. 534; M'Cutchen v. M'Cutchen, 9 Port. (Ala.) 650; Hadjo v. Gooden, 13 Ala. 721; Stevens v. Irwin, 12 Cal. 306; People v. Tyler, 35 Cal. 553; Eason v. Chapman, 21 Ill. 33; Massey v. Farmers' Nat. Bank, 104 Ill. 327; Robinson v. State, 16 Fla. 835;

Nelson v. State, 32 Fla. 244; Stokes v. State, 18 Ga. 17; Taylor v. Smith, 16 Ga. 7; Mobley v. Hamit, 1 A. K. Marsh. (Ky.) 590; State v. Howard, 9 N. H. 485; Titus v. Ash, 24 N. H. 319; Keator v. People, 32 Mich. 486; Hamilton v. People, 29 Mich. 173; Lyman v. Philadelphia, 56 Pa. St. 488; Knight v. House, 29 Md. 194; 96 Am. Dec. 515; People v. Mather, 4 Wend. (N. Y.) 229; People v. Rector, 19 Wend. (N. Y.) 569; People v. Davis, 21 Wend. (N. Y.) 309; Adams v. Greenwich Ins. Co., 70 N. Y. 166; Ford v. Ford, 7 Humph. (Tenn.) 92; Wilson v. State, 3 Wis. 798; Uhl v. Com., 6 Gratt. (Va.) 706; Griffin v. State, 26 Tex. App. 157; Mayes v. State (Tex. Crim. App. 1893), 24 S. W. Rep. 421; State v. Boswell, 2 Dev. (N. Car.) 209; State v. Johnson, 40 Kan. 266; Hudspeth v. State, 50 Ark. 534.

Professor Greenleaf seemed to be of the opinion that the weight of American authority was against permitting the witness to testify as to whether he would believe the impeached witness under oath, and he is supported in this opinion by the case of Phillips v. Kingfield, 19 Me. 375; 36 Am. Dec. 760, and Willard v. Goodenough, 30 Vt. 393; but the text writers generally, and the great weight of authority, support the rule as laid down in the text. Thus, in Hamilton v. People, 29 Mich. 186, the court said: "Until Mr. Greenleaf allowed a statement to creep into his work on evidence to the effect that the American authorities disapproved the English rule, it was never very seriously questioned. See 1 Greenl. Ev., § 461. It is a little remarkable that of the cases referred to to sustain this idea not one contained a decision upon the question and only one contained more than a passing dictum not in any way called for. Phillips v. Kingfield, 19 Me. 375; 36 Am. Dec. 760. The authorities referred to in that case contained no such decision, and the court, after reasoning out the matter somewhat carefully, declared the question was not presented by the

(2) *Cross-Examination*.—There is no occasion where witnesses are more prone to substitute their impressions or their prejudices in the place of facts than when testifying on the subject of character. Reputation is often affected by suspicion or aspersed by malevolence, and it is not infrequent that it is made the subject of detraction for the very purpose of attack on the trial where it is made the subject of inquiry.¹ The impeaching witness may, therefore, be required to state on cross-examination the names of the persons whom he has heard speak disparagingly of the other witness, what they said about him, etc. In other words, he may be required to answer such questions as are proper for the purpose of ascertaining the extent of his information and the source of his knowledge.²

c. REQUISITE KNOWLEDGE OF IMPEACHING WITNESS.—The object of an inquiry of this sort is, or should be, to bring to light the true character of the witness sought to be impeached,

record for decision. The American editors of Phillips and Starkie do not appear to have discovered any such conflict and do not allude to it. . . . So far as the reports show, the American decisions, instead of shaking the English doctrine, are very decidedly in favor of it and have so held upon repeated and careful consideration, and we have not been referred to, nor have we found, any considerable conflict."

The opinion of the impeaching witness must be based on general reputation. He should not be asked if he would believe the impeached witness where he was interested. *Massey v. Farmers' Nat. Bank*, 104 Ill. 327.

It is not essential that witnesses who state that they would not believe another person on oath, should ever have heard such person give evidence under oath. The real question is, whether they have a sufficient knowledge of his character to give such testimony. *Rex v. Bispham*, 4 C. & P. 392; 19 E. C. L. 437.

1. *Church, C. J.*, in *Weeks v. Hull*, 19 Conn. 379; 1 Am. Dec. 249.

2. *Mawson v. Hartsink*, 4 Esp. 102; *Weeks v. Hull*, 19 Conn. 379; 1 Am. Dec. 249; *Bates v. Barber*, 4 Cush. (Mass.) 107; *Robinson v. State*, 16 Fla. 835; *Nelson v. State*, 32 Fla. 244; *State v. Howard*, 9 N. H. 485; *Lower v. Winters*, 7 Cow. (N. Y.) 263; *Fulton Bank v. Benedict*, 1 Hall (N. Y.) 480; *People v. Mather*, 4 Wend. (N. Y.) 232; *Hutts v. Hutts*, 62 Ind. 215; *State v. Miller*, 71 Mo. 89; *Sorrelle v. Craig*, 9 Ala. 534; *Hadjo v. Gooden*, 13 Ala.

721; *State v. Meadows*, 18 W. Va. 658; *State v. Merriman*, 34 S. Car. 16.

In *People v. Annis*, 13 Mich. 517, *Cooley, J.*, said: "In nothing may parties be more easily mistaken than in judging of the general reputation of another for truth and veracity. They may either be mistaken in assuming the speech of one or two to be the voice of the community; or they may confound a reputation for something else with a reputation for untruth; or they may misconstrue reports; or they may honestly be mistaken in regard to their purport. Nothing is more common in practice than to see a witness placed upon the stand to impeach the general reputation of another for veracity when a cross-examination demonstrates that the reports only relate to a failure, probably an honest one, to meet obligations, while the party's real reputation for truth is above suspicion. Nothing short of a cross-examination, which compels the impeaching witness to state both the source of the reports and their nature, will enable the party either to test the correctness of the impeaching evidence or to protect the witness who is assailed, if he is assailed, unjustly."

The time for testing the knowledge of the witness is on cross-examination; the judge may properly prevent inquiries on the direct examination as to whether the impeaching witness has ever heard the reputation of the witness sought to be impeached, discussed. *Wood v. State*, 31 Fla. 221; *Bakeman v. Rose*, 14 Wend. (N. Y.) 110.

the better to enable the jury to judge of his credibility, and the legal evidence of his character is his general reputation in the community where he resides; that is, what the persons who have the best opportunity of knowing him say about him in their social and business intercourse.¹ It follows that the impeaching witness is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the other witness has been derived, nor, indeed, is he allowed to do so, but he must speak from his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant, and any question which does not call for such knowledge is an improper one, and ought to be rejected.²

Though an impeaching witness may not speak from his personal knowledge of the facts which establish reputation, he must

1. *Boynton v. Kellogg*, 3 Mass. 189; *Bates v. Barber*, 4 Cush. (Mass.) 107; *Coates v. Sulau*, 46 Kan. 341; *Crabtree v. Kile*, 21 Ill. 180; *Crabtree v. Hagenbaugh*, 25 Ill. 233; 79 Am. Dec. 324; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Dance v. McBride*, 43 Iowa 624; *Douglas v. Tousey*, 2 Wend. (N. Y.) 354; 20 Am. Dec. 616; *Kimmel v. Kimmel*, 3 S. & R. (Pa.) 337; 8 Am. Dec. 653.

2. *Clifford, J.*, in *Teese v. Huntingdon*, 23 How. (U. S.) 13.

To the same effect are *Holmes v. State*, 88 Ala. 26; 16 Am. St. Rep. 17; *Martin v. Martin*, 25 Ala. 211; *People v. Webster*, 89 Cal. 572; *People v. Bentley*, 77 Cal. 7; 11 Am. St. Rep. 225; *Benesch v. Waggner*, 12 Colo. 534; *Benesch v. Mitchelson*, 12 Colo. 539; *Nelson v. State*, 32 Fla. 244; *State v. Barrett*, 40 Minn. 65; *Boon v. Weathered*, 23 Tex. 675; *Griffin v. State*, 26 Tex. App. 157; *White v. Com.* (Ky. 1894), 28 S. W. Rep. 340.

The inquiry must be confined to the general reputation of the witness. The impeaching witness may not give his own opinion based on his personal knowledge. *People v. Markham*, 64 Cal. 157; 49 Am. Rep. 700; *State v. Boswell*, 2 Dev. (N. Car.) 209; *Bucklin v. State*, 20 Ohio 18; *Fulton Bank v. Benedict*, 1 Hall (N. Y.) 550; *Kitteringham v. Dance*, 58 Iowa 632; *State v. Egan*, 59 Iowa 636; *State v. Woodworth*, 65 Iowa 141; *Ayres v. DuPrey*, 27 Tex. 592.

When the impeaching witness has declared under oath that he knows the general reputation of the witness sought to be impeached, in the community where he lives, he is qualified to

proceed with his testimony. If he has mistaken his opinion based on personal knowledge for general reputation, it remains for the cross-examining party to develop that fact. *Bullard v. Lambert*, 40 Ala. 204; *State v. Christian*, 44 La. Ann. 950; *Paradise v. Sun Mut. Ins. Co.*, 6 La. Ann. 597; *State v. Reed*, 41 La. Ann. 581; *Nelson v. State*, 32 Fla. 244; *Morrison v. Press Pub. Co.* (Super. Ct.), 14 N. Y. Supp. 131; *Long v. State*, 23 Neb. 33; *State v. Meadows*, 18 W. Va. 658.

It is not proper to inquire what is said of the witness by others. The inquiry, on the examination in chief, must be as to what is said by people in general. *Hadjo v. Gooden*, 13 Ala. 721; *Wike v. Lightner*, 11 S. & R. (Pa.) 198; *Boynton v. Kellogg*, 3 Mass. 189; *Phillips v. Kingfield*, 19 Me. 375; 36 Am. Dec. 760.

It is not necessary that the impeaching witness be personally acquainted with the other. It is sufficient if he knows his general reputation in the community. *State v. Turner*, 36 S. Car. 539.

But to be acquainted with the general reputation of a person for truth and veracity it is not necessary to know what a majority of his neighbors and associates think and say of him, *Robinson v. State*, 16 Fla. 835; *Crabtree v. Hagenbaugh*, 25 Ill. 233; 79 Am. Dec. 324; *Crabtree v. Kile*, 21 Ill. 180; *Dave v. State*, 22 Ala. 23; though a witness should not take as his estimate of general reputation what two or three persons say of one. *Taylor v. Ryan* (Neb. 1884), 19 N. W. Rep. 475; *Matthewson v. Burr*, 6 Neb. 312.

speak from his personal knowledge of that reputation as established. What other persons have told him of the reputation of the witness sought to be impeached is but hearsay, or reputation of reputation, and does not qualify him to testify as an impeaching witness.¹ For example, a stranger sent by a party into the neighborhood of a witness to learn his general reputation, will not be permitted to testify as to the result of his inquiries.²

d. TIME AND PLACE OF ACQUIRING REPUTATION.—The impeaching evidence should, as a rule, relate to the general reputation of the witness in his present or recent place of residence.³ But a person's reputation is not to be impeached or sustained by calling as witnesses only a certain number of his nearest neighbors, nor are witnesses to be confined to what is said of a man among a few of those who live nearest to him. A man's neighborhood or place of residence extends, for these purposes, as far as he is well known; as far as people are acquainted with him and his character.⁴ It is, also, true that the material object of inquiry is the character of the witness at the time when he testifies;⁵

1. *Douglass v. Tousey*, 2 Wend. (N. Y.) 354; 20 Am. Dec. 616; *Curtis v. Fay*, 37 Barb. (N. Y.) 64; *White v. Com.* (Ky. 1894), 28 S. W. Rep. 340. Compare *Carlson v. Winterson* (C. Pl.), 31 N. Y. Supp. 430.

In *Haley v. State*, 63 Ala. 86, a witness called to impeach another witness was asked and permitted to answer the question whether he knew the general character of the other witness in his neighborhood from rumor. This the court held to be an improper question, saying: "Rumor is not always reputation. The word has many meanings. Its most common and accepted signification is a flying report traceable to no known or responsible source. Hence, a knowledge of character derived from rumor may be no more nor less than that furnished by a flying report brought to the knowledge of the witness. He may know nothing of the estimate in which the person of whom he testifies is held, beyond that which is brought to him by a flying report; still, a non-professional witness having only this information might ignorantly and innocently answer that he knew the general character from rumor. All legal practitioners have encountered difficulty in bringing to the comprehension of witnesses the legal import of the words general character when they became the subject of inquiry."

2. *Douglass v. Tousey*, 2 Wend. (N. Y.) 354; 20 Am. Dec. 616; *Reid v. Reid*, 17 N. J. Eq. 101.

3. *Sun Fire Office v. Ayerst*, 37 Neb. 184; *Long v. State*, 23 Neb. 34; *Marion v. State*, 20 Neb. 242; 57 Am. Rep. 825; *Fisher v. Conway*, 21 Kan. 25; 30 Am. Rep. 419; *Willard v. Goodenough*, 30 Vt. 393; *Buse v. Page*, 32 Minn. 111; *Heath v. Scott*, 65 Cal. 548; *Waddingham v. Hulet*, 92 Mo. 528; *Sorrelle v. Craig*, 9 Ala. 534; *People v. Lyons*, 51 Mich. 215; *Rawles v. State*, 56 Ind. 433; *Aurora v. Cobb*, 21 Ind. 492; *Louisville, etc., R. Co. v. Richardson*, 66 Ind. 43; *Kelley v. Proctor*, 41 N. H. 139; *Wallis v. White*, 58 Wis. 26; *Teese v. Huntingdon*, 23 How. (U. S.) 2.

4. *Kelley v. Proctor*, 41 N. H. 146; *Chess v. Chess*, 1 P. & W. (Pa.) 39.

It has been held that an inquiry as to the general reputation of a man in the county of his residence is not too broad. *Kimmel v. Kimmel*, 3 S. & R. (Pa.) 336; 8 Am. Dec. 655; *Boswell v. Blackman*, 12 Ga. 591.

But evidence of his reputation in a county where he has never resided is not admissible. *Combs v. Com.* (Ky. 1895), 29 S. W. Rep. 734.

5. *Stratton v. State*, 45 Ind. 468; *Walker v. State*, 6 Blackf. (Ind.) 1; *Rogers v. Lewis*, 19 Ind. 405; *Aurora v. Cobb*, 21 Ind. 492; *Willard v. Goodenough*, 30 Vt. 393.

In *Fisher v. Conway*, 21 Kan. 25; 30 Am. Rep. 419, it appeared that the court excluded evidence of the reputation of a witness subsequent to the commencement of the action. This was held to be error. *Brewer, J.*, delivering

but if some latitude were not allowed in this regard, it would, in many cases, be impossible to impeach the most corrupt witness, or to sustain the most truthful one.¹ The principle that the existence of a state of things once established by proof is presumed to continue the same until the contrary is shown is applicable, within reasonable limits, to the character of a witness proved to have once sustained a bad reputation for truth and veracity.² It is, therefore, competent to impeach a witness by proof of his reputation in a neighborhood where he formerly resided, if the evidence be not too remote in point of time.³ As the law prescribes no definite limit of time, the discretion of the court must be exercised in every instance where the proposed evidence is not so recent or remote as to preclude all differences of

the opinion of the court, said: "Another matter of alleged error is in the ruling of the court in reference to impeaching testimony. It excluded all testimony of knowledge of plaintiff's reputation for truth and veracity based upon rumors and reports, since the commencement of the action. In other words, the court made this inquiry: 'What was the plaintiff's reputation for truth and veracity before the commencement of this action?' and not, 'What is his reputation to-day, when he is testifying?' In this was error. Impeaching testimony is for the purpose of discrediting the witness by showing that the community in which he lives do not believe what he says; that he is such a notorious liar that he is generally disbelieved. It is his present credibility that is to be attacked; is he now to be believed? What do his neighbors think and say of him at the present time? not, what did they think and say months or years ago? True, general reputation is not established in a day; and so the inquiry is not to be restricted to any particular week or month or year. The reputation a man has in any community is based upon all the years, few or many, of his living in such community. He may not have entered the community until after the commencement of the action, and still have established a reputation for truth and veracity, or the reverse; for oftentimes a case is not tried until years after its commencement."

1. *Stratton v. State*, 45 Ind. 468; *Manion v. Lambert*, 10 Bush (Ky.) 295.

It is not necessary that evidence of reputation have reference to the precise time of the examination. *Rucker v. Beaty*, 3 Ind. 70.

2. *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 431.

In *State v. Lanier*, 79 N. Car. 622, the court said: "Witnesses are not and cannot be, in testifying on the subject of general character, limited to the times precisely when they speak, because reputation depends very greatly on reports which the witness must have heard before he is put on the stand for examination. Then, how long before is the question. No doubt evidence referring to the character of the witness sought to be impeached at a recent period would have more influence with the jury than evidence at a more remote period. Still, the evidence in each instance is of the same grade, and we cannot say that either would not aid the jury in estimating the value of what has been said by the witness. Men's characters, no doubt, change frequently, but in the eye of the law, they are not presumed to change suddenly."

Evidence of the reputation of a witness in a neighborhood from which he removed two years before the trial is admissible. *Norwood, etc., Co. v. Andrews*, 71 Miss. 641.

The law does not presume that a person of mature age, whose general character has been notoriously bad up to within a period of five years, has reformed so as to have acquired an unimpeachable reputation since that time. *Rathbun v. Ross*, 46 Barb. (N. Y.) 127.

3. *Holmes v. Stateler*, 17 Ill. 453; *Brown v. Luehrs*, 1 Ill. App. 74; *Blackburn v. Mann*, 85 Ill. 222; *State v. Lanier*, 79 N. Car. 622; *Hamilton v. People*, 29 Mich. 173; *Keator v. People*, 32 Mich. 486; *Pape v. Wright*, 116 Ind. 509.

opinion.¹ And the decisions are by no means uniform as to what constitutes a proper exercise of this discretion, some courts being much more liberal in their views regarding the admission of such testimony than others.²

c. PARTICULAR ACTS OF MISCONDUCT. — Whether the inquiry into the character of the witness be confined to his reputation for truth and veracity, or extend to his general moral character, the rule is uniform that evidence of specific crimes or of

1. *Watkins v. State*, 82 Ga. 231; 14 Am. St. Rep. 155; *Snow v. Grace*, 29 Ark. 131; *Holliday v. Cohen*, 34 Ark. 707; *Walker v. State*, 6 Blackf. (Ind.) 1; *Stratton v. State*, 45 Ind. 473.

In *Teese v. Huntingdon*, 23 How. (U. S.) 2, the court said: "Such testimony undoubtedly may properly be excluded by the court when it applies to a period of time so remote from the transaction involved in the controversy as thereby to become entirely unsatisfactory and immaterial; and as the law cannot fix that period of limitation, it must necessarily be left to the discretion of the court."

In *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 434, the court said: "No certain limit, in point of duration, can be laid down for inquiries like this. The impeaching party is not restricted in his evidence to the present time, but may look to the past, and it is only necessary to say here that the law does not absolutely shut out, as immaterial, an inquiry into the character of the witness four years before the trial."

2. It has been held that evidence of the bad reputation for truth and veracity of a witness sought to be impeached, at a time one and one-half years before the trial, was not too remote. *Com. v. Billings*, 97 Mass. 405. And the same has been held of evidence of a reputation two years before the trial, *Lawson v. State*, 32 Ark. 220; or three years, *Kelly v. State*, 61 Ala. 19; or four years, *Keator v. People*, 32 Mich. 484; *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 431.

Where a witness left the jurisdiction seven or eight years before the trial, it was held that proof of the reputation he left behind was admissible for the purpose of impeaching him, it not appearing that anyone within reach of the process of the court was acquainted with his reputation in his new domicile. *Watkins v. State*, 82 Ga. 233; 14 Am. St. Rep. 155. See also *Snow v. Grace*, 29 Ark. 131.

On the other hand, it has been held

that where the witness sought to be impeached had resided in another jurisdiction for two years, he could not be impeached, except by witnesses who knew his general reputation there. *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472. Compare *Stratton v. State*, 45 Ind. 468.

In *Missouri*, it has been held that such evidence relating to a period three years back was too remote. *Wood v. Matthews*, 73 Mo. 482.

Where a witness has resided in a jurisdiction five years and is well known, it is not permissible to attack his credibility by proof of his general reputation in the place of his former abode. *Webber v. Hanke*, 4 Mich. 198; *State v. Potts*, 78 Iowa 656; *Rucker v. Beaty*, 3 Ind. 70.

Where there is some evidence of the bad reputation of the witness in the neighborhood where he at present resides, there is no objection to evidence tending to prove also that he had a bad reputation at his former place of residence. *Memphis, etc., Packet Co. v. McCool*, 83 Ind. 392; 43 Am. Rep. 71; *People v. Abbot*, 19 Wend. (N. Y.) 192.

Reputation After Commencement of Action. — The fact that the testimony of a witness was taken by commission some time before the trial, is no objection to proof of his bad reputation for truth and veracity at the time of the trial. *Dollner v. Lintz*, 84 N. Y. 669.

Unless the testimony touching his reputation is founded on opinions expressed *post litem motam*. *Reid v. Reid*, 17 N. J. Eq. 101.

And even in that case, it seems that the impeaching testimony should be received, leaving it to the party who called the impeached witness to show by cross-examination or by direct testimony that a conspiracy had been formed, after the institution of the prosecution or suit, to destroy the credit of his witnesses. *State v. Howard*, 9 N. H. 485; *Fisher v. Conway*, 21 Kan. 18; 30 Am. Rep. 419.

particular acts of misconduct on his part, is not admissible for the purpose of impeaching his credit. The impeaching evidence must be confined to the general reputation of the witness.¹

f. PARTICULAR TRAITS OF CHARACTER—(1) When Not Material to the Issue.—It is also a general rule that peculiar traits of character, aside from that of habitual lying, shall not be made the subject of inquiry for the purpose of impeaching a witness.² Thus, a witness may not be impeached by evidence that he is in the habit of associating with lewd and unchaste women,³ neither is it permissible, as a rule, to impeach a female witness by attacking her reputation for chastity,⁴ even where it is proposed to

1. *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393; *Rex v. Watson*, 32 How. St. Tr. 406; *Layer's Case*, 16 How. St. Tr. 285; *Lowery v. State*, 98 Ala. 45; *Nugent v. State*, 18 Ala. 521; *People v. O'Brien*, 96 Cal. 171; *People v. Sherman* (Cal. 1893), 32 Pac. Rep. 879; *Barkly v. Copeland*, 86 Cal. 483; *Jones v. Duchow*, 87 Cal. 109; *Sharon v. Sharon*, 79 Cal. 633; *People v. Bowers* (Cal. 1888), 18 Pac. Rep. 660; *Clements v. McGinn* (Cal. 1893), 33 Pac. Rep. 920; *Johnson v. State*, 61 Ga. 305; *Ratteree v. Chapman*, 79 Ga. 574; *Wilson v. State*, 16 Ind. 392; *Rawles v. State*, 56 Ind. 433; *Blough v. Parry* (Ind. 1895), 40 N. E. Rep. 70; *Frye v. Illinois Bank*, 11 Ill. 367; *Eason v. Chapman*, 21 Ill. 33; *Crabtree v. Kile*, 21 Ill. 180; *Hansell v. Erickson*, 28 Ill. 257; *Dimick v. Downs*, 82 Ill. 570; *Gifford v. People*, 87 Ill. 210; *Sheahan v. Collins*, 20 Ill. 326; 71 Am. Dec. 271; *State v. Sibley* (Mo. 1895), 31 S. W. Rep. 1033; *State v. Rogers*, 108 Mo. 202; *State v. Grant*, 79 Mo. 113; 49 Am. Rep. 218; *State v. Bulla*, 89 Mo. 595; *State v. Gesell*, 124 Mo. 531; *Warner v. Lockerby*, 31 Minn. 421; *Utley v. Merrick*, 11 Met. (Mass.) 302; *People v. Rector*, 19 Wend. (N. Y.) 580; *Bakeman v. Rose*, 14 Wend. (N. Y.) 110; *Gilpin v. Daly* (Supreme Ct.), 12 N. Y. Supp. 448; *People v. Herrick*, 13 Johns. (N. Y.) 84; 7 Am. Dec. 364; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Macdonald v. Garrison*, 2 Hilt. (N. Y.) 510; *State v. Boswell*, 2 Dev. (N. Car.) 209; *Carlson v. Winterson* (C. Pl.), 31 N. Y. Supp. 430; *Barton v. Morphee*, 2 Dev. (N. Car.) 520; *State v. Garland*, 95 N. Car. 671; *Clink v. Gunn*, 90 Mich. 135; *Taylor v. Com.*, 3 Bush (Ky.) 508; *Evans v. Smith*, 5 T. B. Mon. (Ky.) 363; 17 Am. Dec. 74; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785; *Young v. Com.*, 6 Bush (Ky.) 312; *Vance v. Com.* (Va.

1894), 19 S. E. Rep. 785; *Rixey v. Bayse*, 4 Leigh (Va.) 330; *Bishop v. Wheeler*, 46 Vt. 409; *Crane v. Thayer*, 18 Vt. 162; *Merriman v. State*, 3 Lea (Tenn.) 393; *Wike v. Lightner*, 11 S. & R. (Pa.) 108; *Leverich v. Frank*, 6 Oregon 212; *Muetze v. Tuteur*, 77 Wis. 236; *Ketchingman v. State*, 6 Wis. 426; *Moore v. Moore*, 73 Tex. 383; *Boon v. Weathered*, 23 Tex. 675; *Griffith v. State* (Ind. 1895), 39 N. E. Rep. 440.

And the ruling is the same in equity as at law. *Troup v. Sherwood*, 3 Johns. Ch. (N. Y.) 558; *Purcell v. M'Namara*, 8 Ves. Jr. 324; *Wood v. Hammerton*, 9 Ves. Jr. 145; *Carlos v. Brook*, 10 Ves. Jr. 49; *White v. Fussell*, 1 Ves. & B. 151; *Watmore v. Dickinson*, 2 Ves. & B. 267.

Evidence that a witness lied on another occasion is not admissible for the purpose of impeaching him. *Com. v. Kennon*, 130 Mass. 39; *Luther v. Skeen*, 8 Jones (N. Car.) 356; *Walker v. State*, 6 Blackf. (Ind.) 1.

2. *Ward v. State*, 28 Ala. 63; *Cline v. State*, 51 Ark. 142. While the law so recognizes the affinity of vices as not to regard the testimony of a witness of bad moral character as above all exception, it rejects the conclusion that a person guilty of one immoral habit is necessarily disposed to practice all others. *Bakeman v. Rose*, 18 Wend. (N. Y.) 154. A witness's reputation for honesty is not open to inquiry for the purpose of impeachment. *Leonard v. Pope*, 27 Mich. 145. A witness may not be impeached by proof that he is a confidence man and a thief. *Conway v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 401.

3. *State v. Jackson*, 44 La. Ann. 160; *State v. Parker*, 7 La. Ann. 84; *Cline v. State*, 51 Ark. 140; *State v. Sibley* (Mo. 1895), 31 S. W. Rep. 1033.

4. *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393; *Rex v. Hodgson*, R. & R.

prove that she is a common prostitute.¹ In a few cases, however, the wholesome restraints of this rule have been disregarded.² It is not competent to attack the reputation of a witness by proof that he or she is the keeper of a house of ill fame.³ In an action by a father to recover damages for the seduction of his daughter, proof of her bad character is admissible in mitigation of damages.⁴ And in a bastardy case the mother may be cross-examined in regard to her sexual intercourse with other men about the period of conception, in order to show that it cannot be known who the father is,⁵ but in such case it is not competent to prove her bad reputation for chastity prior to the

C. C. 211; *Macbride v. Macbride*, 4 Esp. 242; *People v. Mills*, 94 Mich. 630; *People v. Whitson*, 43 Mich. 419; *People v. Abbott*, 97 Mich. 487; *Com. v. Churchill*, 11 Met. (Mass.) 538; 45 Am. Dec. 229; *Jackson v. Lewis*, 13 Johns. (N. Y.) 504; *Bakeman v. Rose*, 14 Wend. (N. Y.) 110; *People v. Sherman* (Cal. 1893), 32 Pac. Rep. 879; *People v. Yslas*, 27 Cal. 630; *Spicer v. State* (Ala. 1894), 16 So. Rep. 706; *Holland v. Barnes*, 53 Ala. 86; 25 Am. Rep. 595; *Spears v. Forrest*, 15 Vt. 435; *State v. Smith*, 7 Vt. 141; *Morse v. Pineo*, 4 Vt. 281; *State v. Randolph*, 24 Conn. 363; *Merriman v. State*, 3 Lea (Tenn.) 393; *Leverich v. Frank*, 6 Oregon 212; *Smith v. State*, 58 Miss. 867; *State v. Larkin*, 11 Nev. 314; *Kilburn v. Mullen*, 22 Iowa 502; *Gilchrist v. McKee*, 4 Watts (Pa.) 380; 28 Am. Dec. 721; *Jones v. State*, 13 Tex. 168; 62 Am. Dec. 550; *U. S. v. Masters*, 4 Cranch. (C. C.) 479; *Teese v. Huntingdon*, 23 How. (U. S.) 2.

In *Com. v. Murphy*, 14 Mass. 387, it was held that a female witness might be impeached by proof that she was a common prostitute, but the authority of this case was greatly shaken by the case of *Com. v. Moore*, 3 Pick. (Mass.) 196; and it was subsequently overruled in *Com. v. Churchill*, 11 Met. (Mass.) 538; 45 Am. Dec. 229.

1. *Com. v. Churchill*, 11 Met. (Mass.) 538; 45 Am. Dec. 229; *Bakeman v. Rose*, 18 Wend. (N. Y.) 146; *Jackson v. Lewis*, 13 Johns. (N. Y.) 504; *State v. Randolph*, 24 Conn. 363; *Spears v. Forrest*, 15 Vt. 435; *Morse v. Pineo*, 4 Vt. 281; *State v. Hobgood*, 46 La. Ann. 855; *Rhea v. State*, 100 Ala. 119; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8; *McInerney v. Irvin*, 90 Ala. 275; *Stayton v. State*, 32 Tex. Crim. Rep. 33.

2. Thus it has been held in a few

cases that inquiry may be made into the general character of a witness for chastity, though specific acts of lewdness may not be proved. *State v. Shields*, 13 Mo. 236; 53 Am. Dec. 147; *State v. Grant*, 79 Mo. 133; 49 Am. Rep. 218; *Weathers v. Barksdale*, 30 Ga. 888; *Evans v. Smith*, 5 T. B. Mon. (Ky.) 365; 17 Am. Dec. 74.

It was intimated in *State v. Grant*, 76 Mo. 236, that this rule did not apply to male witnesses, and indeed it has been expressly so decided by the appellate court of that state. *State v. Clawson*, 30 Mo. App. 144; *State v. Coffey*, 44 Mo. App. 455. But in *State v. Shroyer*, 104 Mo. 441; 24 Am. St. Rep. 344, the supreme court of the state held that the rule applied to male as well as female witnesses, remarking: "If it be true that the general character of a man is not affected by his reputation for unchastity, the evidence of such reputation will do him no injury." It may be remarked that such reasoning merely dodges the question, and affords no justification for the admission of irrelevant testimony, and, besides, it ignores the injury which may be done to the cause of the party who called the witness thus attacked. The court cited, in support of its ruling, the case of *State v. Rider*, 95 Mo. 486.

3. *Birmingham Union R. Co. v. Hale*, 90 Ala. 8; *Vance v. Com.* (Va. 1894), 19 S. E. Rep. 785; *Wilson v. State*, 16 Ind. 392. Compare *State v. Cagle*, 114 N. Car. 835.

But a witness may be asked on cross-examination if she has not kept girls for the purpose of prostitution. *State v. Hack*, 118 Mo. 92.

4. *Hogan v. Cregan*, 6 Robt. (N. Y.) 138; *Shattuck v. Myers*, 13 Ind. 46; 74 Am. Dec. 236. Compare *Ford v. Jones*, 62 Barb. (N. Y.) 484.

5. Anonymous, 37 Miss. 54.

period of conception, for the purpose of discrediting her as a witness.¹

A witness may not be impeached by proof that he is a common drunkard;² or that he is in the habit of eating opium;³ but it is competent to show that when the litigated event occurred the witness was drunk,⁴ or was under the influence of opium.⁵

(2) *When Material to the Issue.*—In cases where reputation for chastity has a direct bearing upon the probability of the facts stated by the witness, it may be proved for the purpose of impeachment. Thus, in a prosecution for rape, or for assault with intent to commit a rape, the defendant may prove the unchaste character of the prosecutrix, as tending to show the improbability of her story.⁶ But, according to the weight of authority, it is not competent to prove her specific acts of illicit intercourse except with the defendant himself.⁷ The reason for this rule, however, has never been quite satisfactory to the bench or the bar,

1. Anonymous, 37 Miss. 54; Com. v. Moore, 3 Pick. (Mass.) 194; Rawles v. State, 56 Ind. 433; Morse v. Pineo, 4 Vt. 281.

But on the trial of an indictment for seduction, under a promise of marriage, the general character of the complainant for chastity is open to inquiry. *McTyler v. State*, 91 Ga. 254.

2. *Brindle v. McIlvaine*, 10 S. & R. (Pa.) 282; *People v. Kahler*, 93 Mich. 625.

In *Missouri*, where the rule is very liberal as to the admission of impeaching testimony, it has been held proper to prove that a female witness is a drunkard and a common prostitute. *State v. Grant*, 79 Mo. 133; 49 Am. Rep. 218.

3. *Eldridge v. State*, 27 Fla. 162.

4. *State v. Rollins*, 113 N. Car. 732; *Com. v. Brady*, 147 Mass. 583; *Willis v. State* (Neb. 1894), 61 N. W. Rep. 254; *State v. Nolan* (Iowa, 1894), 61 N. W. Rep. 181; *Mace v. Reed*, 89 Wis. 440.

5. *People v. Webster*, 139 N. Y. 73.

6. *Rex v. Barker*, 3 C. & P. 589; 14 E. C. L. 467; *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393; *Rex v. Martin*, 6 C. & P. 562; 25 E. C. L. 544; *Reg. v. Mercer*, 6 Jur. 243; *McQuirk v. State*, 84 Ala. 435; 5 Am. St. Rep. 381; *Pleasant v. State*, 15 Ark. 652; *Com. v. Kendall*, 113 Mass. 210; *People v. McLean*, 71 Mich. 309; *State v. Reed*, 41 La. Ann. 581; *People v. Abbot*, 19 Wend. (N. Y.) 192; *State v. DeWolf*, 8 Conn. 100; 20 Am. Dec. 90; *Camp v. State*, 3 Ga. 419; *State v. Forshner*, 43 N. H. 89; 80

Am. Dec. 132; *McCombs v. State*, 8 Ohio St. 643; *McDermott v. State*, 13 Ohio St. 332; 82 Am. Dec. 444; *Pratt v. State*, 19 Ohio St. 277; *State v. Daniel*, 87 N. Car. 507; *State v. White*, 35 Mo. 500; *Anderson v. State*, 104 Ind. 467; *State v. Ward*, 73 Iowa 532; *Rogers v. State*, 1 Tex. App. 187; *Jenkins v. State*, 1 Tex. App. 346; *Dorsey v. State*, 1 Tex. App. 33; *Wilson v. State*, 17 Tex. App. 532; *Shields v. State*, 32 Tex. Crim. Rep. 498.

In *Fry v. Com.*, 82 Va. 336, it was held that the complainant might not be asked, on cross-examination, if she had not been before a person of unchaste character, though the court said it might have been proved by other witnesses, if the defendant were able to produce them.

7. *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393; *Rex v. Hodgson*, R. & R. C. C. 211; *Reg. v. Cockcroft*, 11 Cox C. C. 410; *Reg. v. Dean*, 6 Cox C. C. 23; *Pleasant v. State*, 15 Ark. 624; *McQuirk v. State*, 84 Ala. 435; 5 Am. St. Rep. 381; *Boddie v. State*, 52 Ala. 395; *Shartzler v. State*, 63 Md. 149; 52 Am. Rep. 501; *State v. Knapp*, 45 N. H. 148; *State v. Forshner*, 43 N. H. 89; 80 Am. Dec. 132; *State v. White*, 35 Mo. 500; *Richie v. State*, 58 Ind. 355; *Wilson v. State*, 16 Ind. 392; *Com. v. Harris*, 131 Mass. 336; *Com. v. Regan*, 105 Mass. 593; *McCombs v. State*, 8 Ohio St. 643; *McDermott v. State*, 13 Ohio St. 332; 82 Am. Dec. 444; *Shirwin v. People*, 69 Ill. 55; *State v. Fitzsimon* (R. I. 1893), 27 Atl. Rep. 446; *Pefferling v. State*, 40 Tex.

491; *Dorsey v. State*, 1 Tex. App. 33; *Wilson v. State*, 17 Tex. App. 533. And the same rule applies in a civil action to recover damages for an indecent assault. *Miller v. Curtis*, 158 Mass. 127.

In *Minnesota*, this rule applies where the alleged offense is assault with intent to commit rape. *State v. Vadnais*, 21 Minn. 384. In *Reg. v. Robins*, 2 M. & Rob. 512, Coleridge, J., after consultation with Erskine, J., was of the opinion that the prosecutrix might be asked, on cross-examination, if she had had sexual intercourse with other men, and that witnesses might be called to contradict her if she answered in the negative. But if this case was ever considered authority it was expressly overruled in *Reg. v. Holmes*, L. R., 1 C. C. R. 334, where it was said: "The question raised in this case is one of very great importance; and if we had entertained any substantial doubt upon it, we should have thought it right to submit it for the opinion of all the judges. But when we look, first, at the principles applicable to the case, and, secondly, at authority, we think it impossible to doubt what the decision ought to be. The question is, whether, on an indictment for rape, or for attempt at rape, or for an indecent assault, amounting in substance to an attempt at rape, if the prosecutrix is asked, in cross-examination, whether she has had connection with another person not the prisoner, and denies it, evidence can be called to contradict her. We are all of opinion that it cannot. In the first place, the general rule of evidence is that if a question be put in cross-examination as to a collateral point, the answer must be taken for better or for worse. And the reason is obvious. If such evidence as that here proposed were admitted, the whole history of the prosecutrix's life might be gone into. If a charge might be made as to one man, it might be made as to fifty, and that without notice to the prosecutrix. It would not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice. Upon principle, therefore, we must hold that the answer is binding. When we look at the authorities the case is still clearer. The first case on the subject is *Rex v. Hodgson*, R. & R. C. C. 211. That case was heard first before eight of the judges, and afterwards before the whole

number. It was an actual decision that the prosecutrix, on a charge of rape, was not bound to answer such a question as that here put. That seems, as a matter of principle, to involve that, if the question had been answered, the answer would have been binding. But, further, the second objection taken in that case seems to raise the very point; and upon that the judges lay down the law distinctly, in accordance with the view which we take. That case is therefore an actual decision, involving in principle the point now in question, and a *dictum*, at the least, by some of the most learned judges who ever sat, upon the point. *Reg. v. Cockcroft*, 11 Cox C. C. 410, was an indictment for rape, and was tried first before Martin, B., and again before Willes, J., and both of those learned judges held that such evidence as that here tendered was inadmissible. So far all the decisions entirely support that view which we think to follow clearly from the settled principles of the law of evidence. We are asked to abandon that view upon the authority of *Reg. v. Robins*, 2 M. & Rob. 512. That was, no doubt, a decision of Coleridge, J., after consulting Erskine, J., upon the very point now in dispute. But we cannot follow that ruling in opposition to the whole current of authority upon the question. In *Rex v. Barker*, 3 C. & P. 589; 14 E. C. L. 467, the question was as to evidence showing the prosecutrix to be a common prostitute, and such evidence has long been held material. In *Rex v. Martin*, 6 C. & P. 562; 25 E. C. L. 544, the evidence was as to the prosecutrix having previously had connection with the prisoner, and such evidence is undoubtedly admissible, for it has a direct bearing upon the question of consent. These are really all the cases upon the subject. But from *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393, it may be collected that Holroyd, J., held the same view in the case of an indictment for an attempt at rape. We have, therefore, a deliberate judgment of the twelve judges, the decisions of Martin, B., and Willes, J., and the opinion of Holroyd, J., against the ruling of Coleridge, J."

Whatever may be the rule in regard to the relations of the prosecutrix with other persons, her previous acts of incontinence with the defendant may always be made the subject of inquiry in order to show the improbability that she resisted him. *Rex v. Martin*, 6 C.

and there is good authority supporting the rule that previous illicit intercourse with other men may be shown as bearing directly on the principal question at issue, that is, whether the intercourse was by force or with the consent of the prosecutrix, and this for the reason that no impartial mind can resist the conclusion that a female who has recently been in the habit of indulging in illicit intercourse with others, will not be so likely to resist as one who is spotless and pure.¹ In case the prosecutrix is a child under the age of consent, the law conclusively presumes

& P. 562; 25 E. C. L. 544; *Bedgood v. State*, 115 Ind. 275; *State v. Foshner*, 43 N. H. 89; *Pleasant v. State*, 15 Ark. 624; *People v. Jenness*, 5 Mich. 305; *Hall v. People*, 47 Mich. 638; *Strany v. People*, 24 Mich. 1; *McQuirk v. State*, 84 Ala. 435; 5 Am. St. Rep. 381; *People v. Abbot*, 19 Wend. (N. Y.) 192; *Woods v. People*, 55 N. Y. 515; 14 Am. Rep. 309; *State v. Cook*, 65 Iowa 560; *State v. Jefferson*, 6 Ired. (N. Car.) 305; *State v. Reed*, 39 Vt. 417; 94 Am. Dec. 337; *Wilson v. State*, 17 Tex. App. 525.

1. *State v. Johnson*, 28 Vt. 512; *State v. Reed*, 39 Vt. 417; 94 Am. Dec. 337; *People v. Benson*, 6 Cal. 222; 65 Am. Dec. 506; *Benstine v. State*, 2 Lea (Tenn.) 172; 31 Am. Rep. 593; *Titus v. State*, 7 Baxt. (Tenn.) 132. In *State v. Jefferson*, 6 Ired. (N. Car.) 305, it was held that the prisoner might give evidence that the woman had been his concubine, but that he might not give in evidence, to prove her a strumpet, that she had had criminal connection with one or more other individuals. But in *State v. Murray*, 63 N. Car. 31, a judgment of conviction was reversed because the trial court refused to allow the prisoner to prove that the prosecutrix had had intercourse with other men; and in *State v. Freeman*, 100 N. Car. 435, it was held proper to ask the prosecutrix, on cross-examination, if she had not given birth to a bastard child. This rule was sanctioned in *People v. Abbot*, 19 Wend. (N. Y.) 192, where Cowan, J., delivering the opinion of the court, said: "I am fully aware of the two cases of *Rex v. Hodgson*, R. & R. C. C. 211, and *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393, in which it was held that you shall not be permitted to inquire of the prosecutrix as to connection with other men. It is with a view to these cases that I have thought it my duty to consider the question *a priori*, and I must say that they appear to me entirely anomalous,

not only when compared with the cases in respect to circumstantial evidence generally, but with adjudications in respect to evidence receivable on trials for this very crime. . . . The decisions of the courts at Westminster Hall are certainly very high evidence of the law. In most cases, I agree that we ought to regard them as conclusive; but no court can overrule the law of human nature, which declares that one who has already started on the road of prostitution, would be less reluctant to pursue her way than another who remains at her home of innocence, and looks upon such a career with horror. I have long had occasion to know and consider much the two cases cited as adverse to the reception of this evidence; and I never yet could bring myself to doubt that circumstances much more remote and of less influence are constantly received on the very best authority. Those cases are anomalous in more than one respect. While they reject evidence of the fact, they receive evidence of reputation of the fact, or mere hearsay. They seem to suppose that the testimony was proposed to shake the general credibility of the witness, as if it went to truth and veracity. That is not so. It goes to her credibility in the particular matter, to a circumstance relevant to the case in hand, from which the jury are asked to say she did consent; and it may be proved by the prosecutrix, or, if she deny it, by others. It is most strange that a reputation of a want of chastity should be preferred in evidence to direct proof. No reason is given for such a distinction by the court; but the counsel in *Rex v. Hodgson*, R. & R. C. C. 211, did say that general reputation alone was to be received, because it was not to be presumed the prosecution would come prepared to meet evidence of the particular fact. Such a reason would go to show that every circumstance in a chain must be shown by reputation instead of

that she is not capable of giving her consent, and evidence of her reputation for chastity, or the lack of it, is not admissible, since every act of intercourse with her is a crime committed against her.¹

g. CONVICTION OF AN INFAMOUS CRIME.—In many jurisdictions, the common-law disability of a witness resulting from his conviction of an infamous crime has been removed by statute,² but where this has been done, such conviction may still be proved for the purpose of impeaching the witness.³ In some jurisdictions, it is not competent to prove the conviction of any crime which would not have rendered the witness infamous at common law,⁴ while

ocular proof. I am unwilling to deprive prisoners of any evidence sanctioned by authority in this kind of prosecution. Their case is often hard enough. 1 Hale's P. C. 635, 636. But I never yet could see why reputation should be received upon any principle peculiar to such a case. It cannot be, as supposed in *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393, that the woman's character is in issue, in any other sense than that of every witness, who may be impeached as generally unworthy of credit. The books are certainly strong and uncontradicted that on trying this offense her character as a common strumpet may be proved for such a purpose. *Rex v. Barker*, 3 C. & P. 589; 14 E. C. L. 467. . . . I must, with great deference, and on the grounds already mentioned, be allowed to differ from Mr. Justice Holroyd, in *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393, when he treats the inquiry into acts of lewdness, as collateral, saying, that even though you question the prosecutrix as to particular facts, you must take her answer as conclusive. The same idea seems to have been entertained in *Rex v. Hodgson*, R. & R. C. C. 211. I have been quite unfortunate if I have not shown that in this case of rape, the question is very material in examining the probability of consent; the vital inquiry in the cause. Those authorities are very severe, and I never could bring myself to act upon them in their full extent."

The general term of the supreme court refused to follow this decision in *People v. Jackson*, 3 Park. Cr. Rep. (N. Y.) 391; but in *Woods v. People*, 55 N. Y. 515; 14 Am. Rep. 309 (*reversing* 1 Thomp. & C. (N. Y.) 610), it was held that evidence of the complainant's habits of receiving men at her dwelling, for the purpose of promiscuous intercourse with them, was competent on

the question of consent. And in *Brennan v. People*, 7 Hun (N. Y.) 171, the court followed the rule laid down in *People v. Abbot*, 19 Wend. (N. Y.) 192, citing *People v. Dohring*, 59 N. Y. 383; 17 Am. Rep. 349, and *Woods v. People*, 55 N. Y. 515; 14 Am. Rep. 309. Compare *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418.

1. *People v. Abbott*, 97 Mich. 484; *People v. Glover*, 71 Mich. 303; *State v. Eberline*, 47 Kan. 155.

2. See *INFAMY*, vol. 10, p. 612.

3. *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Baltimore, etc., R. Co. v. Rambo*, 59 Fed. Rep. 75; *Ford v. State*, 91 Ga. 162; *Coleman v. State*, 94 Ga. 85; *Georgia R. Co. v. Homer*, 73 Ga. 251; *State v. Kelsoe*, 76 Mo. 507; *State v. Loehr*, 93 Mo. 103; *Coble v. State*, 31 Ohio St. 100; *Glenn v. Clore*, 42 Ind. 60.

In an action to recover a penalty, the judgment is not a conviction of a crime though the penalty be for the commission of a crime. *Arhart v. Stark* (Super. Ct.), 27 N. Y. Supp. 301.

The record of conviction is competent impeaching evidence, though the witness has been pardoned. *Dudley v. State*, 24 Tex. App. 163; *Bennett v. State*, 24 Tex. App. 73; *Long v. State*, 23 Neb. 33.

4. *Card v. Foot*, 57 Conn. 427; *Bartholomew v. People*, 104 Ill. 601; 44 Am. Rep. 97; *State v. Taylor*, 98 Mo. 240.

Nothing less than a conviction of a felony is admissible. *Hanners v. McClelland*, 74 Iowa 318; *Pitner v. State*, 23 Tex. App. 366.

The conviction of a misdemeanor is immaterial. *State v. Payne*, 6 Wash. 563; *State v. Taylor*, 98 Mo. 240; *State v. Smith*, 125 Mo. 2.

A conviction under a city ordinance against disorderly conduct and other

in others, the language of the statute is broad enough to let in the record of conviction of any crime, whether a felony or a misdemeanor.¹ An intermediate rule is that the crime must be of such a nature as to imply moral turpitude or a lack of veracity in the person committing it.² The fact that a witness is under indictment may not be proved for the purpose of impeaching him;³ neither is evidence of his arrest upon a criminal charge admissible for that purpose.⁴ The record is the best evidence, and, in direct impeachment, is the only admissible evidence of conviction,⁵ though it has been held in many cases that the witness himself may be cross-examined on the subject.⁶ And where this is not allowed, he may, nevertheless, be asked if he has been in prison, since that is an independent fact which may be proved without the production of documentary evidence.⁷

6. Impeaching One's Own Witness—*a. IN GENERAL.*—A party who voluntarily calls a witness in support of his case thereby so

minor offenses, cannot be shown to impeach a witness. *Coble v. State*, 31 Ohio St. 100; *Arhart v. Stark* (Super. Ct.), 27 N. Y. Supp. 301; *State v. Taylor*, 98 Mo. 240; *Goode v. State*, 32 Tex. Crim. Rep. 505.

1. *Com. v. Ford*, 146 Mass. 131; *Helm v. State*, 67 Miss. 562.

The record of conviction for assault and battery may be received to impeach the witness. *Quigley v. Turner*, 150 Mass. 108; *State v. Sauer*, 42 Minn. 258.

2. *Langhorne v. Com.*, 76 Va. 1012; *Uhl v. Com.*, 6 Gratt. (Va.) 706.

Proof of conviction of petit larceny is competent by way of impeachment. *Carpenter v. Nixon*, 5 Hill (N. Y.) 260; *Newcomb v. Griswold*, 24 N. Y. 300; *State v. Wyse*, 33 S. Car. 582.

3. *Lipe v. Eisenlerd*, 32 N. Y. 229; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555; 20 Am. Dec. 649; *West v. Lynch*, 7 Daly (N. Y.) 245; *People v. Gay*, 7 N. Y. 378; *Van Bokkelen v. Berdell*, 130 N. Y. 141; *Sullivan v. Newman* (Supreme Ct.), 17 N. Y. Supp. 424; *Com. v. Sullivan*, 161 Mass. 59.

It has been held, however, that the witness may be asked, on cross-examination, if he is not under indictment. *Carroll v. State*, 32 Tex. Crim. Rep. 431; *Roberts v. Com.* (Ky. 1892), 20 S. W. Rep. 267; *People v. Hite*, 8 Utah 461.

4. *Loewer's Gambrinus Brewery Co. v. Bachman* (C. Pl.), 18 N. Y. Supp. 138; *State v. Howard*, 102 Mo. 142; *Pullen v. Pullen*, 43 N. J. Eq. 136.

5. *U. S. v. Biebusch*, 1 Fed. Rep. 213; *Baltimore, etc., R. Co. v. Rambo*, 59 Fed. Rep. 75; *Newcomb v. Griswold*, 24 N. Y. 298; *Hilts v. Colvin*, 14 Johns. (N. Y.) 182; *Hall v. Brown*, 30 Conn. 551; *Johnson v. State*, 48 Ga. 116; *Com. v. Gorham*, 99 Mass. 420; *Com. v. Green*, 17 Mass. 515; *Com. v. Sullivan*, 161 Mass. 59; *State v. Payne*, 6 Wash. 563; *Boyd v. State* (Tenn. 1895), 29 S. W. Rep. 901.

The whole record should be introduced in evidence. *Kirby v. People*, 123 Ill. 436; *Doggett v. Simms*, 79 Ga. 253; *Norton v. Perkins* (Vt. 1894), 31 Atl. Rep. 148.

6. *State v. Taylor*, 118 Mo. 159; *State v. Miller*, 100 Mo. 606; *State v. Martin* (Mo. 1894), 28 S. W. Rep. 12; *State v. Pratt*, 121 Mo. 566; *Clemens v. Conrad*, 19 Mich. 170; *Wilbur v. Flood*, 16 Mich. 40; 93 Am. Dec. 203; *People v. Cummins*, 47 Mich. 334; *State v. Pfefferle*, 36 Kan. 90; *State v. Probasco*, 46 Kan. 310; *State v. O'Brien*, 81 Iowa 95; *State v. Ellwood*, 17 R. I. 763; *State v. Lawhorn*, 88 N. Car. 634; *State v. Patterson*, 2 Ired. (N. Car.) 346; 38 Am. Dec. 699; *State v. Garrett*, Bush. (N. Car.) 357; *McLaughlin v. Mencke* (Md. 1894), 30 Atl. Rep. 603.

7. *Real v. People*, 42 N. Y. 270; *Newcomb v. Griswold*, 24 N. Y. 298; *Lights v. State*, 21 Tex. App. 313; *Smith v. State*, 64 Md. 25; 54 Am. Rep. 752.

A witness may be asked, on cross-examination, if he is working out a fine for theft. *Sentell v. State* (Tex. Crim. App. 1895), 30 S. W. Rep. 226.

far vouches for his credibility that he will not, as a general rule, be permitted to impeach him either by proof of his general reputation, or of his contradictory statements made out of court at another time.¹

b. CONTRADICTING ONE'S OWN WITNESS.—It must not be understood, however, that a party, by calling a witness who unexpectedly gives evidence against him, is concluded by such evidence. He may call other witnesses to prove that the facts are otherwise than as stated, and it is no objection to any relevant evidence of the material facts upon which he relies to support his case or defense, that it may incidentally contradict and discredit one or more of his own witnesses.²

1. Bull. N. P. 297; *Ewer v. Baker*, 3 B. & C. 746; 10 E. C. L. 220; *Hickory v. U. S.*, 151 U. S. 303; *Bullard v. Pear-sall*, 53 N. Y. 230; *People v. Safford*, 5 Den. (N. Y.) 118; *Thompson v. Blanchard*, 4 N. Y. 311; *Sanchez v. People*, 22 N. Y. 147; *Thalheimer v. Klapetzy* (Supreme Ct.), 12 N. Y. Supp. 941; *Pollock v. Pollock*, 71 N. Y. 137; *Moffatt v. Tenney*, 17 Colo. 189; *Babcock v. People*, 13 Colo. 515; *Dixon v. State*, 86 Ga. 754; *Webber v. Jackson*, 79 Mich. 175; *Pickard v. Bryant*, 92 Mich. 430; *Hall v. Chicago*, etc., R. Co., 84 Iowa 311; *Deere v. Bagley*, 80 Iowa 197; *Helm v. Handley*, 1 Litt. (Ky.) 219; *Richards v. State*, 82 Wis. 172; *Perkins v. State*, 78 Wis. 551; *Hurley v. State*, 46 Ohio St. 320; *Stockton v. Demuth*, 7 Watts (Pa.) 39; *Jamison v. Bagot*, 106 Mo. 240; *Price v. Lederer*, 33 Mo. App. 426; *Story v. Saunders*, 8 Humph. (Tenn.) 663; *Erwin v. State*, 32 Tex. Crim. Rep. 519; *Scott v. State* (Tex. Crim. App. 1892), 20 S. W. Rep. 549; *State v. Keefe*, 54 Kan. 197.

A party who introduces a witness is estopped to prove him insane at the time of the transaction attempted to be proved. *Montgomery v. Hunt*, 5 Cal. 366.

Where the deposition of a witness is taken by both parties, neither can impeach his credibility. *Story v. Saunders*, 8 Humph. (Tenn.) 663.

But where the party who took a deposition refuses to put it in evidence, and the other party does so, the former is then at liberty to impeach the witness, as the act of putting the deposition in evidence makes the witness that of the party who does so. *Cudworth v. South Carolina Ins. Co.*, 4 Rich. (S. Car.) 416; 55 Am. Dec. 692; *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343.

2. *Melhuish v. Collier*, 15 Q. B. 887;

69 E. C. L. 887; *Richardson v. Allan*, 2 Stark. 334; 3 E. C. L. 433; *Alexander v. Gibson*, 2 Campb. 555; *Ewer v. Baker*, 3 B. & C. 746; 10 E. C. L. 220; *Friedlander v. London Assur. Co.*, 4 B. & Ad. 193; 24 E. C. L. 47; *The Lochlibo*, 1 Eng. L. & Eq. 645; *Bradley v. Ricardo*, 8 Bing. 57; 21 E. C. L. 220; *Hickory v. U. S.*, 151 U. S. 309; *U. S. v. Hall*, 44 Fed. Rep. 864; *U. S. v. Watkins*, 3 Cranch C. C. 441; *Hemingway v. Garth*, 51 Ala. 530; *Bradford v. Bush*, 10 Ala. 386; *Winston v. Moseley*, 2 Stew. (Ala.) 137; *White v. State*, 87 Ala. 24; *Norwood v. Kenfield*, 30 Cal. 393; *Moffatt v. Tenney*, 17 Colo. 189; *Babcock v. People*, 13 Colo. 515; *Merchants Bank v. Rawls*, 7 Ga. 191; 50 Am. Dec. 394; *Burkhalter v. Edwards*, 16 Ga. 593; 60 Am. Dec. 744; *Cronan v. Roberts*, 65 Ga. 678; *Skipper v. State*, 59 Ga. 63; *Hollingsworth v. State*, 79 Ga. 605; *Gray v. Gray*, 3 Litt. (Ky.) 465; *Coulter v. American Merchants' Union Express Co.*, 56 N. Y. 585; *Hunter v. Wetsell*, 84 N. Y. 555; 38 Am. Rep. 544; *Sisson v. Conger*, 1 Thomp. & C. (N. Y.) 564; *Lawrence v. Barker*, 5 Wend. (N. Y.) 301; *McArthur v. Hurlbert*, 21 Wend. (N. Y.) 190; *Thompson v. Blanchard*, 4 N. Y. 303; *Hunt v. Fish*, 4 Barb. (N. Y.) 324; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *People v. Skeehan*, 49 Barb. (N. Y.) 217; *Parsons v. Suydam*, 3 E. D. Smith (N. Y.) 276; *Bok v. Vincent*, 12 Abb. Pr. (N. Y. C. Pl.) 137; *Bemis v. Kyle*, 5 Abb. Pr. N. S. (N. Y. Buffalo Super. Ct.) 232; *Jackson v. Leek*, 12 Wend. (N. Y.) 105; *Steinbach v. Columbian Ins. Co.*, 2 Cai. (N. Y.) 131; *Lewis v. Baker*, 162 Pa. St. 510; *Stockton v. Demuth*, 7 Watts (Pa.) 39; *De Lisle v. Priestman*, 1 Browne (Pa.) 176; *Shelton v. Hampton*, 6 Ired. (N. Car.)

c. PARTY ENTRAPPED BY HOSTILE WITNESS. — It frequently happens that a party is entrapped into calling a hostile and unscrupulous witness who has given one account of a state of facts before the trial, but gives a materially different account on the witness stand. This circumstance has given rise to much discussion, and no little contrariety of opinion as to how far a party thus surprised and deceived may impeach such a witness by proving his statements out of court. If a witness unexpectedly give material evidence against the party who called him, such party may, for the purpose of refreshing his memory and awakening his conscience, ask him if he did not, on a particular occasion, make a contrary statement.¹ Thus far the authorities are agreed, but the question is, should the inquiry stop here. If the witness admits that he has made a contrary statement, there is, of course, no necessity for other evidence of it, and, according to the weight of judicial authority, if he denies making the imputed statement, the party cannot be allowed to prove it by other witnesses where it would not be admissible as independent evidence, and can therefore have no effect but to impair the credit of the witness with the jury.² On the other hand, it has been urged with much

216; *Den v. Cox*, 12 Ired. (N. Car.) 315; *Chester v. Wilhelm*, 111 N. Car. 314; *Crowell v. Kirk*, 3 Dev. (N. Car.) 357; *Spencer v. White*, 1 Ired. (N. Car.) 236; *Meyer Bros. Drug Co. v. McMahan*, 50 Mo. App. 18; *Price v. Lederer*, 33 Mo. App. 426; *Brown v. Wood*, 19 Mo. 475; *Pickard v. Bryant*, 92 Mich. 430; *Rockwood v. Poundstone*, 38 Ill. 199; *McFarland v. Ford*, 32 Ill. App. 173; *Lauer v. Kuder* (Ill. 1893), 34 N. E. Rep. 484; *Thorn v. Moore*, 21 Iowa 285; *State v. Cummins*, 76 Iowa 133; *Brown v. Bellows*, 4 Pick. (Mass.) 179; *Com. v. Starkweather*, 10 Cush. (Mass.) 59; *Brown v. Osgood*, 25 Me. 505; *Hall v. Houghton*, 37 Me. 411; *Fairly v. Fairly*, 38 Miss. 280; *Blackwell v. Wright*, 27 Neb. 269; *Perry v. Massey*, 1 Bailey (S. Car.) 32; *Farr v. Thompson, Cheves* (S. Car.) 37; *Olmstead v. Winsted Bank*, 32 Conn. 278; 85 Am. Dec. 260; *Seavy v. Dearborn*, 19 N. H. 351; *Swamscot Mach. Co. v. Walker*, 22 N. H. 457; *Skellinger v. Howell*, 8 N. J. L. 311.

1. *Melhuish v. Collier*, 15 Q. B. 878; 69 E. C. L. 878; *Reg. v. Williams*, 6 Cox C. C. 343; *Dunn v. Aslett*, 2 M. & Rob. 122; *Hemingway v. Garth*, 51 Ala. 530; *Campbell v. State*, 23 Ala. 76; *Griffith v. State*, 90 Ala. 583; *McNerney v. Reading*, 150 Pa. St. 611; *Hurley v. State*, 46 Ohio St. 320; *Hall*

v. Chicago, etc., R. Co., 84 Iowa 311; *George v. Triplett* (N. Dak. 1895), 63 N. W. Rep. 891.

If, in a criminal case, a witness gives an answer different from what was expected, his deposition before the coroner or justice, as the case may be, may be put in his hands for the purpose of refreshing his memory, and the question may then be repeated. *Reg. v. Williams*, 6 Cox C. C. 343.

If the witness does not testify against the party who called him, but simply fails to give the evidence he was expected to give, it is not proper to interrogate him further as to his previous contradictory statements. *Com. v. Welsh*, 4 Gray (Mass.) 535, per Shaw, C. J.; *Moore v. Chicago, etc., R. Co.*, 59 Miss. 243.

2. *Reg. v. Ball*, 8 C. & P. 745; 34 E. C. L. 616; *Reg. v. Farr*, 8 C. & P. 768; 34 E. C. L. 627; *Holdsworth v. Dartmouth*, 2 M. & Rob. 153; *Winter v. Butt*, 2 M. & Rob. 357; *Friedlander v. London Assur. Co.*, 4 B. & Ad. 193; 24 E. C. L. 47; *Rex v. Moran, Jebb C. C.* 91; *The Lochlibo*, 1 Eng. L. & Eq. 645; *Hickory v. U. S.*, 151 U. S. 309; *Griffin v. Wall*, 32 Ala. 149; *Rapp v. LeBlanc*, 1 Dall. (Pa.) 63; *Smith v. Price*, 8 Watts (Pa.) 447; *Stearns v. Merchants' Bank*, 53 Pa. St. 490; *Rockwood v. Poundstone*, 38 Ill. 199; *People v. Safford*, 5 Den. (N. Y.) 112; *Bullard*

reason that a party should not thus be placed at the mercy of a designing witness, and there are many cases in which it is held that where a party has been surprised and entrapped by his own witness, the court may, in its discretion, allow him to call other witnesses to prove that such treacherous witness had previously made statements contrary to his testimony, not for the purpose of proving the truth of such previous statements but to show the treachery of the witness and to set the party right before the jury.¹ In a number of jurisdictions the discussion has been set

v. Pearsall, 53 N. Y. 230; *Sanchez v. People*, 22 N. Y. 147; *Thompson v. Blanchard*, 4 N. Y. 311; *Thalheimer v. Klapetzky* (Supreme Ct.), 12 N. Y. Supp. 941; *Adams v. Wheeler*, 97 Mass. 68; *Brown v. Bellows*, 4 Pick. (Mass.) 194; *Whitaker v. Salisbury*, 15 Pick. (Mass.) 544; *Com. v. Starkweather*, 10 Cush. (Mass.) 59; *Com. v. Hudson*, 11 Gray (Mass.) 64; *Hurley v. State*, 46 Ohio St. 320; *Richards v. State*, 82 Wis. 172; *Brewer v. Porch*, 17 N. J. L. 377; *Fairly v. Fairly*, 38 Miss. 280; *Roundtree v. Tibbs*, 4 Hayw. (Tenn.) 108; *In re Kennedy's Estate*, 104 Cal. 429; *Smith v. Dawley* (Iowa, 1894), 60 N. W. Rep. 625.

It cannot be said of a party, however, that he gives credit for honesty to a witness whom he puts upon the stand to prove his own fraud. *Webber v. Jackson*, 79 Mich. 179; 9 Am. St. Rep. 165; *Roberts v. Miles*, 12 Mich. 297; *Becker v. Koch*, 104 N. Y. 394; 58 Am. Rep. 515; *Cross v. Cross*, 108 N. Y. 628.

1. *Johnson v. Leggett*, 28 Kan. 605; *State v. Sorter*, 52 Kan. 531; *National Syrup Co. v. Carlson*, 42 Ill. App. 178; *Miller v. Cook*, 127 Ind. 339; *Smith v. Briscoe*, 65 Md. 561; *Moore v. Chicago, etc., R. Co.*, 59 Miss. 243; *Dunn v. Dunnaker*, 87 Mo. 600; *Rex v. Oldroyd*, R. & R. C. C. 88.

This rule was vigorously supported by Lord Denman, C. J. See *Wright v. Beckett*, 1 M. & Rob. 427, for his reasoning on the subject. In this case he cited *Bernasconi v. Fairbrother*, a *nisi prius* case in which he had received similar evidence. See also *Dunn v. Aslett*, 2 M. & Rob. 122, where he adhered to this opinion. In *Wright v. Beckett*, 1 M. & Rob. 427, Mr. Baron Bolland, differing from Lord Denman, was of the opinion that the evidence was not admissible, and the same opinion was afterwards expressed by Parke, Baron, in *Holdsworth v. Dartmouth*,

2 M. & Rob. 153, and by Erskine, J., in *Winter v. Butt*, 2 M. & Rob. 357. See also other English cases cited in the last preceding note. The matter was, however, set at rest by Stat. 17 & 18 Vict., ch. 125, which declares such evidence admissible, thus establishing by statute the rule contended for by Lord Denman.

In *State v. Norris*, 1 Hayw. (N. Car.) 429; 1 Am. Dec. 564, the prosecution was permitted to impeach one of its own witnesses by proof that he had made statements out of court at variance with his testimony, though the court conceded that a party to a civil action could not be permitted thus to impeach his witness. This distinction is not sound in principle, and the case was expressly overruled in *State v. Taylor*, 88 N. Car. 697.

In *Selover v. Bryant*, 54 Minn. 434, Dickinson, J., said: "The case justified the conclusion of the court that the plaintiffs were surprised by the adverse testimony. It is one of the controverted questions in the law of evidence whether a party calling a witness, and who is surprised by his adverse testimony, may be permitted to show that he had made previous statements contrary to his testimony. A learned writer has said that the weight of authority seems to be in favor of admitting such proof. 1 Greenl. Ev., § 444. We are in doubt whether the weight of authority is not the other way, but we feel confident that well recognized reasons and principles of the law of evidence support the proposition that, at least in the discretion of the trial court, such evidence is admissible." And after discussing the contrary rule, the learned judge continues: "The reason upon which it rests is, we think, plainly fallacious. The fault in the reason lies in the premise that, by calling the witness, the party presents him as being

at rest by the statutory adoption of the rule last above stated.¹ In order, however, to justify the application of this rule, it is not sufficient that the witness has merely failed to give evidence which he was expected to give. In such case, his credibility is immaterial, as he has done no damage; he must have actually testified against the party who called him, and in favor of the opposing party, in some material matter, before he may be thus impeached.²

worthy of credit, or in any sense vouches for his truthfulness. In some sense and measure this may be true, but, laying aside the subject of general impeachment, and directing our attention only to the question of allowing proof of statements contrary to the testimony by which a party is surprised at the trial, the above stated reason is of no controlling force, except as it includes and implies such a degree of responsibility for the credit of the witness,—such a personal voucher of his truthfulness—that it would be bad faith, double dealing, trifling with the court, or something akin thereto, for the party to afterwards throw discredit upon his testimony. The premise is not tenable. A party is not to be held to have assumed any such responsibility as to the truthfulness of a witness, and ordinarily, at least, there can be no imputation of bad faith or anything like it when, the party being surprised by his own witness testifying directly in favor of the adverse party, he offers to show his preliminary statements to the contrary as impeaching his credibility. One has not all the world from which to choose the witnesses by whose testimony he must prove his case. He has not the freedom of choice that one has in the selection of an agent; he can only call those who are supposed to know the facts in issue. He is entitled to have their testimony placed before the jury, not as the statements of his agents or representatives by which he is to be concluded, but as the testimony of witnesses whose credibility he cannot be expected to vouch for, but which the jury are to determine. It is everywhere admitted that a party whose witness testifies against him is not concluded thereby. He may prove the fact to be contrary to such testimony, although that does discredit a witness whom he has called. We deny that, by calling a witness to the stand, a party becomes responsible for his credibility in any such sense that he is

absolutely precluded, when surprised by adverse testimony, from showing that the witness had made statements of the facts contrary to his testimony. It is at least within the discretion of the court to allow this."

1. *Greenough v. Eccles*, 5 C. B. N. S. 786; 94 E. C. L. 786; *Rice v. Howard*, 16 Q. B. Div. 681; *Ryerson v. Abington*, 102 Mass. 530; *Brooks v. Weeks*, 121 Mass. 433; *Com. v. Donahoe*, 133 Mass. 407; *Dixon v. State*, 86 Ga. 754; *Skipper v. State*, 59 Ga. 66; *Conway v. State*, 118 Ind. 482; *Williams v. Dickenson*, 28 Fla. 90; *Champ v. Com.*, 2 Metc. (Ky.) 23; *Blackburn v. Com.*, 12 Bush (Ky.) 181; *People v. De Witt*, 68 Cal. 586; *People v. Mitchell*, 94 Cal. 550; *People v. Kruger*, 100 Cal. 523; *Davis v. State* (Tex. Crim. App. 1893), 21 S. W. Rep. 369; *Thompson v. State*, 29 Tex. App. 208; *Williams v. State*, 25 Tex. App. 76; *Bennett v. State*, 24 Tex. App. 73; *White v. State*, 10 Tex. App. 381; *Hurlburt v. Hurlburt*, 63 Vt. 667; *Ohio, etc., R. Co. v. Stein* (Ind. 1894), 39 N. E. Rep. 246.

In *Massachusetts*, a predicate must be laid by calling the attention of the witness to the contradictory statement intended to be proved and the particular occasion when he made it. This is required by the statute, though it is not required in that state in the impeachment of opponents' witnesses. *Batchelder v. Batchelder*, 139 Mass. 1; *Newell v. Homer*, 120 Mass. 277; *Com. v. Smith* (Mass. 1895), 40 N. E. Rep. 189.

2. *Erwin v. State*, 32 Tex. Crim. Rep. 520; *Thomas v. State*, 14 Tex. App. 70; *Bennett v. State*, 24 Tex. App. 77; *Scott v. State* (Tex. Crim. App. 1892), 20 S. W. Rep. 549; *Gibson v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 471; *Batchelder v. Batchelder*, 139 Mass. 1; *Com. v. Welsh*, 4 Gray (Mass.) 535; *McDaniel v. State*, 53 Ga. 253; *Champ v. Com.*, 2 Metc. (Ky.) 22; *People v. Jacobs*, 49 Cal. 384; *People v. Wallace*, 89 Cal. 164; *People v.*

d. PARTY BOUND TO CALL THE WITNESS.—Where a party is bound by law to produce a certain witness, such as a subscribing witness to a will, deed, or other paper, he is not deemed to vouch for his credit, and if such witness give damaging evidence against him, he may contradict him or impeach him by proof of his previous declarations at variance with his testimony.¹

e. WHERE A PARTY CALLS AN OPPOSING WITNESS.—If, after a witness has been examined and cross-examined, the cross-examining party calls him in support of his own case, he thereby makes him his own witness and will not be allowed to impeach him as the witness of the opposing party.² Neither may a party impeach

Mitchell, 94 Cal. 556; *Blough v. Parry* (Ind. 1895), 40 N. E. Rep. 70.

A party, though surprised, may not impeach his own witness if he is not hurt by his testimony. *Chism v. State*, 70 Miss. 742; *People v. Mitchell*, 94 Cal. 550; *Smith v. Briscoe*, 65 Md. 561; *Bennett v. State*, 24 Tex. App. 77; *Adams v. State*, 34 Fla. 185.

Upon the trial of Warren Hastings, the judges delivered the following answer to the House of Lords: "Where a witness, produced and examined in a criminal proceeding by the prosecutor, disclaimed all knowledge of any matter so interrogated, it is not competent for such prosecutor to pursue such examination by proposing a question containing the particulars of an answer supposed to have been made by such witness before a committee of the House of Commons, or in any other place, and by demanding of him whether the particulars so suggested were not the answers he had so made." *Journ. D. P.*, Ap. 50, 1788, quoted in *Stark. Ev.* (10th Am. ed.) 251. See also *Com. v. Welsh*, 4 Gray (Mass.) 535; *Moore v. Chicago*, etc., R. Co., 59 Miss. 243.

1. *Thornton v. Thornton*, 39 Vt. 122; *Dennett v. Dow*, 17 Me. 19; *Shorey v. Hussey*, 32 Me. 579; *Harden v. Hays*, 9 Pa. St. 151; *Cowden v. Reynolds*, 12 S. & R. (Pa.) 281; *Olinde v. Saizan*, 10 La. Ann. 153; *Williams v. Walker*, 2 Rich. Eq. (S. Car.) 291; 46 Am. Dec. 53; *Diffenderfer v. Scott*, 5 Ind. App. 243. Compare *Lowe v. Jolliffe*, 1 W. Bl. 365; *Goodtitle v. Clayton*, 4 Burr. 2224; *People v. Case* (Mich. 1895), 62 N. W. Rep. 1017.

In *Massachusetts*, a party being under the necessity of calling a subscribing witness may contradict his statement of facts. *Brown v. Bellows*, 4 Pick. (Mass.) 179. But he cannot impeach his general character for truth

and veracity. *Whitaker v. Salisbury*, 15 Pick. (Mass.) 534.

Pub. Stats. of Massachusetts, ch. 169, § 22, authorizes the party producing a witness to prove that he has, at other times, made statements inconsistent with his present testimony, but expressly declares that he shall not be allowed to impeach his credit by evidence of bad character.

In *New Jersey*, it has been held that the complainant in a suit in equity cannot impeach the general character of the defendant for truth and veracity, though he cannot avoid taking his answer under oath, thus making it evidence in the case. *Brown v. Bulkley*, 14 N. J. Eq. 306.

2. *Craig v. Grant*, 6 Mich. 447; *Tourelotte v. Brown*, 4 Colo. App. 377; *Richards v. State*, 82 Wis. 172.

In *Com. v. Hudson*, 11 Gray (Mass.) 66, Shaw, C. J., said: "The district attorney called a witness and thereby undertook that, so far as he knew, he was entitled to credit, and held him up to the court and jury as a credible witness. Can he afterwards impeach him? Sometimes the attorney may be disappointed. The witness may even have told him that he would testify that way, and courts, in such case, are inclined to allow him to disparage a witness, but the general rule is that he must not. Here, the district attorney must have known that he testified before the grand jury, but we do not put it on that ground. The attempt is not to prove the fact which he testified to before the grand jury; it can only be to disparage him by showing that he testified differently. The whole course of practice is otherwise in this Commonwealth. A witness, when called by one party, is liable to be examined, and bound to answer, as to all facts material to the case, whether examined upon

his own witness who is called by the opposing party at a subsequent stage of the trial;¹ though it has been held that where the party calling a witness is not able to prove anything by him, and, upon cross-examination, the witness gives damaging testimony against him, such witness is, for the purpose of impeachment, to be deemed the witness of the cross-examining party.² So, also, in jurisdictions where the cross-examination is confined to the matters inquired of in the examination in chief, a party who travels beyond the legitimate bounds of cross-examination and thereby elicits new and material matter, to that extent, at least, makes the witness his own and should not be allowed to impeach him.³ But where the cross-examination may properly extend to all matters material to the issue, the witness remains the witness of the party who called him, and the other party's right to impeach him is not jeopardized by the extent of the cross-examination.⁴

f. ONE PARTY CALLED BY THE OTHER.—Where a party calls the opposing party to the witness stand, he is, of course, no more concluded by his testimony than he would be by that of any other witness. He may prove the facts as they exist by other witnesses, if he can, though he do thereby incidentally discredit the opposing party as a witness; but, by calling him as such, he precludes himself from attacking him for the mere purpose of impeachment.⁵ And he will not, as a rule, be heard, in argument to

that subject by the party calling him or not. It is said that the defendant, by calling the witness again, makes him his own witness to all purposes. He does, to some purposes; it would be very difficult to determine what. But the party who first called him cannot be allowed to say or to show that he was unworthy of credit."

1. *Coulter v. American Merchants' Union Express Co.*, 56 N. Y. 585; *Nichols v. White*, 85 N. Y. 531; *Smith v. Provident Sav. L. Assur. Soc.*, 65 Fed. Rep. 765.

2. *Beebe v. Tinker*, 2 Root (Conn.) 160; *Artz v. Chicago, etc., R. Co.*, 44 Iowa 286.

3. *People v. Moore*, 15 Wend. (N. Y.) 419; *Hill v. Froehlich* (Supreme Ct.), 14 N. Y. Supp. 610; *First Baptist Church v. Brooklyn F. Ins. Co.*, 23 How. Pr. (N. Y. Supreme Ct.) 448; *Fairchild v. Bascomb*, 35 Vt. 398; *Artz v. Chicago, etc., R. Co.*, 44 Iowa 286; *Deere v. Bagley*, 80 Iowa 197; *Shackelford v. State* (Tex. Crim. App. 1894), 27 S. W. Rep. 8. See also *Redington v. Pacific Postal Tel. Cable Co.* (Cal. 1895), 40 Pac. Rep. 432.

4. *Johnson v. Armstrong*, 97 Ala.

731; *Lewis v. Hodgdon*, 17 Me. 267; *State v. Jones*, 64 Mo. 391; *Sawrey v. Murrell*, 2 Hayw. (N. Car.) 397.

5. *Ewer v. Baker*, 3 B. & C. 746; 10 E. C. L. 220; *Warren v. Gabriel*, 51 Ala. 235; *Drennen v. Lindsey*, 15 Ark. 359; *Gardner v. Connelly*, 75 Iowa 205; *Humble v. Shoemaker*, 70 Iowa 223; *Hunt v. Coe*, 15 Iowa 197; *Thorn v. Moore*, 21 Iowa 289; *U. S. Life Ins. Co. v. Kielgast*, 26 Ill. App. 567; *Wallach v. Wylie*, 28 Kan. 138; *Holbrook v. Mix*, 1 E. D. Smith (N. Y.) 154; *Hunter v. Wetsell*, 84 N. Y. 555; 38 Am. Rep. 544; *Becker v. Koch*, 104 N. Y. 394; 58 Am. Rep. 515; *DeMeli v. DeMeli*, 120 N. Y. 490; 17 Am. St. Rep. 652; *Claffin v. Dodson*, 111 Mo. 195; *Bensberg v. Harris*, 46 Mo. App. 404; *Chandler v. Fleeman*, 50 Mo. 239; *Paxton v. Boyce*, 1 Tex. 317; *Good v. Knox*, 64 Vt. 97; *Tarsney v. Turner*, 2 Flipp. (U. S.) 735; *Dravo v. Fabel*, 25 Fed. Rep. 116; *Garny v. Katz*, 89 Wis. 230.

Where a Party Entraps His Opponent.

—If a party relies on what his adversary swore at a former trial, and calls him as a witness, and is surprised and deceived by a material change in his

the court or jury, to question his veracity.¹ But the fact that a party calls the opposing party as a witness, does not preclude him from proving material admissions made by such party at other times. Such admissions are admissible as independent evidence, notwithstanding they may contradict the testimony given by the witness.²

X. CORROBORATION—1. Not Allowed Until the Witness Is Attacked.

—In a case where corroboration is required by law, it is always permissible to strengthen the testimony of a witness by proof of connected incidents showing its consistency.³ But in other cases, a party is not allowed to introduce evidence to sustain the testimony of his witness before his credibility has been attacked.⁴ Thus, where a witness is merely contradicted by evidence disproving the facts testified to by him, and no other attempt is made to impeach him, it is not competent to call witnesses for the purpose of corroborating him.⁵ The party who called the witness is not,

testimony, he may impeach him in jurisdictions where he would be allowed to impeach another witness called by him in such case. *Cox v. Prater*, 67 Ga. 588.

1. *Tarsney v. Turner*, 48 Fed. Rep. 818; 2 Flipp. (U. S.) 733; *Graves v. Davenport*, 50 Fed. Rep. 881.

In *Minnesota*, the rule is otherwise. Thus, in *Schmidt v. Durham* (Minn. 1892), 52 N. W. Rep. 277, Gillfillan, C. J., said: "Whether a party who calls the opposite party to be examined as a witness, under Laws of 1885, ch. 193, accredits him, so that he cannot offer evidence to impeach his general character for truth and veracity, we need not, in this case, consider. He certainly may question the truth of his statements of fact, either by independent opposing evidence, or by inference or arguments drawn from the testimony of the party himself. Thus, if, in a case like this, the party so called testify that the conveyance was made in good faith, the party calling him is not concluded by such testimony, but may insist that upon the entire account of the transaction, given by the party testifying, the inference may be drawn that the conveyance was not *bona fide*."

2. *Jamison v. Bagot*, 106 Mo. 257; *Thomas v. McDanel*, 88 Iowa 374; *Kelly v. Jay* (Supreme Ct.), 29 N. Y. Supp. 933; *Brubaker v. Taylor*, 76 Pa. St. 83.

3. *Bruton v. State*, 21 Tex. 337.

4. *Bryant v. Tidgewell*, 133 Mass. 86; *Hamilton v. Conyers*, 28 Ga. 277; *State v. Rorabacher*, 19 Iowa 154; *Adams v. Greenwich Ins. Co.*, 70 N.

Y. 170; *State v. Grant*, 79 Mo. 133; 49 Am. Rep. 218; *State v. Thomas*, 78 Mo. 327.

The general character of a witness is presumed to be good until he is impeached, and evidence of his good character is not admissible until his character has been impugned by the other party. *Dodd v. Norris*, 3 Campb. 519; *U. S. v. Holmes*, 1 Cliff. (U. S.) 98; *Rogers v. Moore*, 10 Conn. 13; *Johnson v. State*, 21 Ind. 329; *Magee v. People*, 139 Ill. 138; *Braddee v. Brownfield*, 9 Watts (Pa.) 124; *Wertz v. May*, 21 Pa. St. 279; *People v. Rector*, 19 Wend. (N. Y.) 579; *Fulkerson v. Murdock*, 53 Mo. App. 151; *Funderberg v. State*, 100 Ala. 36; *Osmun v. Winters*, 25 Oregon 260.

Corroborating evidence is not admissible on the examination in chief. *Jackson v. Etz*, 5 Cow. (N. Y.) 314; *People v. Vane*, 12 Wend. (N. Y.) 78; *Adams v. Greenwich Ins. Co.*, 70 N. Y. 170; *Conway v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 401.

In *Harrison's Case*, 12 How. St. Tr. 861, corroborating evidence was received in connection with examination in chief, but the law is now settled the other way. See *Dodd v. Norris*, 3 Campb. 519, where Lord Ellenborough excluded evidence of good character in rebuttal of the cross-examination, observing that there was ample opportunity for explanation on the redirect examination.

5. *Diffenderfer v. Scott*, 5 Ind. App. 243; *Fitzgerald v. Goff*, 99 Ind. 34; *Pruitt v. Cox*, 21 Ind. 15; *Brann v.*

however, precluded from adding to the strength of the evidence upon which he first rested his case, though he does thereby incidentally corroborate an unimpeached witness.¹

2. Right to Corroborate.—When a shadow has been cast upon the reputation of a witness for truth and veracity, by competent impeaching evidence, the party who called him has a right to introduce evidence to corroborate him.² And for this purpose an impeaching witness may in his turn be impeached.³

3. Evidence of Good Character.—Where a direct assault has been made upon the general character of a witness, or upon his general reputation for truth and veracity, the party who called him may

Campbell, 86 Ind. 516; *Garr v. Shaffer* (Ind. 1894), 38 N. E. Rep. 811; *Presser v. State*, 77 Ind. 274; *Vance v. Vance*, 2 Metc. (Ky.) 581. See also *Leonori v. Bishop*, 4 Duer (N. Y.) 420; *Starks v. People*, 5 Den. (N. Y.) 106; *Tedens v. Schumers*, 112 Ill. 267; *Wertz v. May*, 21 Pa. St. 279; *Texas*, etc., *R. Co. v. Raney*, 86 Tex. 365.

In *Bishop of Durham v. Beaumont*, 1 Campb. 207, Lord Ellenborough refused to admit evidence of the good character of a witness who stood contradicted by other witnesses. To the same effect are *State v. Ward*, 49 Conn. 429; *Owens v. White*, 28 Ala. 413; *Heywood v. Reed*, 4 Gray (Mass.) 574; *Atwood v. Dearborn*, 1 Allen (Mass.) 480; 79 Am. Dec. 755; *Paxton v. Dye*, 26 Ind. 393.

If, however, the contradiction involves a charge of fraud or other grossly improper conduct on the part of the witness, evidence of his good character is then admissible. *Annesley v. Anglesea*, 17 How. St. Tr. 1348; *George v. Pilcher*, 28 Gratt. (Va.) 318; 26 Am. Rep. 350. Compare *Provis v. Reed*, 3 M. & P. 4; 5 Bing. 435; 15 E. C. L. 490.

1. *John v. State*, 16 Ga. 200.

In *Outlaw v. Hurdle*, 1 Jones (N. Car.) 163, Pearson, J., said: "We conclude with his honor that the practice in *North Carolina* has been, and, we think, it is sustained by good sense, for a party to offer as many witnesses as may be deemed necessary to establish his allegation. If the other party chooses, he may rest the case upon it, or he may call witnesses in his turn, and the first party may call witnesses in reply and for the purpose of adding to the strength of the evidence upon which he at first rested the case. Lord Kenyon, who had as much good sense as any judge that ever tried a case,

somewhere remarks, 'It is not worth while to jump until you get to the fence;' that is, there is no use in meeting objections until they are presented, or in piling up proof until it is made necessary by what is done on the other side." Compare *Wade v. Thayer*, 40 Cal. 578.

The contrary was held in *State v. Parish*, 22 Iowa 284.

2. *State v. Cherry*, 63 N. Car. 495; *March v. Harrell*, 1 Jones (N. Car.) 329; *Isler v. Dewey*, 71 N. Car. 16; *Green v. Gould*, 3 Allen (Mass.) 465; *Wade v. Thayer*, 40 Cal. 584; *Holbert v. State*, 9 Tex. App. 219; 35 Am. Rep. 738; *State v. Jones*, 29 S. Car. 201. See also *Loomis v. Stuart* (Tex. Civ. App. 1893), 24 S. W. Rep. 1078; *Howard v. Galbraith* (Tex. Civ. App. 1894), 30 S. W. Rep. 689.

Where it is attempted to impeach a witness by the introduction of a portion of his testimony on a former occasion, it is error to exclude another portion which corroborates his testimony on the witness stand. *Jones v. State* (Tex. Crim. App. 1894), 25 S. W. Rep. 634.

Where a party, in attempting to impeach a witness for the opposing party, incidentally impeaches one of his own witnesses, he cannot afterwards introduce evidence to corroborate him. *Mealer v. State*, 32 Tex. Crim. Rep. 102.

3. *State v. Cherry*, 63 N. Car. 495; *Starks v. People*, 5 Den. (N. Y.) 106; *Evans v. State* (Ga. 1895), 22 S. E. Rep. 208.

Judge Taylor remarks that it has not yet been formally settled how far this plan of recrimination may be carried, but that the practice has been said by some lawyers to conform to the rule of the civil law, that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses may be called to attack the

support his testimony by proof of his good reputation.¹ There appears to be no difference of opinion regarding the general rule as stated above, but there is considerable conflict of authority as to the limits of the rule. It is said by some of the best text writers that if the character of a witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support his character by proof of his general good reputation.² Accordingly, it is held in some jurisdictions that whenever the character of a witness for truth is attacked in any way, it is competent for the party calling him to give general evidence in support of his good character.³ Where this rule obtains, it is competent to support the credibility of a witness who has been impeached by proof of his former declarations at variance with his testimony, by evidence of his general

characters of these last. 2 Tayl. on Ev., § 1473, citing *Stafford's Trial*, 7 How. St. Tr. 1484.

1. *People v. Rector*, 19 Wend. (N. Y.) 569; *Stape v. People*, 85 N. Y. 390; *M'Cutchen v. M'Cutchen*, 9 Port. (Ala.) 650; *Clackner v. State*, 33 Ind. 412; *Sloan v. Edwards*, 61 Md. 89; *Prentiss v. Roberts*, 49 Me. 127; *State v. Nelson*, 58 Iowa 208; *Hamilton v. People*, 29 Mich. 173.

2. *Stark. Ev.* (10th Am. ed.) 252; 1 *Greenl. Ev.*, § 469.

The case of *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393, is generally cited in support of this text, but, as we shall presently see, it does not go to the full extent claimed for it by the text writers.

In pursuance of this rule, it has been held that where the credibility of a witness is vigorously attacked on cross-examination, evidence of his good reputation for truthfulness is admissible. *State v. Fruge*, 44 La. Ann. 165; *State v. Boyd*, 38 La. Ann. 374; *State v. Johnson* (La. 1895), 17 So. Rep. 789; *Texas, etc., R. Co. v. Raney*, 86 Tex. 363; *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343; *Vernon v. Tucker*, 30 Md. 462; *State v. Cherry*, 63 N. Car. 495; *Isler v. Dewey*, 71 N. Car. 16.

In *Stevenson v. Gunning*, 64 Vt. 609, the court said: "It is observable that a distinction is taken between an attack upon the character of the witness, as such, for credibility, and the character of the testimony given for belief. It is only when the character of the witness for credibility is directly attacked by general evidence regarding his standing and character for truth and veracity, or by showing that he has

made contradictory or inconsistent statements, either out of court or in court, or that he has been convicted of some crime, or engaged in some act affecting his credibility, like suborning or attempting to suborn a witness, or suppress testimony in the case on trial, that sustaining evidence can be used. But when the character of the testimony given by a witness is attacked only by showing its improbability, or by other testimony conflicting with the testimony of the witness, sustaining testimony cannot be admitted. If admitted when there is only a conflict in the testimony of opposing witnesses, the opposing witnesses on both sides could be supported by sustaining testimony in regard to their standing and character by reputation as witnesses, and the trial would be prolonged indefinitely. Besides, the character of the testimony given by a witness does not directly attack the character of the witness for credibility." Compare *Sweet v. Sherman*, 21 Vt. 23.

3. *Paine v. Tilden*, 20 Vt. 554; *State v. Roe*, 12 Vt. 93; *Sweet v. Sherman*, 21 Vt. 23; *Mosley v. Vermont Mut. F. Ins. Co.*, 55 Vt. 142; *Stevenson v. Gunning*, 64 Vt. 609; *Hadjo v. Gooden*, 13 Ala. 718; *George v. Pilcher*, 28 Gratt. (Va.) 318; 26 Am. Rep. 350; *State v. Cherry*, 63 N. Car. 495; *Isler v. Dewey*, 71 N. Car. 16.

In order to admit evidence of good character for truth, it is not necessary that the general character of a witness be first impeached. It is sufficient that his veracity as a witness has been fairly challenged. *Texas, etc., R. Co. v. Raney* (Tex. Civ. App. 1893), 23 S. W. Rep. 340.

good character for truth and veracity.¹ It must, however, be admitted that the English cases do not warrant this liberal reception of character evidence. As a rule, evidence in support of the good character of a witness is not admissible unless other witnesses have been called to attack his general reputation, and admissions wrung from him on the cross-examination do not warrant the reception of such evidence, unless they are of such a nature as to amount to an attack on his general reputation.² This is the rule in a number of American jurisdictions.³ And

1. *Hadjo v. Gooden*, 13 Ala. 718; *Holley v. State* (Ala. 1895), 17 So. Rep. 102; *Haley v. State*, 63 Ala. 83; *Lewis v. State*, 35 Ala. 380; *Burrell v. State*, 18 Tex. 730; *Ledbetter v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 479; *Dixon v. State*, 15 Tex. App. 271; *Coombes v. State*, 17 Tex. App. 258; *Thomas v. State*, 18 Tex. App. 214; *Johnson v. Brown*, 51 Tex. 65; *Phillips v. State*, 19 Tex. App. 164; *Tipton v. State*, 30 Tex. App. 530; *Harris v. State*, 30 Ind. 131; *Clark v. Bond*, 29 Ind. 555; *Stratton v. State*, 45 Ind. 468; *Carroll County v. O'Conner* (Ind. 1893), 35 N. E. Rep. 1006; *Garr v. Shaffer* (Ind. 1894), 36 N. E. Rep. 208; *Isler v. Dewey*, 71 N. Car. 14; *Glaze v. Whitley*, 5 Oregon 164; *Sweet v. Sherman*, 21 Vt. 23; *Paine v. Tilden*, 20 Vt. 554.

Evidence of the contradictory statements must actually be introduced. Merely laying the foundation is not sufficient to let in evidence of good character. *State v. Cooper*, 71 Mo. 436.

2. *Dodd v. Norris*, 3 Campb. 519; *Doe v. Harris*, 7 C. & P. 330; 32 E. C. L. 529; *Bamfield v. Massey*, 1 Campb. 460.

The case of *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393, generally cited in support of the more liberal rule, went no further than this: The prosecutrix admitted on cross-examination that she had twice been sent to the house of correction on charges of theft, and Holroyd, J., considering this an attack upon her general reputation, admitted evidence of her subsequent good conduct.

The English cases make an exception of attesting witnesses to wills who are dead at the time of the trial. If the reputation of such witnesses is impugned by a charge of fraud in the execution of the will, the proponent may prove their general good character

though no direct attack has been made on their general reputation. *Doe v. Stephenson*, 3 Esp. 284; *Doe v. Walker*, 4 Esp. 50; *Provis v. Reed*, 3 M. & P. 4; *Bishop of Durham v. Beaumont*, 1 Campb. 207. Compare *Wright v. Littler*, 3 Burr. 1245.

This exception is allowed, however, only when the witness is dead at the time of the trial. *Coleridge, J.*, in *Doe v. Harris*, 7 C. & P. 330; 32 E. C. L. 529.

3. *Russell v. Coffin*, 8 Pick. (Mass.) 154; *Brown v. Mooers*, 6 Gray (Mass.) 451; *McCarty v. Leary*, 118 Mass. 509; *Rogers v. Moore*, 10 Conn. 13; *People v. Rector*, 19 Wend. (N. Y.) 569; *People v. Hulse*, 3 Hill (N. Y.) 309; *Hannah v. McKellip*, 49 Barb. (N. Y.) 342; *Barvee v. People*, 1 Thomp. & C. (N. Y.) 289; *People v. Gay*, 7 N. Y. 378; *affirming* 1 Park. Cr. Rep. (N. Y.) 308, and *overruling* *Carter v. People*, 2 Hill (N. Y.) 317. See also *Pratt v. Andrews*, 4 N. Y. 493.

It has been held that an attempt to impeach a witness by asking another witness what is his character for truth, warrants the introduction of evidence in support of his character, though the impeaching witness answered that his character is good. *Com. v. Ingraham*, 7 Gray (Mass.) 46.

In *Connecticut*, an exception to the rule permits evidence of general good character for veracity, without a general impeachment, where the witness is in the situation of a stranger. *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 364; 52 Am. Dec. 344; *Rogers v. Moore*, 10 Conn. 13. See also *State v. De Wolf*, 8 Conn. 93; 20 Am. Dec. 90.

Mr. Greenleaf has stated the more liberal rule first considered in the following language: "Where evidence of contradictory statements by a witness or of other particular facts, as, for example, that he has been committed to the house of correction, is offered by

where it obtains, proof that a witness has been convicted of crime is such an assault on his character as will let in evidence of his good reputation;¹ but proof that he has made statements out of court at variance with his testimony, does not warrant the reception of such evidence.²

way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for truth." 1 Greenl. Ev., § 469, citing *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393. But, notwithstanding the great reputation of the author, it has been said this statement is not law. Thus, in *Brown v. Mooers*, 6 Gray (Mass.) 451, it was attempted to introduce evidence of the good reputation of a witness for truth, who had been impeached by proof of material false statements made by him, but the court said: "The evidence as to the general character of Shaw for truth was not competent. His general character had not been impeached. The case of *Russell v. Coffin*, 8 Pick. (Mass.) 143, cited by the plaintiff, is directly against him on the precise point at issue. See pp. 146, 154. The statement in 1 Greenl. Ev., § 469, is not sustained by the case the author cites of *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393, and is not law."

In *Russell v. Coffin*, 8 Pick. (Mass.) 154, the same court, after stating the rule as laid down by Starkie, said: "The position, as laid down by Starkie, cannot be carried to the extent contended for. He probably meant only that where the questions put in the cross-examination and the answers did impeach his general character, the other party might rebut by proving a good general character, and so far we do not object to the principle. As in the case stated by Starkie, the witness was asked whether she had not been twice committed to Bridewell, and answered that she had. This went to affect her general reputation, and the party who called her was allowed to prove that since those commitments her character had been fair and good. But it never was decided that if a witness was contradicted as to any fact of his testimony, either by his own declarations at other times, or by other witnesses, evidence might be admitted to prove his general good character. If this were the practice, great delay and

confusion would arise, and as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted, and, indeed, it would be a trial of the witnesses and not of the action."

1. *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393; *People v. Amanacus*, 50 Cal. 233; *Gertz v. Fitchburg R. Co.*, 137 Mass. 77; 50 Am. Rep. 285; *Com. v. Green*, 17 Mass. 541; *Webb v. State*, 29 Ohio St. 351; *Wick v. Baldwin*, 51 Ohio St. 51.

But an admission by a witness, upon cross-examination, that he had been tried for crime in another state and acquitted does not authorize the introduction of evidence in support of his good character. *Harrington v. Lincoln*, 4 Gray (Mass.) 563.

Where the record of conviction of crime is introduced as impeaching evidence, it may be rebutted by evidence of the good reputation of the witness for truth and veracity, but it may not be shown that the witness was innocent of the crime for which he was convicted; the record is conclusive evidence on that point. *Gertz v. Fitchburg R. Co.*, 137 Mass. 77; 50 Am. Rep. 285; *Com. v. Gallagher*, 126 Mass. 54.

The sustaining proof should go to character generally, and not to the disproof of particular facts brought out on the cross-examination of an impeaching witness. *Surles v. State*, 89 Ga. 167.

2. *Stamper v. Griffin*, 12 Ga. 456; *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Brown v. Mooers*, 6 Gray (Mass.) 451; *People v. Gay*, 7 N. Y. 378; *People v. Hulse*, 3 Hill (N. Y.) 313; *Frost v. McCarger*, 29 Barb. (N. Y.) 617; *Vance v. Vance*, 2 Metc. (Ky.) 581; *Wertz v. May*, 21 Pa. St. 274; *Webb v. State*, 29 Ohio St. 357; *Chapman v. Cooley*, 12 Rich. (S. Car.) 654.

Evidence tending to show that a witness has made contradictory statements in reference to the matter under inquiry, is more properly an assault upon the credit rather than the character of the witness, and, therefore, does not open the way for evidence to sustain the general character of the witness.

4. **Prior Consistent Statements.**—It was ruled, in an early English case, that a party who called a witness against whom contradictory statements were proved might show that he had at other times made statements in harmony with his testimony, and that he was consistent in his relation of the facts;¹ and this rule has been adopted in many American cases.² The soundness of the rule, however, was justly doubted by Mr. Justice Buller,³ and it was subsequently discarded by the courts on the ground that what a witness said without the sanction of an oath ought not to confirm what he said upon oath.⁴ And perhaps the weight of American authority rejects evidence that the witness on other occasions made statements in harmony with his testimony,⁵ unless

Such evidence is admissible only when the general character of the witness is directly assailed by the party against whom he is called to testify. *Chapman v. Cooley*, 12 Rich. (S. Car.) 654; *State v. Jones*, 29 S. Car. 201; *Miller v. Western*, etc., R. Co., 93 Ga. 480.

1. *Lutterell v. Reynell*, 1 Mod. 282. Chief Baron Gilbert was of this opinion, Gilb. Ev. 135, and the law is so stated in Hawk. Pl. Cr., bk. 2, ch. 46, § 48. See also 2 Phil. Ev., p. 973.

The same ruling was made in the trial of Sir John Friend, 13 How. St. Tr. 32. Compare *Harrison's Case*, 12 How. St. Tr. 861.

2. *State v. Staton*, 114 N. Car. 813; *Wallace v. Grizzard*, 114 N. Car. 488; *State v. McKee*, 98 N. Car. 500; *State v. Rowe*, 98 N. Car. 629; *State v. Brewer*, 98 N. Car. 607; *State v. Jacobs*, 107 N. Car. 873; *State v. George*, 8 Ired. (N. Car.) 324; 49 Am. Dec. 392; *State v. Dove*, 10 Ired. (N. Car.) 469; *State v. Whitfield*, 92 N. Car. 831; *Hoke v. Fleming*, 10 Ired. (N. Car.) 263; *March v. Harrell*, 1 Jones (N. Car.) 331; *Johnson v. Patterson*, 2 Hawks (N. Car.) 183; 11 Am. Dec. 756; *State v. Twitty*, 2 Hawks (N. Car.) 449; 11 Am. Dec. 779; *State v. Laxton*, 78 N. Car. 564; *State v. Morton*, 107 N. Car. 890; *McAleer v. Horsey*, 35 Md. 463; *Bloomer v. State*, 48 Md. 537; *Washington F. Ins. Co. v. Davison*, 30 Md. 105; *Cooke v. Curtis*, 6 Har. & J. (Md.) 93; *Hobbs v. State*, 133 Ind. 404; *Ramey v. State*, 127 Ind. 243; *Dodd v. Moore*, 92 Ind. 397; *Brookbank v. State*, 55 Ind. 169; *Dailey v. State*, 28 Ind. 285; *Beauchamp v. State*, 6 Blackf. (Ind.) 300; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Lockwood v. Betts*, 8 Conn. 133; *State v. Hendricks*, 32 Kan. 563; *Henderson v. Jones*, 10 S. & R. (Pa.) 322; 13 Am.

Dec. 676; *Hester v. Com.*, 85 Pa. St. 139; *Dossett v. Miller*, 3 Sneed (Tenn.) 72; *Third Nat. Bank v. Robinson*, 1 Baxt. (Tenn.) 479; *Hayes v. Cheatham*, 6 Lea (Tenn.) 10; *State v. Dennin*, 32 Vt. 158; *State v. Grant*, 79 Mo. 113; 49 Am. Rep. 218; *U. S. v. Neverson*, 1 Mackey (D. C.) 152; *Bailey v. State*, 9 Tex. App. 98; *Stephens v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 728; *Goode v. State*, 32 Tex. Crim. Rep. 505; *Ball v. State*, 31 Tex. Crim. Rep. 214; *Williams v. State*, 24 Tex. App. 637; *State v. Waggoner*, 39 La. Ann. 919.

Where this rule obtains, it is permissible to corroborate a witness by proof that he gave the same testimony before the grand jury which he gave upon the trial. *Goode v. State*, 32 Tex. Crim. Rep. 505; *Perkins v. State*, 4 Ind. 222.

3. See Bull. N. P. 294.

4. *Rex v. Parker*, 3 Doug. 242; 26 E. C. L. 95; *Berkely Peerage Case*, cited in 2 Phil. Ev. 974. See also 2 Tayl. Ev., § 1476; *Brazier's Case*, 1 East P. C. 443.

5. *Conrad v. Griffey*, 11 How. (U. S.) 480; *U. S. v. Holmes*, 1 Cliff. (U. S.) 98; *Loomis v. New York*, etc., R. Co., 159 Mass. 39; *Com. v. Jenkins*, 10 Gray (Mass.) 485; *Com. v. James*, 99 Mass. 438; *Fallin v. State*, 83 Ala. 7; *Nichols v. Stewart*, 20 Ala. 358; *Adams v. Thornton*, 82 Ala. 260; *McKelton v. State*, 86 Ala. 594 (*overruling* *Sonneborn v. Bernstein*, 49 Ala. 168); *Reed v. Spaulding*, 42 N. H. 114; *Riney v. Vanlandingham*, 9 Mo. 816; *Connor v. People*, 18 Colo. 373; *Davis v. Graham*, 2 Colo. App. 210; *Dufresne v. Weise*, 46 Wis. 298; *Dudley v. Bolles*, 24 Wend. (N. Y.) 465; *Robb v. Hackley*, 23 Wend. (N. Y.) 50; *Butler v. Truslow*, 55 Barb. (N. Y.) 293; *Smith v. Stickney*, 17 Barb. (N. Y.)

it is charged that his story is a recent fabrication,¹ or that he has some motive for testifying falsely, which it can be shown did not exist when he made the statements proposed to be proved in corroboration of his testimony.² It may be added that in prosecutions for rape, it is always competent to prove the fact that the prosecuting witness complained of the outrage soon after its perpetration, for the purpose of corroborating her testimony, though the particulars of such complaint are not admissible to prove the commission of the crime.³

5. Requisite Knowledge of Sustaining Witness—*a.* IN GENERAL.—

A witness called to sustain another whose general character or reputation for truth and veracity has been assailed, must first state that he knows the general moral character of the witness thus impeached, or his general reputation for truth and veracity, according to the rule of the jurisdiction; otherwise, he cannot be further examined on that point.⁴ But if he answers that he is

489; *People v. Finnegan*, 1 Park. Cr. Rep. (N. Y.) 147; *Herrick v. Smith*, 13 Hun (N. Y.) 448; *Ware v. Ware*, 8 Me. 42; *People v. Doyell*, 48 Cal. 85; *State v. Thomas*, 3 Strobb. (S. Car.) 269; *Davis v. Kirksey*, 2 Rich. (S. Car.) 176; *Stolp v. Blair*, 68 Ill. 541; *State v. Vincent*, 24 Iowa 570; 95 Am. Dec. 753; *Fussell v. State* (Ga. 1893), 21 S. E. Rep. 97.

In *Utah*, the rule is that prior consistent statements are not admissible to corroborate a party who is a witness in his own behalf, when such statements were made in his own interest. *Silva v. Pickard* (Utah, 1894), 37 Pac. Rep. 86.

In *New York*, the early cases followed the rule laid down in *Lutterell v. Reynell*, 1 Mod. 282. See *Jackson v. Etz*, 5 Cow. (N. Y.) 314; *People v. Vane*, 12 Wend. (N. Y.) 80; *People v. Moore*, 15 Wend. (N. Y.) 419; *People v. Rector*, 19 Wend. (N. Y.) 569. But these cases have been overruled on this point, and the later cases follow the rule of the later English cases excluding such corroborating statements. *Robb v. Hackley*, 23 Wend. (N. Y.) 50; *Dudley v. Bolles*, 24 Wend. (N. Y.) 465; *Butler v. Truslow*, 55 Barb. (N. Y.) 293; *Smith v. Stickney*, 17 Barb. (N. Y.) 489; *People v. Finnegan*, 1 Park. Cr. Rep. (N. Y.) 147; *Herrick v. Smith*, 13 Hun (N. Y.) 448.

1. *Gates v. People*, 14 Ill. 438; *Stolp v. Blair*, 68 Ill. 541; *State v. Petty*, 21 Kan. 54; *Hayes v. Cheatham*, 6 Lea (Tenn.) 10; *People v. Doyell*, 48 Cal. 85; *French v. Merrill*, 6 N. H. 465; *Baber v. Broadway*, etc., R. Co. (C.

Pl.), 29 N. Y. Supp. 40; *State v. Flint*, 60 Vt. 304; *English v. State* (Tex. Crim. App. 1895), 30 S. W. Rep. 233.

The prior statements in harmony with the testimony of the witness must have been made by him before he made the contradictory statements put in evidence for the purpose of impeaching him. Otherwise, they are not admissible, because, if they were made afterwards, they may have been made for the very purpose of neutralizing the contradictory statements. *Conrad v. Griffey*, 11 How. (U. S.) 491; *Ellicott v. Pearl*, 10 Pet. (U. S.) 438; *Queener v. Morrow*, 1 Coldw. (Tenn.) 123.

2. *Robb v. Hackley*, 23 Wend. (N. Y.) 54; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.) 95; *Herrick v. Smith*, 13 Hun (N. Y.) 448; *Railway Pass. Assur. Co. v. Warner*, 62 N. Y. 651; *Gates v. People*, 14 Ill. 438; *Stolp v. Blair*, 68 Ill. 541; *Reed v. Spaulding*, 42 N. H. 114; *State v. Flint*, 60 Vt. 304.

3. *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 393; *Reg. v. Osborne*, C. & M. 622; 41 E. C. L. 338; *Reg. v. Walker*, 2 M. & Rob. 212; *Griffin v. State*, 76 Ala. 32; *Scott v. State*, 48 Ala. 420; *State v. DeWolf*, 8 Conn. 93; 20 Am. Dec. 90; *State v. Kinney*, 44 Conn. 153; 26 Am. Rep. 436; *Baccio v. People*, 41 N. Y. 265; *Thompson v. State*, 38 Ind. 39; *Sentell v. State* (Tex. Crim. App. 1895), 30 S. W. Rep. 226. See RAPE. vol. 19, p. 959.

4. *Cook v. Hunt*, 24 Ill. 536; *Magee v. People*, 139 Ill. 138; *Gifford v. People*, 148 Ill. 173; *Haley v. State*, 63

acquainted with the general reputation of the witness sought to be sustained, the court will not determine by a preliminary inquiry whether he has sufficient knowledge to enable him to testify. That is a matter to be attended to on cross-examination, after which the value of his testimony is to be determined by the jury.¹

b. VALUE OF NEGATIVE EVIDENCE.—Inasmuch as the best character is generally that which is the least talked about,² the testimony of one who is well acquainted with a witness and his neighbors, and would be likely to hear what is said of him, that he has never heard his character called in question, is admissible to show that his general character is good;³ and the fact that a witness has known a person for a long time and has never heard anyone speak disparagingly of him, seems to be a sufficient qualification for him to swear that he would believe such person upon oath,⁴ though it has been held no error to refuse to permit him to do so.⁵

6. Explanation by the Impeached Witness Himself.—It is always proper to give a witness who has been impeached, either upon cross-examination or by independent evidence, an opportunity to make any explanation he can in support of his own credibility.⁶

7. Necessity of Corroboration—*a.* OF ACCOMPLICES—(1) *At Common Law.*—At common law, the credibility of an accomplice, like that of any other witness, is a matter for the consideration of the jury, and the accused may be legally convicted upon the unsp-

Ala. 83; *Clay v. Robinson*, 7 W. Va. 363; *Lyman v. Philadelphia*, 56 Pa. St. 488.

The sustaining witness should not speak from his individual knowledge of the impeached witness. *Jackson v. State* (Ala. 1895), 17 So. Rep. 333.

1. *State v. Fairlamb*, 121 Mo. 137; *State v. Pettit*, 119 Mo. 410.

2. 1 Tayl. Ev., § 350; *State v. Lee*, 22 Minn. 409; 21 Am. Rep. 769.

3. *Reg. v. Rowton*, 34 L. J. M. C. 57; 2 B. & H. C. C. 333; *Cole v. State*, 59 Ark. 50; *State v. Nelson*, 58 Iowa 208; *Taylor v. Smith*, 16 Ga. 7; *Artope v. Goodall*, 53 Ga. 318; *Morss v. Palmer*, 15 Pa. St. 51; *Gandolfo v. State*, 11 Ohio St. 114; *Bucklin v. State*, 20 Ohio 18; *Davis v. Franke*, 33 Gratt. (Va.) 413; *Lemons v. State*, 4 W. Va. 755; 6 Am. Rep. 293; *Clay v. Robinson*, 7 W. Va. 363.

In *Morss v. Palmer*, 15 Pa. St. 51, *Rogers, J.*, said: "It is also said the testimony ought to have been excluded because the witnesses examined for the defendant had no knowledge of his character. But surely, it is evidence in support of character that a witness acquainted with the person assailed,

living in his neighborhood, has never heard any ill of him. It is certainly some proof that a person, against whom the tongue of slander has never been heard to wag, is not so destitute of truth and sincerity as that he ought not to be believed on his oath. The evidence is not easily reconcilable with the charge that he is totally unworthy of credit. The presumption is, if the charge be true, it must have been heard by those who lived near and were in daily intercourse with him."

In *Illinois*, the rule appears to be otherwise. See *Magee v. People*, 139 Ill. 138.

4. *Hodgkins v. State*, 89 Ga. 761; *People v. Davis*, 21 Wend. (N. Y.) 309.

5. *Clay v. Robinson*, 7 W. Va. 363.

6. *Rex v. Woods*, 1 C. & D. C. C. 439; *Haralson v. State*, 82 Ala. 47; *Yarbrough v. State*, 71 Ala. 376; *Burke v. State*, 71 Ala. 377; *Henderson v. State*, 70 Ala. 29; 45 Am. Rep. 72; *Bressler v. People*, 117 Ill. 422; *People v. Wessel*, 98 Cal. 352; *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604; *Jourdan v. Patterson* (Mich. 1894), 61 N. W. Rep. 64; *Roberts v. Com.*, 94 Ky. 499; *Hoover v. Cary*, 86 Iowa 494; *Ferris*

ported testimony of a confederate in crime.¹ The great caution, however, which is necessary in weighing the testimony of such witnesses, has led the courts to the uniform practice of advising the jury not to convict the prisoner upon the testimony of an accomplice, unless it is corroborated in some material part.² But there is no positive rule of law requiring such an instruction, though it has been said by a great judge that it is a practice which deserves all the reverence of law.³ It rests in the discretion of the court, and a refusal to give it is consequently not reversible error.⁴ In giving this instruction, the judge does not withdraw the case from the jury by positive direction, but only advises them not to give credit to such unsupported testimony.⁵

(2) *Required by Statute.*—In a number of jurisdictions, it is

v. Hard, 135 N. Y. 354; *State v. Claire*, 41 La. Ann. 1067; *State v. Bedard*, 65 Vt. 278; *Duffresne v. Weise*, 46 Wis. 298.

1. *Rex v. Atwood*, 1 Leach C. C. 464; *Rex v. Durham*, 1 Leach C. C. 478; *Rex v. Dawber*, 3 Stark. 34; 14 E. C. L. 153; *Rex v. Jones*, 2 Campb. 133; *Reg. v. Andrews*, 1 Cox C. C. 183; *Rex v. Hastings*, 7 C. & P. 152; 32 E. C. L. 475; *Rex v. Jarvis*, 2 M. & Rob. 40; *Rex v. Webb*, 6 C. & P. 595; 25 E. C. L. 556; *Reg. v. Avery*, 1 Cox C. C. 206; *Rex v. Addis*, 6 C. & P. 388; 25 E. C. L. 452; *Rex v. Rudd*, Cowp. 336; *Reg. v. Stubbs*, Dears. C. C. 555; *Sayer's Case*, 16 How. St. Tr. 158; *Murphy's Case*, 19 How. St. Tr. 702; *Lord Ellenborough's Charge in Watson's Case*, 32 How. St. Tr. 583; *Lord Tenterden's Charge in cases of Cato Street Conspiracy*, 33 How. St. Tr. 689; *U. S. v. Flemming*, 18 Fed. Rep. 907; *U. S. v. Neverson*, 1 Mackey (D. C.) 152; *U. S. v. Bicksler*, 1 Mackey (D. C.) 341; *State v. Stebbins*, 29 Conn. 463; 79 Am. Dec. 223; *State v. Williamson*, 42 Conn. 261; *Com. v. Holmes*, 127 Mass. 424; *Collins v. People*, 98 Ill. 584; 38 Am. Rep. 105; *State v. Jackson*, 106 Mo. 174. See *supra*, this title, *Credibility*, subtit. *Accomplices*, where the rule is stated and many other cases are cited.

2. *Rex v. Wilkes*, 7 C. & P. 272; 32 E. C. L. 507; *Rex v. Barnard*, 1 C. & P. 88; 11 E. C. L. 324; *Rex v. Jones*, 2 Campb. 131; *Rex v. Atwood*, 1 Leach C. C. 464; *Reg. v. Farler*, 8 C. & P. 106; 34 E. C. L. 314; *Rex v. Noakes*, 5 C. & P. 326; 24 E. C. L. 342; *Rex v. Addis*, 6 C. & P. 388; 25 E. C. L. 452; *Reg. v. Boyes*, 1 B. & S. 311; 101 E. C. L. 311; 30 L. J. Q. B. 301; *Rex v. Gallagher*, 15 Cox C. C. 289; *Reg. v. Dunne*, 5 Cox C. C. 507; *Com. v. Price*, 10 Gray

(Mass.) 472; 71 Am. Dec. 668; *Com. v. Brooks*, 9 Gray (Mass.) 299; *Allen v. State*, 10 Ohio St. 287; *Ray v. State*, 1 Greene (Iowa) 316; *State v. Hardin*, 2 Dev. & B. (N. Car.) 407; *Ingalls v. State*, 48 Wis. 647; *Mack v. State*, 48 Wis. 286; *Black v. State*, 59 Wis. 471; *State v. Patterson*, 52 Kan. 335; *State v. Watson*, 31 Mo. 361; *Collins v. People*, 98 Ill. 584; 38 Am. Rep. 105; *Olive v. State*, 11 Neb. 1; *U. S. v. Neverson*, 1 Mackey (D. C.) 152; *U. S. v. Bicksler*, 1 Mackey (D. C.) 341; *U. S. v. Kessler*, Baldw. (U. S.) 22; *U. S. v. Troax*, 3 McLean (U. S.) 224.

3. Lord Abinger, in *Reg. v. Farler*, 8 C. & P. 106; 34 E. C. L. 314. In *U. S. v. Sykes*, 58 Fed. Rep. 1004, Dick, J., said: "It is the duty of the judge to advise the jury to consider such testimony with great caution and not regard it as worthy of credit without corroboration by other evidence material to the issue before them." Judge Taylor also says: "It is true that judges in their discretion generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone, and although the adoption of this practice will not be enforced by a court of review, its omission will, in most cases, be deemed a neglect of duty on the part of a judge." 1 Tayl. Ev., § 967. Citing *Rex v. Barnard*, 1 C. & P. 88; 11 E. C. L. 324; *Rex v. Wilkes*, 7 C. & P. 272; 32 E. C. L. 507.

4. *Reg. v. Boyes*, 1 B. & S. 311; 101 E. C. L. 311; *Com. v. Holmes*, 127 Mass. 424; *Com. v. Chase*, 147 Mass. 599; *Cheatham v. State*, 67 Miss. 335; 19 Am. St. Rep. 310. See also *Rex v. Jones*, 2 Campb. 132; *Rex v. Durham*, 1 Leach C. C. 478.

5. 1 Tayl. Ev., § 967; *U. S. v. Sykes*, 58 Fed. Rep. 1004.

provided by statute that a conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by other evidence in some material matter tending directly to connect the prisoner with the crime charged, thus substantially enacting into a positive rule of law the instruction which was usually given to the jury at common law.¹

Where it appears from the evidence that a witness for the prosecution is an accomplice of the defendant, it is the duty of the court to instruct the jury touching the weight of his testimony.²

(3) *Who Are Accomplices.*—Under a statute requiring corroboration of accomplices, it has been held that the term applies not only to technical accomplices but to all witnesses who are *participes criminis*, whether as principals or accessories.³ But the rule does not apply to detectives and spies, however much their con-

1. Burney v. State, 87 Ala. 80; Marler v. State, 67 Ala. 55; 42 Am. Rep. 95; Lumpkin v. State, 68 Ala. 56; People v. Melvane, 39 Cal. 614; People v. Ames, 39 Cal. 403; People v. Clough, 73 Cal. 348; People v. Strybe (Cal. 1894), 36 Pac. Rep. 3; People v. Cloonan, 50 Cal. 449; State v. Schlager, 19 Iowa 169; Johnson v. State, 4 Greene (Iowa) 65; State v. Upton, 5 Iowa 465; Bernhard v. State, 76 Ga. 13; State v. Quinlan, 40 Minn. 55; People v. O'Neil, 109 N. Y. 251, *affirming* 48 Hun (N. Y.) 46; People v. Williams, 29 Hun (N. Y.) 522; People v. Bosworth, 64 Hun (N. Y.) 75; People v. Courtney, 28 Hun (N. Y.) 589; People v. Ryland, 28 Hun (N. Y.) 568; Cox v. Com., 125 Pa. St. 94; Smith v. Com. (Ky. 1891), 17 S. W. Rep. 182; Bowling v. Com., 79 Ky. 604; Craft v. Com., 80 Ky. 349; Irvin v. State, 1 Tex. App. 301; Wright v. State, 43 Tex. 170; Hauck v. State, 1 Tex. App. 361; Hasselmeyer v. State, 1 Tex. App. 701; Nourse v. State, 2 Tex. App. 316; Sweat v. State, 4 Tex. App. 624; Tooney v. State, 5 Tex. App. 193; Brown v. State, 6 Tex. App. 313; Lockhart v. State, 29 Tex. App. 35; Roguemoore v. State, 28 Tex. App. 55; Stouard v. State, 27 Tex. App. 1; Buchanan v. State (Tex. Crim. App. 1894), 24 S. W. Rep. 895; Clark v. State (Tex. App. 1891), 17 S. W. Rep. 1089; Blanchette v. State, 29 Tex. App. 46; Lopez v. State, 34 Tex. 133; Davis v. State, 2 Tex. App. 588; Roach v. State, 4 Tex. App. 46; Miller v. State, 4 Tex. App. 251; Powell v. State, 15 Tex. App. 441; Dunn v. State, 15 Tex. App. 560; McNealley v. State (Wyoming, 1894), 36 Pac. Rep. 824; People v. Chadwick, 7 Utah 134.

2. Wicks v. State, 28 Tex. App. 448; Stone v. State, 22 Tex. App. 185; Hines v. State, 27 Tex. App. 104.

But where the prosecution does not rely wholly on the testimony of an accomplice to connect the accused with the offense, it is not incumbent on the court without request to instruct the jury touching corroboration. Robinson v. State, 84 Ga. 674.

Mere knowledge on the part of the witness that the defendant committed the crime, though he remain silent on the subject, does not call for an instruction concerning the weight of an accomplice's testimony. Smith v. State, 28 Tex. App. 309; O'Connor v. State, 28 Tex. App. 288; Chumley v. State, 28 Tex. App. 87; Rhodes v. State, 11 Tex. App. 563; *overruled*, on other grounds, in Nolen v. State, 14 Tex. App. 480; 46 Am. Rep. 247; Green v. State, 51 Ark. 189; Edmonson v. State, 51 Ark. 115; State v. Roberts, 15 Oregon 187.

3. Irvin v. State, 1 Tex. App. 301; Nourse v. State, 2 Tex. App. 317; Barrara v. State, 42 Tex. 260; Williams v. State, 42 Tex. 392; Davis v. State, 2 Tex. App. 605; Jones v. State, 3 Tex. App. 579; Roach v. State, 4 Tex. App. 46; Ham v. State, 4 Tex. App. 675; Smith v. State, 13 Tex. App. 511; House v. State, 16 Tex. App. 33; Hornsberger v. State, 19 Tex. App. 335.

One who is in partnership with a gambler, shares his winnings and losses, and loans him money to bet, is an accomplice of his. English v. State, 35 Ala. 428.

In *Utah*, it has been held that an accessory after the fact is not an accomplice of the principal offender, within

duct may affect their credibility.¹ Persons who are present at a prize fight, though guilty of an offense, are not accomplices of the principal actors.² Upon a prosecution for giving a bribe, the person bribed is not an accomplice of the defendant in such a sense as to require corroboration.³ Neither is a prisoner who broke jail an accomplice of the person who assisted him to escape.⁴ A receiver of stolen goods is an accomplice of the thief who stole them, within the meaning of this rule;⁵ but one who buys intoxicating liquor sold in violation of law is not an accomplice of the vendor.⁶

On the trial of an indictment for procuring an abortion, the patient is not technically an accomplice and the rule requiring corroboration of accomplices does not strictly apply to her.⁷ In a prosecution for incest, the female is deemed equally guilty with the male if she knowingly and willfully unites with him in the commission of the crime. Consequently, her testimony ought to be corroborated in order to convict him.⁸ So, also, persons who by mutual consent commit the crime against nature are accomplices and neither should be convicted on the unsupported testimony of the other.⁹ Whether or not a witness is an accomplice, is a question of fact for the jury.¹⁰ But it is not necessary that such fact be established beyond a reasonable doubt,¹¹ though the jury should be reasonably satisfied that he is an

the meaning of the statute requiring corroboration. *People v. Chadwick*, 7 Utah 134.

1. *People v. Bolanger*, 71 Cal. 17; *People v. Farrell*, 30 Cal. 316; *People v. Molins* (General Sessions), 10 N. Y. Supp. 130; *State v. Beauleigh*, 92 Mo. 490; *Reg. v. Mullins*, 3 Cox C. C. 526.

One who goes to a house kept for the purposing of gambling and engages in the gaming for the express purpose of appearing as a witness against the proprietor, is not an accomplice. *Com. v. Baker*, 155 Mass. 287. See also *supra*, this title, *Credibility*, subtit. *Detectives and Informers*.

2. *Rex v. Hargrave*, 5 C. & P. 170; 24 E. C. L. 260.

3. *Reg. v. Boyes*, 1 B. & S. 311; 101 E. C. L. 311.

4. *Ash v. State*, 81 Ala. 76.

5. *Rex v. Moores*, 7 C. & P. 270; 32 E. C. L. 507; *Rex v. Wells*, M. & M. 326; 22 E. C. L. 324; *Reg. v. Robinson*, 4 F. & F. 43; *Reg. v. Pratt*, 4 F. & F. 315.

In *Tennessee*, it has been held that the receiver of stolen goods is guilty of a substantive offense and is neither an accomplice nor accessory of the thief,

within the meaning of the statute in that state requiring corroboration of accomplices. *Harris v. State*, 7 Lea (Tenn.) 124.

6. *Com. v. Downing*, 4 Gray (Mass.) 29; *Com. v. Willard*, 22 Pick. (Mass.) 476; *State v. Hoxsie*, 15 R. I. 1; 2 Am. St. Rep. 838; *People v. Smith*, 28 Hun (N. Y.) 626; *affirmed*, on the opinion of the general term, 92 N. Y. 665.

7. *Com. v. Wood*, 11 Gray (Mass.) 85; *Com. v. Boynton*, 116 Mass. 345; *Com. v. Follansbee*, 155 Mass. 274.

And in such case it cannot be said, as a matter of law, that a third person who procured ether, which the defendant administered to the patient, is an accomplice, where it does not appear that such person knew the purpose for which the ether was to be used. *Com. v. Follansbee*, 155 Mass. 274.

8. *Blanchette v. State*, 29 Tex. App. 47; *Mercer v. State*, 17 Tex. App. 452; *Dodson v. State*, 24 Tex. App. 514; *Freeman v. State*, 11 Tex. App. 92; 40 Am. Rep. 787.

9. *Reg. v. Jellyman*, 8 C. & P. 604; 34 E. C. L. 547.

10. *Com. v. Glover*, 111 Mass. 401; *Com. v. Ford*, 111 Mass. 394.

11. *Com. v. Ford*, 111 Mass. 394.

accomplice before rejecting his testimony for the want of corroboration.¹

(4) *Sufficiency of Corroborating Evidence.*—It is not necessary that an accomplice be corroborated upon every fact to which he swears, for, if this were required, there would be no necessity for calling him as a witness.² Neither is it necessary that he be corroborated by the direct testimony of other witnesses; circumstantial evidence is sufficient, if it is material and tends to connect the prisoner with the crime charged.³ It is, however, necessary that the corroborating evidence be upon some part of the testimony which is material to the issue,⁴ and it must also tend to show that the defendant committed the crime charged in the indictment. It may be laid down as a general principle that it is not a sufficient corroboration to prove that an offense was in fact committed in the manner described by the accomplice,⁵

1. *Childress v. State*, 86 Ala. 77; *Hines v. State*, 27 Tex. App. 104.

2. *U. S. v. Reeves*, 38 Fed. Rep. 404; *U. S. v. Ybanez*, 53 Fed. Rep. 540; *U. S. v. Howell*, 56 Fed. Rep. 21; *U. S. v. Lancaster*, 44 Fed. Rep. 896; *People v. Ogle*, 104 N. Y. 511; *People v. Kunz*, 73 Cal. 313.

3. *People v. Elliott*, 106 N. Y. 288; *People v. Kerr* (Oyer & T. Ct.), 6 N. Y. Supp. 674; *People v. Christian*, 78 Hun (N. Y.) 28; *People v. Wiley* (Supreme Ct.), 20 N. Y. Supp. 445; *People v. Grundell*, 75 Cal. 305; *Pritchett v. State*, 92 Ga. 33; *State v. Townsend*, 19 Oregon 213; *Fort v. State*, 52 Ark. 180; *State v. Russell* (Iowa, 1894), 58 N. W. Rep. 890; *State v. Stanley*, 48 Iowa 221; *Morrow v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 395; *State v. Jackson*, 106 Mo. 174; *Com. v. Drake*, 124 Mass. 21; *State v. Smalls*, 11 S. Car. 262; *State v. Ford*, 3 Strobbh. (S. Car.) 517, note; *Hester v. Com.*, 85 Pa. St. 139.

Possession of stolen goods not satisfactorily accounted for is sufficient corroborating evidence. *Reg. v. Birkett*, 8 C. & P. 732; 34 E. C. L. 608; *Boswell v. State*, 92 Ga. 581; *People v. Grundell*, 75 Cal. 301; *Morrow v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 395; *Jernigan v. State*, 10 Tex. App. 546. See also *Smith v. State*, 59 Ala. 104; *Ford v. State*, 70 Ga. 722; *Pritchett v. State*, 92 Ga. 33; *Roberts v. State*, 80 Ga. 772.

That the coat of a murdered man was found in the possession of the person accused of killing him, is proper corroborating evidence, though the accomplice testified only to the killing

and not to the taking of the coat. *Malachi v. State*, 89 Ala. 134.

4. *Com. v. Bosworth*, 22 Pick. (Mass.) 397; *Com. v. Holmes*, 127 Mass. 424; *Com. v. Chase*, 147 Mass. 599.

5. *Rex v. Webb*, 6 C. & P. 595; 25 E. C. L. 556; *Reg. v. Dyke*, 8 C. & P. 261; 34 E. C. L. 381; *Kelsey's Case*, 2 Lew. 45; *Rex v. Addis*, 6 C. & P. 388; 25 E. C. L. 452; *Reg. v. Farler*, 8 C. & P. 106; 34 E. C. L. 314; *Rex v. Wilkes*, 7 C. & P. 272; 32 E. C. L. 507; *Reg. v. Mullins*, 3 Cox C. C. 526; *Reg. v. Robinson*, 4 F. & F. 43; *State v. Miller*, 100 Mo. 606; *State v. Chyo Chiagk*, 92 Mo. 395; *People v. Clough*, 73 Cal. 348; *People v. Smith*, 98 Cal. 218; *People v. Thompson*, 50 Cal. 480; *Burney v. State*, 87 Ala. 80; *Vaughan v. State*, 58 Ark. 353; *People v. Elliott*, 106 N. Y. 288; *People v. Ogle*, 104 N. Y. 511; *People v. Everhardt*, 104 N. Y. 591; *People v. White*, 62 Hun (N. Y.) 114; *People v. Bosworth*, 64 Hun (N. Y.) 75; *Cox v. Com.*, 125 Pa. St. 94; *Hester v. Com.*, 85 Pa. St. 139; *Conway v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 401; *Smith v. Com.* (Ky. 1891), 17 S. W. Rep. 182; *State v. Howard*, 32 Vt. 403; *State v. Russell* (Iowa, 1894), 58 N. W. Rep. 890; *Hughes v. State*, 58 Miss. 355.

In *Reg. v. Farler*, 8 C. & P. 106; 34 E. C. L. 314, Lord Abinger instructed the jury as follows: "It is a practice which deserves all the reverence of law that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in

unless proof of the *corpus delicti* necessarily involves the defendant's connection with the crime.¹

The practice requiring corroboration of the testimony of one accomplice, applies where two or more are called to testify, because one accomplice cannot corroborate another.² And it has

my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself, will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man was to break open a house, and put a knife to your throat and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put the knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it. Here you find that the prisoner and the accomplice are seen together at the house of the landlord. Now, look at his evidence. If they were seen together under circumstances that were extraordinary, and where the prisoner was not likely to be, unless there were concert, it might be something; but he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there, and he left when they were shutting up the house. Therefore, it is perfectly natural that he should have been there and left when he did. The single circumstance is that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week, and there the case ends against him. All the rest depends upon the evidence of the accomplice. The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence."

There are some expressions to the contrary in earlier cases; but it seems that all those cases really decide is that there is no rule of law preventing the conviction of a prisoner upon the unsupported testimony of an accomplice. *Rex v. Jones*, 2 Campb. 132; *Rex v. Dawber*, 3 Stark. 34; 14 E. C. L. 153; *Rex v. Hastings*, 7 C. & P. 152; 32 E. C. L. 475.

It is no confirmation of a thief that the stolen property was found on the premises of the person charged as receiver, for the thief may have placed the goods there himself. *Reg. v. Pratt*, 4 F. & F. 315; *Reg. v. Robinson*, 4 F. & F. 43.

The fact that the accused has told suspicious lies about the crime is not sufficient to corroborate the testimony of an accomplice. *People v. Koenig*, 99 Cal. 574; *Buchanan v. State* (Tex. Crim. App. 1894), 24 S. W. Rep. 895.

A confession by the accused, supported by evidence of the *corpus delicti*, sufficiently corroborates the evidence of an accomplice. *Schaefer v. State*, 93 Ga. 177; *Schoenfeldt v. State*, 30 Tex. App. 695. See also *Partee v. State*, 67 Ga. 570; *Territory v. Mahaffey*, 3 Mont. 112; *People v. Cleveland*, 49 Cal. 578; *People v. Zimmerman* (Cal.), 3 West Coast Rep. 59.

The fact that the prisoner was seen in the neighborhood about the time the crime was committed is not sufficient to corroborate the testimony of an accomplice, *Reg. v. Farler*, 8 C. & P. 106; 34 E. C. L. 314; *State v. Odell*, 8 Oregon 30; unless the defense is an *alibi*. *Territory v. Kinney* (N. Mex.), 1 West Coast Rep. 801.

1. *People v. O'Neil*, 109 N. Y. 251; *People v. Jaehne*, 103 N. Y. 182.

2. *Rex v. Noakes*, 5 C. & P. 326; *Reg. v. Stubbs*, *Dears*, C. C. 555; 7 Cox C. C. 48; *Reg. v. Magill*, Ir. Cir. Rep. 418; *Reg. v. Mullins*, 3 Cox C. C. 526; *Johnson v. State*, 4 Greene (Iowa) 65; *Gonzales v. State*, 9 Tex. App. 374.

Under the Texas statute it is held that where two or more accomplices testify against the accused the court should instruct the jury that one accomplice cannot corroborate another. *McConnell v. State* (Tex. App. 1892), 18 S. W. Rep. 645; *Whitlow v. State* (Tex. App. 1892), 18 S. W. Rep. 865.

Where three confederates in crime made separate statements without any knowledge or collusion *inter sese*, and the three statements were in all material respects identical, it was held that proof of this fact was sufficient corroboration

been held that the wife of an accomplice cannot corroborate him;¹ but the trend of American authority is in support of the contrary rule.² Where several prisoners are on trial for the same offense, evidence in corroboration of an accomplice tending to connect one of them with the crime charged should not be taken as a sufficient corroboration against the others. The corroboration must extend to all of them before they can all be convicted.³

(5) *In Trials for Misdemeanors*.—It was at one time contended that the practice of requiring confirmation did not extend to cases of misdemeanors.⁴ But it has been said that there is no sound reason for such distinction, and if it ever prevailed it no longer exists,⁵ though the amount of corroboration required may depend, to some extent, on the nature and circumstances of the crime and the degree of moral obliquity to be presumed from its commission.⁶ The rule, however, does not apply in civil actions growing out of conspiracies to commit fraud.⁷ Nor is it applicable

of one of them who appeared as a witness for the prosecution. *U. S. v. Lancaster*, 44 Fed. Rep. 806.

1. *Rex v. Neal*, 7 C. & P. 168; 32 E. C. L. 481.

2. *Woods v. State*, 76 Ala. 35; 52 Am. Rep. 315; *Edmonson v. State*, 51 Ark. 115; *State v. Moore*, 25 Iowa 128; 95 Am. Dec. 176; *State v. McIntire*, 58 Iowa 572; *Haskins v. People*, 16 N. Y. 344; *Dill v. State*, 1 Tex. App. 278. See also *U. S. v. Horn*, 5 Blatchf. (U. S.) 102; *Askea v. State*, 75 Ga. 356; *Adams v. State*, 28 Fla. 511.

3. *Reg. v. Jenkins*, 1 Cox C. C. 177; *Rex v. Moores*, 7 C. & P. 270; 32 E. C. L. 507; *Rex v. Wells, M. & M.* 326; 22 E. C. L. 324; *Rex v. Field, Dick. Q. S.* 520.

In *Com. v. Holmes*, 127 Mass. 431, Gray, C. J., said: "In 1829, where the testimony of an accomplice was confirmed as to an accessory but not as to the principal, Mr. Justice Littledale directed an acquittal of both. *Rex v. Wells, M. & M.* 326; 22 E. C. L. 324. And for the past fifty years, it has been the usual practice of English judges at *nisi prius* to advise the jury that the corroboration of the testimony of an accomplice ought to be of facts going to prove the guilt of the defendant, and that corroboration as to the guilt of one defendant only would not justify the conviction of another." *Citing* *Vaughan, B.*, in *Rex v. Field, Dick. Q. S.* 520; *Patterson, J.*, in *Rex v. Addis*, 6 C. & P. 388; 25 E. C. L. 452, and in *Kelsey's Case*, 2 Lew. 45; *Williams, J.*, in *Rex v. Webb*, 6 C. & P. 595; 25 E. C. L. 556; *Alderson, B.*, in *Rex v. Moores*, 7 C. & P. 270; 32 E. C. L. 507;

in *Rex v. Wilkes*, 7 C. & P. 272; 32 E. C. L. 507; in *Rex v. Fletcher*, 2 Lew. 45, note, and in *Reg. v. Jenkins*, 1 Cox C. C. 177; *Lord Abinger in Reg. v. Farler*, 8 C. & P. 106; 34 E. C. L. 314; *Gurney, B.*, in *Reg. v. Dyke*, 8 C. & P. 261; 34 E. C. L. 381; *Jervis, C. J.*, *Parke, B.*, and *Creswell, J.*, in *Reg. v. Stubbs*, 7 Cox C. C. 48; *Dears, C. C.* 555.

4. *Gibbs*, Attorney General, in *Rex v. Jones*, 31 How. St. Tr. 315; *Truss v. State*, 13 Lea (Tenn.) 311.

5. 2 Phil. Ev. 112; 1 Tayl. Ev. § 966, both *citing* *Reg. v. Farler*, 8 C. & P. 106; 34 E. C. L. 314, where Lord Abinger required corroborating evidence to support the testimony of an accomplice in a trial for a misdemeanor. To the same effect are *U. S. v. Smith*, 2 Bond (U. S.) 323, and *State v. Davis*, 38 Ark. 581.

In *Georgia*, it is provided by statute that no conviction of a felony can be had upon the unsupported testimony of an accomplice, but it is held in that state that the uncorroborated testimony of an accomplice is sufficient to convict of a misdemeanor; this statutory provision not applying to such cases. *Parsons v. State*, 43 Ga. 197; *Crisson v. State*, 51 Ga. 597; *Porter v. State*, 76 Ga. 659; *Rountree v. State*, 88 Ga. 457. And the rule is the same in *Alabama*. *Moses v. State*, 58 Ala. 117; *Hart v. State*, 40 Ala. 32; 88 Am. Dec. 752.

6. *Rex v. Jarvis*, 2 M. & Rob. 40; *Rex v. Cramp*, 14 Cox C. C. 390; *U. S. v. Harries*, 2 Bond (U. S.) 317.

7. *Kalckhoff v. Zoehrlaut*, 43 Wis. 370.

in actions to recover penalties and forfeitures suffered by reason of the commission of misdemeanors;¹ though in such cases the credibility of witnesses may be seriously impaired by their known complicity with the parties from whom the forfeitures are sought to be recovered.²

b. WHERE THE TESTIMONY OF ONE WITNESS IS INSUFFICIENT—(1) *Treason*.—At common law, treason and misprision of treason were sufficiently proved by one credible witness,³ but it has been deemed wise to change this rule by statute. In *England*, the statutory rule is that no person shall be indicted, tried, or attainted of high treason, or misprision of high treason, but upon the oaths of two lawful witnesses, either both to the same overt act or one of them to one, and another of them to another, overt act of the same treason, unless he shall willingly, and without violence, in open court confess the same.⁴ An exception is made in case of the assassination of the Queen, or an attempt to take her life or to do her bodily harm. In such case, the prisoner is to be tried by the rules of evidence applicable to trials for murder, though upon conviction he shall suffer the penalties of high treason.⁵ Though the treason itself must be proved by two witnesses, yet a collateral fact not tending to the proof of an overt act of treason may be proved by one witness only.⁶ For example, if the defendant pleads alienage as a defense, the statute does not require the testimony of two witnesses to prove that he is a British subject.⁷

It is clear, from the language of the statute, that if the prisoner, when arraigned, makes a voluntary confession in open court, there is no necessity for further proof of his guilt.⁸ And it seems that confessions of overt acts made before examining magistrates are admissible against the prisoner as evidence in chief, if they are proved by two lawful witnesses;⁹ and such confessions are

1. *McClory v. Wright*, 10 Ir. C. L. R. 514; *Magee v. Mark*, 11 Ir. C. L. R. 449.

2. *U. S. v. One Distillery*, 2 Bond (U. S.) 399.

3. 1 Tayl. Ev., § 952, citing *Foster C. L.* 233; *McNally Ev.* 31; *Rex v. Clare*, 28 How. St. Tr. 887, 924; *Woodbeck v. Keller*, 6 Cow. (N. Y.) 120.

4. Stat. 7 Wm. III., ch. 3.

This rule has been extended to *Ireland*, also, by Stat. 1 & 2 Geo. IV., ch. 24.

Stats. 1 Edw. VI., ch. 12, and 5 Edw. VI., ch. 11, contain substantially the same provision. Under these statutes, it was held that a person might be convicted of high treason upon the testimony of two witnesses who testified to separate overt acts of the same treason, but not when they testified to separate overt acts of

different treasons. *Lord Stafford's Case*, T. Raym. 407. See also *Case of the Regicides*, Kel. 9; 1 East P. C. 129; *Deacon's Case*, Fost. 9; 1 East P. C. 130; 18 How. St. Tr. 266; *Layser's Case*, 6 St. Tr. 614; 16 How. St. Tr. 220; *Rex v. Jellias*, 1 East P. C. 130; *Gavan's Case*, 2 St. Tr. 873; 1 East P. C. 130.

This rule applies as well to the finding of the indictment by the grand jury as to the trial itself in open court. 1 East P. C. 128.

5. 39 & 40 Geo. III., ch. 93; 1 & 2 Geo. IV., ch. 24, § 2; 5 & 6 Vict., ch. 51, § 1.

6. 1 East P. C. 130; 1 Tayl. Ev., § 955.

7. *Vaughan's Case*, 5 St. Tr. 38; 2 Salk. 634; *Rex v. Smith*, 1 East P. C. 130.

8. 1 East P. C. 131.

9. *Francia's Case*, 1 East P. C. 133; *Greg's Case*, 1 East P. C. 134; 14 How.

admissible in confirmation of witnesses who testify directly to overt acts, though they be proved by one witness only.¹

It is provided in the constitution of the *United States* that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.² And as early as the year 1778, it was held in the State of *Pennsylvania* that the prisoner's confession proved by two witnesses was not alone sufficient to convict him, though where an overt act was proved the confession might be received as corroborating evidence.³

(2) *Perjury*.—In a prosecution for perjury, the evidence of one witness is not sufficient to warrant a conviction, as in such case there is only one oath against another.⁴ Indeed it appears to have been thought at one time that two witnesses were necessary to a conviction.⁵ But, upon principle and authority, the true rule is that to prove the falsity of the statement upon which perjury is charged, the testimony of two witnesses is necessary, or that of one credible witness supported by such corroborating circumstances as make the evidence for the prosecution sufficient at least to overcome the oath of the defendant, and the legal presumption of his innocence.⁶ This rule applies only to the proof of the falsity of the matter upon which perjury is charged; other facts, such as the holding of the court, the proceedings therein, administering the oath, and even that the defendant swore as charged in the indictment, may be proved by one witness.⁷ In an action of slander for charging the plaintiff with perjury, if the defendant pleads the truth of the charge in justification he must sustain his

St. Tr. 1375; *Berwick's Case*, 18 How. St. Tr. 370; *Willis' Case*, 1 East P. C. 134; 8 St. Tr. 254.

1. 1 Phil. Ev., p. 566; 1 Tayl. Ev., § 867; *Willis' Case*, 15 How. St. Tr. 622; *Rex v. Crossfield*, 26 How. St. Tr. 56.

2. Const. *United States*, art. 3, § 3. Similar provisions are to be found in the constitutions and statutes of the various states.

3. *Respublica v. Roberts*, 1 Dall. (Pa.) 39; *Respublica v. McCarty*, 2 Dall. (Pa.) 86.

4. *Reg. v. Muscot*, 10 Mod. 193.

5. Lord Tenterden is said to have entertained this opinion. See *Champney's Case*, 2 Lew. C. C. 258, per Coleridge, J.; *Rex v. Wigley*, 2 Lew. 248, note; 3 Russ. Cr. 78; 1 Tayl. Ev., § 959.

6. *Champney's Case*, 2 Lew. C. C. 258; *Reg. v. Yates, C. & M.* 132; 41 E. C. L. 77; *Reg. v. Towey*, 8 Cox C. C. 328; *Reg. v. Boulter*, 2 Den. C. C. 396; *Reg. v. Virrier*, 12 Ad. & El. 317; 40 E. C. L. 48; *Reg. v. Gardiner*, 2 M. C. C. 95; *Rex v. Mayhew*, 6 C. & P. 315; 25 E.

C. L. 415; *Reg. v. Braithwaite*, 1 F. & F. 638; 8 Cox C. C. 444; *Reg. v. Owen*, 6 Cox C. C. 105; *Reg. v. Webster*, 1 F. & F. 515; *Reg. v. Hare*, 13 Cox C. C. 174; *U. S. v. Wood*, 14 Pet. (U. S.) 440; *U. S. v. Hall*, 44 Fed. Rep. 864; *Com. v. Parker*, 2 Cush. (Mass.) 212; *Com. v. Butland*, 119 Mass. 317; *Com. v. Davis*, 92 Ky. 460; *State v. Hayward*, 1 Nott & M. (S. Car.) 546; *State v. Peters*, 107 N. Car. 876; *Gandy v. State*, 27 Neb. 707; *State v. Gibbs*, 10 Mont. 212, 213; *State v. Heed*, 57 Mo. 252; *State v. Miller*, 44 Mo. App. 159.

In some states, this is declared to be the rule by statute. *State v. Buckley*, 18 Oregon 228; *Beach v. State*, 32 Tex. Crim. Rep. 240; *Kitchen v. State*, 29 Tex. App. 45; *Waters v. State*, 30 Tex. App. 284. See also *PERJURY*, vol. 18, p. 323, where other cases are cited and examples of corroborating circumstances are given.

7. *Com. v. Pollard*, 12 Met. (Mass.) 225; *People v. Hayes*, 70 Hun (N. Y.) 111; *State v. Wood*, 17 Iowa 18; 2 Hawk.

plea by two witnesses, or by one witness and corroborating circumstances.¹ And it seems that the defendant, to support his justification, is bound to give as conclusive proof as would be necessary to convict the plaintiff on an indictment for such offense.² It is not required, however, that the jury shall be satisfied of the truth of the plea beyond a reasonable doubt. After such evidence has been offered and admitted, they should weigh it, as in other civil cases, and if the evidence preponderates in favor of the plea of justification, they may find in favor of the defendant, although upon the same evidence they might acquit the plaintiff, were he on trial for perjury, by allowing him the benefit of a reasonable doubt.³

(3) *To Overcome Answer in Equity*.—As has been seen in another part of this title, an answer in equity is to be taken as evidence in the suit so far as it is responsive to the bill; and to overcome it the complainant must prove his allegations by two witnesses, or by one witness supported by corroborating circumstances.⁴

(4) *Bastardy*.—In *England*, the mother of an illegitimate child must not only be a witness, but her testimony must be corroborated before a man can be adjudged the putative father or an order of affiliation can be made,⁵ and it is necessary that the corroboration be in some material particular.⁶ But this is a statutory rule; and in the absence of such a statute no corroboration is required in such cases as a rule of law;⁷ though, if she is impeached, corroborating evidence is admissible to sustain her testimony.⁸

(5) *Breach of Promise of Marriage*.—In *England*, it is provided by statute that, in actions for breach of promise of marriage, the plaintiff's testimony must be corroborated by some other material evidence in support of the promise.⁹

XI. PRIVILEGE OF REFUSING TO ANSWER—1. **Where Answering Might Subject the Witness to a Criminal Charge**.—It is the privilege

P. C., ch. 46, § 17; 3 Russ. Cr., p. 85; 1 Tayl. Ev., § 963.

1. Spruill v. Cooper, 16 Ala. 791; Woodbeck v. Keller, 6 Cow. (N. Y.) 118; Byrket v. Monohan, 7 Blackf. (Ind.) 83; 41 Am. Dec. 212.

2. Clark v. Dibble, 16 Wend. (N. Y.) 601; Woodbeck v. Keller, 6 Cow. (N. Y.) 118.

3. Spruill v. Cooper, 16 Ala. 792; Kincaide v. Bradshaw, 3 Hawks (N. Car.) 63.

4. See *supra*, this title, *Competency—Parties—Exceptions to the Rule—In Equity*, where the rule is stated and the cases collected.

5. Stats. 8 & 9 Vict., ch. 10, § 6; 35 & 36 Vict., ch. 65, § 4; 36 Vict., ch. 9, § 5; Hodges v. Bennett, 5 H. & N. 625; 29 L. J. M. C. 224.

Where the mother died after the

issue of the summons, but before the hearing, it was held that there was no jurisdiction to make an order. Reg. v. Armitage, L. R., 7 Q. B. 773.

6. Cole v. Manning, 2 Q. B. Div. 611. An order for the maintenance of the child is bad if it does not recite that the mother's statement was corroborated in some material particular. Reg. v. Read, 9 Ad. & El. 619; 36 E. C. L. 222.

7. State v. Nichols, 29 Minn. 359; State v. McGlothlen, 56 Iowa 544.

8. Sweet v. Sherman, 21 Vt. 23; Judson v. Blanchard, 4 Conn. 557.

Compare McClellan v. State, 66 Wis. 335.

9. Stat. 32 and 33 Vict., ch. 68, § 2. See Bessela v. Stern, 2 C. P. Div. 265; Hickey v. Campion, 6 I. R. C. L. 557.

of a witness to refuse to answer any question, the answer to which might expose or tend to expose him to a criminal charge, or to any kind of punishment.¹ This privilege is not confined to matters which will criminate him directly, but extends also to such matters as will have any tendency to criminate him; because, if it were otherwise, question after question might be put to him, until enough evidence might be obtained from him whereon to found a criminal charge, though the answer to no one question directly criminated him.² The rule is the same in equity as at common law, and where discovery is sought of matters which might subject the defendant to a penalty or punishment, the privilege may

1. *Friend's Case*, 10 How. St. Tr. 1090; *Lord Macclesfield's Case*, 16 How. St. Tr. 1149; *Rex v. Gordon*, 2 Doug. 593; *Rex v. Hardy*, 24 How. St. Tr. 720; *Trial of De Berenger*, Gurney 195; *Title v. Grevet*, 2 Ld. Raym. 1008; *Parkhurst v. Lowten*, 2 Swanst. 216; *Cates v. Hardacre*, 3 Taunt. 424; *East India Co. v. Campbell*, 1 Ves. 247; *Paxton v. Douglas*, 19 Ves. Jr. 225; *MacBride v. Macbride*, 4 Esp. 242; *Dodd v. Norris*, 3 Campb. 519; *Maloney v. Bartley*, 3 Campb. 210; *Rex v. Lewis*, 4 Esp. 225; *Rex v. Slaney*, 5 C. & P. 213; 24 E. C. L. 285; *Rawlings v. Hall*, 1 C. & P. 11; 11 E. C. L. 300; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 417; 1 Burr. Tr. 247; *In re Graham*, 8 Ben. (U. S.) 419; *Marbury v. Madison*, 1 Cranch (U. S.) 144; *U. S. v. Moses*, 1 Cranch C. C. 170; *U. S. v. Lynn*, 2 Cranch C. C. 309; *Southard v. Rexford*, 6 Cow. (N. Y.) 254; *Salina Bank v. Henry*, 2 Den. (N. Y.) 155; *People v. Forbes*, 143 N. Y. 219; *Short v. State*, 4 Harr. (Del.) 568; *Temple v. Com.*, 75 Va. 892; *Taylor v. McIrvin*, 94 Ill. 488; *Grannis v. Branden*, 5 Day (Conn.) 260; 5 Am. Dec. 143; *Richman v. State*, 2 Greene (Iowa) 532; *Johnson v. Goss*, 2 Yerg. (Tenn.) 110; *Lea v. Henderson*, 1 Coldw. (Tenn.) 146; *Robinson v. Neal*, 5 T. B. Mon. (Ky.) 212; *Rutherford v. Com.*, 2 Metc. (Ky.) 387; *Janvrin v. Scammon*, 29 N. H. 280; *Coburn v. Odell*, 30 N. H. 540; *State v. Marshall*, 36 Mo. 400; *Pleasant v. State*, 15 Ark. 624; *Marshall v. Riley*, 7 Ga. 367; *Lister v. Boker*, 6 Blackf. (Ind.) 439; *Simmons v. Holster*, 13 Minn. 249.

A witness need not answer a question if it reasonably appears that the answer might expose him to a criminal prosecution. *Stevens v. State*, 50 Kan. 712; *Friess v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 205; *Minters*

v. People, 139 Ill. 363, reversing 39 Ill. App. 438; *Ex p. Clarke*, 103 Cal. 352; *Fries v. Brugler*, 12 N. J. L. 79; 21 Am. Dec. 52; *Poole v. Perritt*, 1 Spears (S. Car.) 128; *State v. Edwards*, 2 Nott & M. (S. Car.) 14; 10 Am. Dec. 557; *Cook v. Corn*, 1 Overt. (Tenn.) 340; *Chamberlain v. Willson*, 12 Vt. 491; 36 Am. Dec. 356; *U. S. v. Strother*, 3 Cranch C. C. 432; *Ex p. Lindo*, 1 Cranch C. C. 445; *U. S. v. Lynn*, 2 Cranch C. C. 309.

The fact that the offense is punishable by the imposition of a fine only does not change the rule. *Rawlings v. Hall*, 1 C. & P. 11; 11 E. C. L. 300.

2. *Rex v. Slaney*, 5 C. & P. 213; 24 E. C. L. 285; *Rex v. O'Coigly*, 26 How. St. Tr. 1351; *Claridge v. Hoare*, 14 Ves. Jr. 59; *Paxton v. Douglas*, 19 Ves. Jr. 225; *Reg. v. Hodgson*, R. & R. C. C. 211; *Dodd v. Norris*, 3 Campb. 519; *Rex v. Pitcher*, 1 C. & P. 85; 11 E. C. L. 323; *Lee v. Read*, 5 Beav. 381; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 417; *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498; *People v. Mather*, 4 Wend. (N. Y.) 236; *State v. Edwards*, 2 Nott & M. (S. Car.) 13; 10 Am. Dec. 557; *State v. Simmons Hardware Co.*, 109 Mo. 118.

A witness is not compellable to disclose any link in the chain of proof against him. *Marshall, C. J.*, in *U. S. v. Burr*, 1 Rob. Rep. 242; *Higdon v. Heard*, 14 Ga. 255; *Paxton v. Douglas*, 16 Ves. Jr. 239. See also *Counselman v. Hitchcock*, 142 U. S. 565; *State v. Farmer*, 46 N. H. 200; *Ward v. State*, 2 Mo. 120; 22 Am. Dec. 449; *Cates v. Hardacre*, 3 Taunt. 424; *Maccallum v. Turton*, 2 Y. & J. 183; *Parkhurst v. Lowten*, 2 Swanst. 215; *Harrison v. Southcote*, 1 Atk. 528; *Swift v. Swift*, 4 Hagg. 154; *King v. King*, 2 Roberts 153.

be asserted by demurrer or by plea, or it may be set up in the answer.¹ And at law the privilege is not confined to trials in open court. It extends also to examinations before the grand jury.²

A witness cannot object to answering a question on the ground that he is a foreigner and his answer will subject him to punishment in his own country, unless he furnishes satisfactory proof of what the law of his country is.³ But if it is proved to the court that by the law of his country his answer may expose him to prosecution, or subject him to a penalty or a forfeiture, he is entitled to his privilege.⁴

2. Exposure to a Penalty or Forfeiture.—It is also the privilege of a witness to refuse to answer any question which has a tendency to expose him to a penalty or a forfeiture,⁵ and this rule is the same in equity as at law.⁶

3. Exposure to a Civil Action.—In *England*, it is now settled that a witness cannot lawfully refuse to answer a question relevant to the matter in issue, on the ground that his answer might subject him to a civil suit upon a cause of action not involving a penalty or a forfeiture.⁷ And in the *United States*, this rule is

1. *Harrison v. Southcote*, 1 Atk. 539; *Chauncey v. Tabourden*, 2 Atk. 392; *Ex p. Symes*, 11 Ves. Jr. 525; *Paxton v. Douglas*, 16 Ves. Jr. 239; *Thorpe v. Macauley*, 5 Madd. 135; *Lee v. Read*, 5 Beav. 381; *Glynn v. Houston*, 1 Keen 329; *Higdon v. Heard*, 14 Ga. 258; *March v. Davison*, 9 Paige (N. Y.) 580; *Stewart v. Turner*, 3 Edw. Ch. (N. Y.) 458; *Brownell v. Curtis*, 10 Paige (N. Y.) 210, by Walworth, Ch., citing *Atty. Gen'l v. Brown*, 1 Swanst. 294; *Dummer v. Chippenham*, 14 Ves. Jr. 245; *Hare on Disc.* 5.

2. *Counselman v. Hitchcock*, 142 U. S. 547; *People v. Lauder*, 82 Mich. 109; *People v. Seaman* (Supreme Ct.), 29 N. Y. Supp. 329.

The rule is also applicable in investigations before legislative bodies. *Emery's Case*, 107 Mass. 172; 9 Am. Rep. 22.

3. *King of Two Sicilies v. Wilcox*, 1 Sim. N. S. 301, per Lord Cranworth.

4. *U. S. of America v. McRae*, L. R., 3 Ch. 79, per Lord Chelmsford.

5. 2 Phil. Ev., § 936; 1 Greenl. Ev., § 453; 2 Tayl. Ev., § 1453; *Jackson v. Benson*, 1 Y. & J. 32.

Under the declaratory statute of 46 Geo. III., ch. 37, the witness is privileged from answering a question, the answer of which might subject him to a penalty or a forfeiture of any kind. 2 Phil. Ev. 936. This statute is said to have been passed on account of the division of opinion of the judges in their answers to the questions pro-

pounded to them by the House of Lords in Lord Melville's case. See 6 Parl. Debates 167; 2 Phil. Ev. 936; *Pye v. Butterfield*, 5 B. & S. 829; 117 E. C. L. 829. See also *Johnson v. Donaldson*, 18 Blatchf. (U. S.) 287; *Henry v. Salina Bank*, 1 N. Y. 86; *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 432; *Livingston v. Harris*, 3 Paige (N. Y.) 533; same case on error, 11 Wend. (N. Y.) 329; *Matter of Kip*, 1 Paige (N. Y.) 601; *Taylor v. Wood*, 2 Edw. Ch. (N. Y.) 94; *People v. Rector*, 19 Wend. (N. Y.) 569; *Matter of Dickinson*, 58 How. Pr. (N. Y.) 260; *Davies v. Lincoln Nat. Bank* (Supreme Ct.), 4 N. Y. Supp. 373; *Simmons v. Holster*, 13 Minn. 249; *Trammel v. Thomas*, 1 Har. & M. (Md.) 261; *Anderson v. State*, 7 Ohio, pt. 2, 250; *Poindexter v. Davis*, 6 Gratt. (Va.) 481.

6. *Storey's Eq. Pl.*, §§ 607, 846; 1 Greenl. Ev., § 453; *Sloman v. Kelly*, 3 Y. & Coll. 673; *Fane v. Atlee*, 1 Eq. Cas. Abr. 77; Pl. 15; *Uxbridge v. Staveland*, 1 Ves. 56.

7. This question was much discussed in Lord Melville's case and was propounded to the judges by the House of Lords. Eight of the judges, the Lord Chancellor and Lord Eldon were of the opinion that the law was as it is given in the text. Four of them, among whom was Lord Mansfield, C. J., were of the opinion that a witness was not compellable to answer any question, the answer to which might subject him

accepted by the current of authority as the true doctrine of the common law,¹ though the rule is not so applied in either country

to a civil action. 6 Parl. Debates, pp. 234, 245; 2 Phil. Ev. 937. This division of opinion gave rise to the statute 46 Geo. III., ch. 37, which settled the rule as declared by the majority of the judges and as stated in the text. See Hall's Am. L. J. 223, 232.

Production of Documents.—A witness cannot be excused from producing papers in his possession, merely because their production may subject him to a civil suit, *Doe v. Date*, 3 Q. B. 609; 43 E. C. L. 889; *Doe v. Egremont*, 2 M. & Rob. 386; unless the papers called for are the title deeds of the witness. *Doe v. Date*, 3 Q. B. 609; 43 E. C. L. 889; *Pickering v. Noyes*, 1 B. & C. 263; 8 E. C. L. 112.

1. *Alexander v. Knox*, 7 Ala. 503; *Taney v. Kemp*, 4 Har. & J. (Md.) 348; 7 Am. Dec. 673; *Naylor v. Semmes*, 4 Gill & J. (Md.) 273; *Baltimore Bank v. Bateman*, 7 Har. & J. (Md.) 104; *Hays v. Richardson*, 1 Gill & J. (Md.) 366; *Stoddard v. Manning*, 2 Har. & G. (Md.) 147; *Com. v. Thurstons*, 7 J. J. Marsh. (Ky.) 62; *Helm v. Handley*, 1 Litt. (Ky.) 221; *Conover v. Bell*, 6 T. B. Mon. (Ky.) 157; *Gorham v. Carroll*, 3 Litt. (Ky.) 221; *Black v. Crouch*, 3 Litt. (Ky.) 226; *Robinson v. Neal*, 5 T. B. Mon. (Ky.) 213; *Baird v. Cochran*, 4 S. & R. (Pa.) 397; *Nass v. Vanswearingen*, 7 S. & R. (Pa.) 192; *Copp v. Upham*, 3 N. H. 159; *Ward v. Sharp*, 15 Vt. 115; *Cox v. Hill*, 3 Ohio 424; *Jones v. Lanier*, 2 Dev. (N. Car.) 480; *Den v. Burrow*, 6 Ired. (N. Car.) 30; *Zollicoffer v. Turney*, 6 Yerg. (Tenn.) 297; *Planters Bank v. George*, 6 Martin (La.) 670; 12 Am. Dec. 487, *overruling* *Orleans Nav. Co. v. New Orleans*, 1 Martin (La.) 23. See also *Stewart v. Turner*, 3 Edw. Ch. (N. Y.) 458; *Lowney v. Perham*, 20 Me. 235.

In *Bull v. Loveland*, 10 Pick. (Mass.) 12, Shaw, C. J., said: "In this case, the general question has been argued at some length whether a witness, without his own consent, can be called to testify to any fact pertinent to the issue between other parties, where such testimony may tend to charge him with a debt or subject him to pecuniary loss or liability, but where it does not tend to expose him to punishment or subject him to any penalty or forfeiture. This question has been the subject of much discussion and difference of opin-

ion among eminent judges and those of the greatest experience in *nisi prius* trials both in *England* and in the *United States*. In the case of *U. S. v. Grundy*, 3 Cranch (U. S.) 344, it seemed to be taken for granted by Marshall, C. J., that a man in a civil case is not bound to testify against his interest, but that was before the discussions in *England* and the opinions of the judges in the House of Lords, growing out of questions raised in Lord Melville's trial. Besides, the question was not argued, and it arose where the witness was called to testify to a fact which would have rendered a ship forfeited under the registry acts of the *United States*, in which at the time of the forfeiture he, himself, claimed an interest. In *Webster v. Lee*, 5 Mass. 334, it was stated, by Parsons, C. J., in giving the opinion of the court, that a witness may, if he consents, testify against his own interest. Although this expression implied that his consent was requisite, yet the case did not call for the expression of an opinion upon the question whether he could be compulsorily required to testify against his will. In a later case, however, *Appleton v. Boyd*, 7 Mass. 131, the same point again came before the same eminent judge at *nisi prius*, upon which he ruled that a witness cannot be required without his consent to testify against his own pecuniary interest. This point, among others, was reserved, but it was not argued or noticed by the counsel on either side. In giving the opinion the court cited no authority, and, in noticing this point, seemed to take the rule for granted, and considered rather whether, from the facts reported, the witness had an interest in the question, than whether by law it would excuse him from giving his testimony. In *England*, this subject underwent much discussion pending the impeachment against Lord Melville, in 1806, upon which occasion the question was put to the judges by the House of Lords. The question was presented in two or three different forms, slightly varying in terms, but it was substantially the same in each. Eight judges and the chancellor were of opinion that the witness was bound to answer a question, although his answer might render him liable to a civil action. The

as to compel a party to the record, or the real party in interest, though not a party to the record, to testify against his own interest.¹

4. **Exposure to Disgrace.**—There has been much discussion as to whether a witness may be compelled to answer a question, the answering of which will degrade his character, though it will not tend to criminate him or expose him to a penalty or a forfeiture.² It may be stated that a witness will not be excused from answering a question concerning a matter which is material to the issue on trial, on the sole ground that his answer will tend to disgrace him.³ But as to collateral and irrelevant matters inquired of

other four judges expressed a contrary opinion. In order to remove the doubts which such a difference of opinion among eminent judges implied, an act was passed, 46 Geo. III., ch. 37, declaring that a witness cannot, by law, refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit. This act, as a statute, of course, has no authority here, but as strictly a declaratory law it is entitled to weight. Lord Erskine, then Lord Chancellor, stated that, notwithstanding some difference of opinion among high authorities, he considered the law so far precise, clear and conspicuous, that it was necessary no new law should be promulgated otherwise than in the form of a declaratory law. In this suggestion he was countenanced by Lord Eldon, who was not then in judicial office. 1 Phil. Ev. (Am. ed.) 208; Peake Ev. (3d ed.) 193; 1 Hall's L. J. 223; 1 Stark. Ev. 135. This rule has recently been recognized and acted on in *Maryland*, *Taney v. Kemp*, 4 Har. & J. (Md.) 348; 7 Am. Dec. 673; *Stoddert v. Manning*, 2 Har. & G. (Md.) 147; and in *Pennsylvania*, *Baird v. Cochran*, 4 S. & R. (Pa.) 397. In a recent case in this court, it has been held that one summoned as trustee cannot avoid answering questions put to him in regard to the validity of a conveyance under which he claims title to property, on the ground that it may affect his own pecuniary interest. *Devoll v. Brownell*, 5 Pick. (Mass.) 448. This is not precisely in point, but it is important as giving a construction to a

constitutional provision which might be supposed to stand in the way of the application of the rule in question in this commonwealth. The provision is found in the 12th article of the Declaration of Rights. 'No subject shall be held to answer for any crime, etc., or be compelled to accuse, or furnish evidence against, himself.' In this case, it was decided that the trustee was bound to answer, though he might thereby charge himself, and that the above constitutional provision does not relate to questions of property. On the whole, we think the weight of authority is in favor of the rule that a witness may be called and examined in a matter pertinent to the issue, where his answers will not expose him to criminal prosecution, or tend to subject him to a penalty or forfeiture, although they may otherwise adversely affect his pecuniary interest, and that the witness was properly called and examined in the present case."

There are some early *Connecticut* cases in which the contrary was held. *Benjamin v. Hathaway*, 3 Conn. 528; *Storrs v. Wetmore*, Kirby (Conn.) 203; *Starr v. Tracy*, 2 Root (Conn.) 528.

1. *Rex v. Woburn*, 10 East 395; *Fenn v. Granger*, 3 Campb. 177; *Appleton v. Boyd*, 7 Mass. 131; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *People v. Irving*, 1 Wend. (N. Y.) 20; *White v. Everest*, 1 Vt. 181.

2. Phil. Ev. 939; 1 Greenl. Ev., § 454; 2 Tayl. Ev., § 1459; *Rapalje, Witnesses*, § 260.

3. 2 Phil. Ev. 939; 1 Greenl. Ev., § 454; 2 Tayl. Ev., § 1459; *Cundell v. Pratt*, M. & M. 108; *Roberts v. Allatt*, M. & M. 192; 22 E. C. L. 288; *People v. Mather*, 4 Wend. (N. Y.) 250; *Moline Wagon Co. v. Preston*, 35 Ill. App. 358; *Clark v. Reese*, 35 Cal. 89; *Clementine v. State*, 14 Mo. 112;

under the license allowed in cross-examination, no definite rule can be formulated. Such questions are asked for the purpose of impairing the credibility of the witness by showing that he has been guilty of immoral acts which render him unworthy of credit, and it is a matter within the sound discretion of the trial court in each particular case as to how far such a method of attack may be pursued.¹

5. Constitutional Guaranty—*a*. IN GENERAL.—It is provided by the constitution of the *United States* that no person shall be compelled in any criminal case to be a witness against himself.² And similar provisions are to be found in the constitutions of the various states.³ This constitutional provision is not limited to cases where witnesses might be called to testify in criminal prosecutions against themselves. The privilege is as broad as the mischief against which it seeks to guard, and insures that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime.⁴

And it is the better opinion that it is a violation of the constitutional privilege of the witness to compel him to submit to a

Hill *v. State*, 4 Ind. 112. See also *Weldon v. Burch*, 12 Ill. 374; *Taylor v. Jennings*, 7 Robt. (N. Y.) 581; *Jennings v. Prentice*, 39 Mich. 421.

1. See *Encyc. of Pl. & Prac.*, article "Examination of Witnesses."

These rulings are made at *nisi prius*, and the varying circumstances of cases have caused great judges to make different rulings at different times. Thus Lord Ellenborough, who once held that a witness was not bound to state whether he had been imprisoned in a house of correction, *Millman v. Tucker*, Peake Add. Cas. 222, and again that the question could not even be put to the witness, *Rex v. Lewis*, 4 Esp. 226, is reported to have decided the contrary in the later case of *Frost v. Holloway*, cited in 2 Tayl. Ev., § 1460, and 2 Phil. Ev. 949, where, upon the refusal of a witness to state whether or not he has been confined in jail for theft, the learned judge said to him: "If you do not answer the question I will send you there."

2. See 5th Amend. Const. *United States*. This provision, read in connection with the 4th amendment aimed at unreasonable searches and seizures, protects a witness from producing books and papers which may be used as incriminating evidence against him. *Boyd v. U. S.*, 116 U. S. 616.

It has been held that a proceeding to

enforce a forfeiture under the revenue laws is not a criminal proceeding within the meaning of this provision. The true test is whether the judgment is of punishment against the person, or of forfeiture against the *res*. *U. S. v. Three Tons of Coal*, 6 Biss. (U. S.) 379.

3. See constitutions of the various states.

A statute requiring officers of a corporation to inform the secretary of state, under oath, whether or not the corporation had violated a statute providing for the forfeiture of the charter in case of such violation is unconstitutional. *State v. Simmons Hardware Co.*, 109 Mo. 118.

4. *Counselman v. Hitchcock*, 142 U. S. 562; *Emery's Case*, 107 Mass. 172; 9 Am. Rep. 22; *Cullen v. Com.*, 24 Gratt. (Va.) 624; *State v. Enoch*, 69 Ind. 314; *Ex p. Cohen*, 104 Cal. 524.

In *New York*, the contrary has been held, the court taking the narrow view that the words "criminal case" must be construed to mean a prosecution against the witness himself. *People v. Kelly*, 24 N. Y. 74.

In a divorce suit, a witness cannot be compelled to state whether he has had criminal intercourse with the plaintiff's wife. *Smith v. Smith* (N. Car. 1895), 21 S. E. Rep. 196.

A prosecution for the removal of a public officer for a violation of duty is a criminal case within the meaning of

physical examination, or to make experiments in the presence of the jury which tend to criminate him.¹ The refusal of the accused to do anything which might tend to criminate him, cannot be proved as a circumstance against him.² And it seems that the result of an experiment which he is compelled to make out of court should not be admitted in evidence against him,³ though the contrary conclusion has been reached by some courts.⁴ It is not a violation of the defendant's constitutional privilege for the jury to observe his general personal appearance, and scrutinize such of his physical peculiarities as are open to the observation of the general public.⁵

6. STATUTES ABRIDGING THE PRIVILEGE.—In the absence of a constitutional provision, this privilege may be abridged by the legislature. In *England*, the privilege has been taken away in some cases by act of Parliament, and in others it has been rendered valueless by acts of indemnity.⁶ In a number of the states having constitutional provisions similar to that contained in the fifth amendment to the constitution of the *United States*, it

the constitutional rule. *Thruston v. Clark* (Cal. 1895), 40 Pac. Rep. 435.

1. *State v. Jacobs*, 5 Jones (N. Car.) 259; *People v. McCoy*, 45 How. Pr. (N. Y. Supreme Ct.) 216.

A defendant in a criminal case cannot be required to give evidence against himself either by acts or words. *Blackwell v. State* (Ga.), 3 Cr. L. Mag. 393; 67 Ga. 76.

In *Stokes v. State*, 5 Baxt. (Tenn.) 619; 30 Am. Rep. 72, the prosecution brought a pan of mud into court and, after proof that it was about as soft as that in which the tracks of the offender had been seen, called on the defendant to put his feet in the mud. The court refused to compel him to do so, but the judgment was nevertheless reversed because the prisoner was asked to make evidence against himself in the presence of the jury.

The contrary rule was adopted by the majority of the court in *State v. Ah Chuey*, 14 Nev. 79; 33 Am. Rep. 530, where the defendant was compelled to exhibit his arm, in order to reveal the presence of tattoo marks described by another witness and thus to prove his own identity.

2. Thus, in *Cooper v. State*, 86 Ala. 610; 11 Am. St. Rep. 84, the defendant, who was on trial for burglary, had refused to make tracks on the carpet in the house where the crime had been committed, in order that they might be compared with those made by the burglar. The state was permitted to

prove the fact of his refusal, and for this error the judgment was reversed.

3. *Day v. State*, 63 Ga. 667.

4. It has been held that if a prisoner is compelled by the officer who arrested him to make an experiment, such as putting his foot into a track found at the scene of the crime, evidence of the result is admissible against him. *State v. Graham*, 74 N. Car. 646; 21 Am. Rep. 493; *Walker v. State*, 7 Tex. App. 245; 32 Am. Rep. 595.

In *State v. Garrett*, 71 N. Car. 85; 17 Am. Rep. 1, it had been proved at the coroner's inquest that the defendant had said that the deceased was accidentally burned to death and that she had burned her own hand in trying to put the fire out. The coroner compelled her to remove the bandage from her hand and it appeared to be uninjured. It was held that the state might prove this circumstance at the trial. See 22 Alb. L. J. 144, where the writer approves this decision on the ground that the prisoner had attempted to conceal evidence ordinarily visible, but questions the soundness of the two preceding cases because they admit secondary evidence of incompetent evidence.

5. *State v. Johnson*, 67 N. Car. 55; *State v. Woodruff*, 67 N. Car. 89; *Williams v. State*, 98 Ala. 52.

6. See 24 & 25 Vict., ch. 96, §§ 75-84; 26 & 27 Vict., ch. 119, § 5. And some other statutes referred to in 2 Tayl. Ev., § 1455.

has been held that statutes which provide that a witness may be compelled to give self-criminating evidence, but that his answers shall not thereafter be used as evidence against him, fully preserve the constitutional privilege.¹ These decisions seem to ignore the fact that a witness may thus be compelled to disclose matters which will lead to his prosecution, or to reveal the existence of evidence, other than his own testimony, which may secure his conviction. It is, therefore, the better opinion that the constitutional privilege of refusing to answer cannot be taken away by statute, unless absolute indemnity is provided, and nothing short of complete amnesty to the witness, an absolute wiping out of the offenses as to him, so that he can no longer be prosecuted for it, will furnish that indemnity.² If, however, he is thus fully

1. *State v. Quarles*, 13 Ark. 307; *Cossart v. State*, 14 Ark. 539; *Pleasant v. State*, 15 Ark. 649; *Ex p. Rowe*, 7 Cal. 184; *Higdon v. Heard*, 14 Ga. 255; *Kneeland v. State*, 62 Ga. 395; *Wilkins v. Malone*, 14 Ind. 153; *Bedgood v. State*, 115 Ind. 275; *LaFontaine v. Southern Underwriters Assoc.*, 83 N. Car. 132; *People v. Kelly*, 24 N. Y. 74; *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851; *Gilpin v. Daly*, 59 Hun (N. Y.) 413; *Gilpin v. Appleby*, 59 Hun (N. Y.) 624; 13 N. Y. Supp. 394; *Ex p. Buskett*, 106 Mo. 602.

2. *Emery's Case*, 107 Mass. 172; 9 Am. Rep. 22; *Cullen v. Com.*, 24 Gratt. (Va.) 624; *Temple v. Com.*, 75 Va. 892; *State v. Nowell*, 58 N. H. 314.

Section 860 of the Rev. Stats. of the *United States* reads as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the *United States*, in any criminal proceeding, or for the enforcement of any penalty or forfeiture, provided that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." In a number of cases it was held by the trial judges of the federal courts that this statute fully protected the witness in his constitutional privilege. *U. S. v. McCarthy*, 18 Fed. Rep. 87; *U. S. v. Brown*, 1 Sawy. (U. S.) 531. But in *Counselman v. Hitchcock*, 142 U. S. 547, reversing 44 Fed. Rep. 268, it

appeared that one Charles Counselman was summoned before the grand jury, who were investigating certain alleged violations of the interstate commerce act, and he declined to answer certain questions propounded to him, on the ground that his answers would criminate him. The district court considered his excuse insufficient and committed him for contempt. Upon *habeas corpus*, the circuit court decided that he was fully protected by section 860 of the Rev. Stats., discharged the writ of *habeas corpus*, and remanded him to the custody of the marshal. From this order he appealed to the Supreme Court of the *United States*, where the decision of the circuit court was reversed on the ground that the statute was not sufficient to protect the constitutional privilege of the witness. After a critical review of the authorities *pro* and *con*, the court said: "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. It is to be noted of section 860 of the Rev. Stats., that it does not undertake to compel self-criminating evidence from a party or a witness. In several of the state statutes above referred to, the testimony of the party or witness is made compulsory, and, in some, either all possibility of a future prosecution of the party or witness is distinctly taken away, or he can plead in bar or abatement the fact that he was compelled to testify. We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the crinating question put to him, can have the

protected by statute, he may be compelled to answer, though his testimony may show that he has committed a crime.¹ But neither the court nor the prosecuting attorney can offer a witness such indemnity; it must be positively guarantied to him by statute.²

6. Where the Witness Can No Longer Be Prosecuted.—A pardon under the great seal precludes the possibility of subsequent punishment for the offense pardoned, and takes away the privilege of refusing to answer questions concerning the same.³ So, also, where a prosecution for an offense, or an action for the recovery of a forfeiture, or a penalty, is barred by the Statute of Limitations, the privilege of refusing to answer no longer exists.⁴ But in order to deprive the witness of his privilege, it is not sufficient to show simply that a prosecution instituted after the question is asked would be barred; it should appear affirmatively that no prosecution is then pending.⁵ Likewise, after an acquittal upon a

effect of supplanting the privilege conferred by the constitution of the *United States*. Section 860 of the Rev. Stats. does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect we give our assent rather to the doctrine of *Emery's Case*, 107 Mass. 172; 9 Am. Rep. 22, than to that of *People v. Kelly*, 24 N. Y. 74, and we consider that the ruling of this court, in *Boyd v. U. S.*, 116 U. S. 616, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party. It is contended, on the part of the appellee, that the reason why the courts in *Virginia*, *Massachusetts*, and *New Hampshire* have held that the exonerating statute must be so broad as to give the witness complete amnesty, is that the constitutions of those states give to the witness a broader privilege and exemption than is granted by the constitution of the *United States*, in that their language is that the witness shall not be compelled to accuse himself or furnish evidence against himself, or give evidence against himself; and

it is contended that the terms of the constitution of the *United States*, and of the constitutions of *Georgia*, *California* and *New York*, are more restricted. But we are of opinion that however this difference may have been commented on in some of the decisions, there is really, in spirit and principle, no distinction arising out of such difference of language.⁶

1. *State v. Nowell*, 58 N. H. 314; *Kain v. State*, 16 Tex. App. 282; *Hirsch v. State*, 8 Baxt. (Tenn.) 89, *Nicholson, C. J.*, and *Turney, J.*, dissenting; *Kendrick v. Com.*, 78 Va. 490, *Lacey and Richardson, JJ.*, dissenting.

2. *Temple v. Com.*, 75 Va. 892.

3. *Pardon*.—*Reg. v. Boyes*, 1 B. & S. 327; 101 E. C. L. 327. This case overrules, by implication, the earlier cases of *Rex v. Reading*, 7 How. St. Tr. 296, and *Rex v. Shaftesbury*, 8 How. St. Tr. 817. See 2 Tayl. Ev., § 1458.

4. *Statute of Limitations*.—*Roberts v. Allatt, M. & M.* 192; 22 E. C. L. 288; *Parkhurst v. Lowten*, 1 Meriv. 400; *Williams v. Farrington*, 2 Cox Ch. 202; *Davis v. Reid*, 5 Sim. 443; *People v. Mather*, 4 Wend. (N. Y.) 252; *Close v. Olney*, 1 Den. (N. Y.) 319; *Salina Bank v. Henry*, 2 Den. (N. Y.) 155; 3 Den. (N. Y.) 593; *Weldon v. Burch*, 12 Ill. 374; *Manchester, etc., R. Co. v. Concord R. Co.* (N. H. 1890), 20 Atl. Rep. 383; *Childs v. Merrill*, 66 Vt. 302; *State v. Wharton* (Tenn. 1887), 3 S. W. Rep. 490.

5. *Southern R. News Co. v. Russell*, 91 Ga. 808; *Salina Bank v. Henry*, 2 Den. (N. Y.) 155; 3 Den. (N. Y.) 593.

criminal charge, it is too late for the witness to refuse to answer concerning the same.¹

7. Privilege of Witness Not of Party.—The privilege of refusing to answer is exclusively the privilege of the witness.² Neither party to the action can claim it or raise the objection on behalf of the witness;³ neither can counsel interpose the objection.⁴ But where a party is a witness in his own behalf he may claim his privilege through his counsel.⁵ And where the matter inquired of is not pertinent to the issue, a party may, of course, object on that ground, or the court may of its own volition exclude the question.⁶

8. Who Determines the Tendency of the Question.—When a question is asked, it is for the court to determine whether any possible answer to it might tend to criminate the witness.⁷ This being decided in the affirmative, the witness must decide for himself whether or not the answer he would give would have such a tendency.⁸ If the judge were to require him to point out how his

1. *Acquittal.*—*Lothrop v. Roberts*, 16 Colo. 250.

2. *Rex v. Adey*, 1 M. & Rob. 94; *Thompson v. Farmer*, M. & M. 48; 22 E. C. L. 245; *Reg. v. Kinglake*, 11 Cox C. C. 499; *Morgan v. Halberstadt*, 60 Fed. Rep. 592; *U. S. v. Craig*, 4 Wash. (U. S.) 732; *People v. Bodine*, 1 Den. (N. Y.) 281; *Southard v. Rexford*, 6 Cow. (N. Y.) 254; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Cloyes v. Thayer*, 3 Hill (N. Y.) 564; *Treat v. Brown*, 4 Conn. 408; 10 Am. Dec. 156; *Fries v. Brugler*, 12 N. J. L. 79; 21 Am. Dec. 52; *Roddy v. Finnegan*, 43 Md. 490; *State v. Wentworth*, 65 Me. 234; 20 Am. Rep. 688; *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 623; *State v. Bilansky*, 3 Minn. 246.

3. *Com. v. Shaw*, 4 Cush. (Mass.) 594; 50 Am. Dec. 813; *Com. v. Gould*, 158 Mass. 499; *State v. Patterson*, 2 Ired. (N. Car.) 346; 38 Am. Dec. 699; *Clark v. Reese*, 35 Cal. 89; *State v. Foster*, 23 N. H. 348; 55 Am. Dec. 191; *McCarty v. Bond*, 9 La. 351; *Newcomb v. State*, 37 Miss. 383; *White v. State*, 52 Miss. 216; *People v. Carroll*, 3 Park. Cr. Rep. (N. Y.) 83; *Day v. State*, 27 Tex. App. 143; *Ingalls v. State*, 48 Wis. 647; *San Antonio St. R. Co. v. Muth* (Tex. Civ. App. 1894), 27 S. W. Rep. 752.

4. *State v. Wentworth*, 65 Me. 234; 20 Am. Rep. 688; *Ward v. People*, 6 Hill (N. Y.) 144; *Osborn v. London Dock Co.*, 10 Exch. 698.

Lord Tenterden refused to allow counsel to support, by argument, the privilege as belonging to the party whom

he represented. *Thompson v. Farmer*, M. & M. 48, note; 22 E. C. L. 245. See also *Rex v. Adey*, 1 M. & Rob. 94; *Marston v. Downes*, 1 Ad. & El. 31; 28 E. C. L. 24.

So, also, it has been held that a witness who objects to the production of documents in his possession, has no right to have the question of his liability to produce them argued by counsel. *Doe v. Egremont*, 2 M. & Rob. 386.

5. *Clifton v. Granger*, 86 Iowa 573.

6. *Sharon v. Sharon*, 79 Cal. 633; *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 623.

7. *Reg. v. Boyes*, 1 B. & S. 311; 101 E. C. L. 311; *Rex v. Garbett*, 2 C. & K. 474; 61 E. C. L. 474; *Ex p. Reynolds*, 20 Ch. Div. 294; 1 Burr. Tr. 245; *U. S. v. McCarthy*, 18 Fed. Rep. 87; *U. S. v. Miller*, 2 Cranch (C. C.) 247; *Devaughn's Case*, 2 Cranch (C. C.) 501; *Sanderson's Case*, 3 Cranch (C. C.) 638; *People v. Mather*, 4 Wend. (N. Y.) 229; *Mitchell's Case*, 12 Abb. Pr. (N. Y. C. Pl.) 249; *In re Taylor* (Oyer & T. Ct.), 28 N. Y. Supp. 500; *Com. v. Bell*, 145 Pa. St. 374; *Janvrin v. Scammon*, 29 N. H. 280; *Richman v. State*, 2 Greene (Iowa) 532; *State v. Duffy*, 15 Iowa 425; *Floyd v. State*, 7 Tex. 215; *Kirschner v. State*, 9 Wis. 140; *Winder v. Diffenderffer*, 2 Bland (Md.) 166.

8. *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418; *Reg. v. Boyes*, 1 B. & S. 311; 101 E. C. L. 311; 1 Burr. Tr. 245; *Sanderson's Case*, 3 Cranch (C. C.) 638; *Richman v. State*, 2 Greene

answer would criminate him, his privilege would be worthless.¹ But if the witness abuses his privilege by willfully and falsely asserting that his answer would criminate him, he may be made to respond in civil damages to the party thus wrongfully deprived of the benefit of his testimony.²

9. Time of Claiming the Privilege.—In *England*, it was formerly held that if a witness testified without objection to any portion of a matter tending to criminate him, it was then too late for him to claim his privilege.³ But it is now settled that he may claim his protection at any stage of the inquiry, and, having done so, may not be compelled to answer any additional questions tending to criminate him.⁴ According to the weight of authority in the *United States*, if the witness understandingly discloses part of a material transaction in which he was criminally concerned without claiming his privilege, he may be compelled to go forward and state the whole of it;⁵ but his privilege should not be denied him if his answer to the question demurred to is not necessary to the full understanding of other material statements which he has made.⁶ The witness has no right to refuse to be sworn on the ground that any testimony he could give would tend to criminate him. The privilege should not be claimed until the question is asked.⁷

(Iowa) 532; *Poole v. Perritt*, 1 Spears (S. Car.) 128; *State v. Edwards*, 2 Nott & M. (S. Car.) 13; *Warner v. Lucas*, 10 Ohio 336; *Ward v. State*, 2 Mo. 120; 22 Am. Dec. 449; *Floyd v. State*, 7 Tex. 215; *Chamberlain v. Willson*, 12 Vt. 491; 36 Am. Dec. 356; *Kirschner v. State*, 9 Wis. 140.

If it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question. *Ex p. Reynolds*, 20 Ch. Div. 294.

1. *Maule, J.*, in *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418; 1 Burr. Tr. 244; *Janvrin v. Scammon*, 29 N. H. 280; *People v. Mather*, 4 Wend. (N. Y.) 229.

2. *Warner v. Lucas*, 10 Ohio 336.

3. *Dixon v. Vale*, 1 C. & P. 278; 11 E. C. L. 391; *East v. Chapman*, 2 C. & P. 570; 12 E. C. L. 268; *Ewing v. Osbaldiston*, 6 Sim. 608.

4. *Reg. v. Garbett*, 1 Den. C. C. 236; *King of Two Sicilies v. Wilcox*, 1 Sim. N. S. 301; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418.

Where a witness answered that there was no consideration for a bill of exchange, but refused to declare the particulars because it would criminate him, Lord Tenterden allowed the excuse but ordered his whole testimony

to be stricken out. *Dandridge v. Cordon*, 3 C. & P. 11; 14 E. C. L. 185.

5. *State v. Foster*, 23 N. H. 354; 55 Am. Dec. 191; *State v. K.*, 4 N. H. 562; *State v. Nichols*, 29 Minn. 357; *Brown v. Brown*, 5 Mass. 320; *Foster v. Pierce*, 11 Cush. (Mass.) 437; 71 Am. Dec. 668; *Com. v. Price*, 10 Gray (Mass.) 476; *Com. v. Pratt*, 126 Mass. 463; *People v. Freshour*, 55 Cal. 375; *Norfolk v. Gaylord*, 28 Conn. 312; *Roddy v. Finnegan*, 43 Md. 502; *Chamberlain v. Willson*, 12 Vt. 491; *Este v. Wilshire*, 44 Ohio St. 636; *Youngs v. Youngs*, 5 Redf. (N. Y.) 505.

But in *Georgia*, it has been held that if it becomes necessary to compel a witness to give self-criminating evidence in order to a full understanding of his other statements, the whole should be stricken out and he should not be compelled to criminate himself. *Pinkard v. State*, 30 Ga. 757.

6. *Amherst v. Hollis*, 9 N. H. 110. See also *Coburn v. Odell*, 30 N. H. 540.

7. *Boyle v. Wiseman*, 10 Exch. 647; *Osborn v. London Dock Co.*, 10 Exch. 698; *Ex p. Stice*, 70 Cal. 51.

Contra.—In *Neale v. Coningham*, 1 Cranch (C. C.) 76, it was held that a witness who could not testify in the case without criminating himself should

10. **The Question May Lawfully Be Asked.**—Any question pertinent to the matter in issue may lawfully be asked, and the court should not exclude it upon the ground that the answer would criminate the witness unless he claims his privilege.¹ But the judge may, and usually does, inform the witness of his privilege,² though he is not bound to do so if no objection is made to answering the question.³ The witness may, if he sees fit, waive his privilege, and answer the question at his peril.⁴

11. **Effect of Refusing to Answer**—*a*. **WHERE THE PRIVILEGE IS ALLOWED.**—If a witness declines to answer a question on the ground that his answer might criminate him, or subject him to a penalty or a forfeiture, no inference of the truth of the matter inquired of may be drawn from that circumstance.⁵ A party to a civil action, however, who offers himself as a witness in his own behalf, stands on a different footing in this respect from a third person brought into court to testify in a case in which he has no interest. If he claims his privilege, and refuses to answer a material question, that fact may be considered against him the same

not be sworn. The court, however, cited no authority, and Cranch, J., dissenting, said: "It is not an objection to his being sworn, but it is a good reason for his refusing to answer any question which may criminate him."

1. *Paxton v. Douglas*, 16 Ves. Jr. 239; *U. S. v. Craig*, 4 Wash. (U. S.) 732; *Williams v. Dickenson*, 28 Fla. 90; *Short v. State*, 4 Harr. (Del.) 568; *Fries v. Brugler*, 12 N. J. L. 81; 21 Am. Dec. 52; *Treat v. Browning*, 4 Conn. 408; 10 Am. Dec. 156; *State v. Patterson*, 2 Ired. (N. Car.) 346; 38 Am. Dec. 699.

2. *Lord Cardigan's Case*, Gurney 79; *Millman v. Tucker*, Peake Add. Cas. 222; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418; *State v. Bilansky*, 3 Minn. 246; *State v. Edwards*, 2 Nott & M. (S. Car.) 13; 16 Am. Dec. 557.

3. *Atty. Gen'l v. Radloff*, 10 Exch. 88; *Com. v. Shaw*, 4 Cush. (Mass.) 594; 50 Am. Dec. 813; *Com. v. Howe*, 13 Gray (Mass.) 31.

4. *Paxton v. Douglas*, 19 Ves. Jr. 225; *State v. Blake*, 25 Me. 350; *Horrell v. Parish*, 26 La. Ann. 6.

In *Mayo v. Mayo*, 119 Mass. 290, the witness gave self-criminating evidence in ignorance of her privilege. This being made to appear, the court informed her of her right, then allowed her to claim her privilege, and ordered her testimony to be stricken out.

For waiver by answering as to part of the transaction, see *supra*, this title, *Time of Claiming the Privilege*.

For waiver by accomplices, see *supra*, this title, *Competency of Accomplices*.

For waiver by the defendant in a criminal prosecution, see *supra*, this title, *Incompetency Removed by Statute—In Criminal Cases—Cross-Examination of the Defendant*.

5. *Rose v. Blakemore*, R. & M. 383; *Rex v. Watson*, 2 Stark. 158; 3 E. C. L. 357; *Millman v. Tucker*, Peake's Add. Cas. 222; *Phelin v. Kenderdine*, 20 Pa. St. 354.

In *Lloyd v. Passingham*, 16 Ves. Jr. 64, Lord Eldon said: "I protest strongly against the doctrine that Robert Passingham, having demurred to so much of the bill as seeks a discovery of facts which have a tendency to affect him criminally, is on that account to be considered as admitting the allegations of the bill; having observed a notion prevailing lately that a witness who refuses to answer a question upon that ground is, therefore, not to be believed. Nothing can be more fallacious as a standard of credit than such a conclusion, or more dangerous to justice by depriving the subject of that protection to which he is entitled by law, and the practice formerly was that the judge told the witness that he was not bound to answer the question."

Such a refusal should not be commented on by counsel or taken into consideration by the jury. *People v. Maunsausau*, 60 Mich. 15; *Carne v. Litchfield*, 2 Mich. 340; *Foster v. People*, 18 Mich. 273.

as any other refusal to produce evidence within his power.¹ But the refusal of a witness to answer a criminating question cannot be shown as a circumstance against him in a subsequent trial for the offense inquired of.² Neither can his answer be put in evidence against him if the court compels him to answer such a question.³

b. WHERE THE PRIVILEGE IS DENIED.—The refusal of a witness to answer any question which he may lawfully be required to answer, is a contempt of court, and if he persists in his refusal he may be punished accordingly.⁴

XII. PRIVILEGED COMMUNICATIONS.—See vol. 19, p. 121.

XIII. EXPERT WITNESSES.—See EXPERT AND OPINION EVIDENCE, vol. 7, p. 490.

XIV. EXEMPTION FROM ARREST.—See ARREST, vol. 1, p. 724.

XV. PAYMENT OF FEES.—See SUBPENA, vol. 24, p. 166.

WITTINGLY.—Knowingly, with knowledge, by design.⁵

1. *Andrews v. Frye*, 104 Mass. 234.

Such refusal, however, is not to be taken as an admission of the fact inquired of. *Lloyd v. Passingham*, 16 Ves. Jr. 64.

2. *State v. Bailey*, 54 Iowa 414.

3. *Horstman v. Kaufman*, 97 Pa. St. 147; 39 Am. Rep. 802; 2 Tayl. Ev., § 1454.

4. *Ex p. Fernandez*, 10 C. B. N. S. 3; 100 E. C. L. 3; *Whitcomb's Case*, 120 Mass. 118; 21 Am. Rep. 502; *In re Allen*, 13 Blatchf. (U. S.) 271; *Brungger v. Smith*, 49 Fed. Rep. 124; *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 196; *LaFontaine v. Southern Underwriters Assoc.*, 83 N. Car. 132; *In re Gannon*, 69 Cal. 541; *People v. Rice* (Supreme Ct.), 10 N. Y. Supp. 270; *Lathrop v. Clapp*, 40 N. Y. 328; 100 Am. Dec. 493; *State v. Lonsdale*, 48 Wis. 348; *Stuart v. Allen*, 45 Wis. 158; *Hirsch v. State*, 8 Baxt. (Tenn.) 89; *Ward v. State*, 2 Mo. 120; 22 Am. Dec. 449; *Ex p. Doll*, 7 Phila. (Pa.) 595; *Ex p. Harris*, 4 Utah 5. See also CONTEMPT, vol. 3, p. 783.

5. Webster's Dictionary; followed in *Osborne v. Warren*, 44 Conn. 357. In that case, a statute of *Connecticut* provided that "every person who shall wittingly and unlawfully throw down, or leave open, any bars, gate or fence," belonging to any inclosure, shall pay to the party injured double damages and a sum not exceeding five dollars, to be recovered in an action of trespass. The defendant, in a controversy with the plaintiffs as to a right of way over their land, threw down their fence,

claiming and believing that he had a right to do so, but the court found that he had no right of way. It was held that his case fell within the intent of the statute. The court said: "That we may know the precise force of the word 'wittingly' we resort to the dictionary. Webster defines it thus: 'Knowingly—with knowledge—by design.' We must presume that in the common speech of the people it imported knowledge simply; that the legislature understood and used it in the same sense, and that the statute is aimed at persons who knowingly and by design throw down fences and leave open gates and bars, having no legal right to do so, excluding only cases which are the result of accident or forgetfulness. The legislature designed to punish to the extent of double damages all persons who, having controversies with adjoining owners as to dividing lines, take the law into their own hands, and render judgment and do execution in their own favor, thereby exposing inclosures to serious damage from incursions of cattle, in the absence and without the knowledge of the owner. The law intends that all persons shall adjust such differences through its appointed means."

In Indictment.—In *Harrington v. State*, 54 Miss. 490, it was held that an indictment under the *Mississippi Code*, for the alteration of a record, must charge that the alteration was "wittingly" done, and is fatally defective if it charges that it was done "willingly," and should be quashed upon motion.

WOMAN—(See also CHILD, vol. 3, p. 229; HUSBAND AND WIFE, vol. 9, p. 789; MAN, vol. 14, p. 86; MARRIED WOMEN, vol. 14, p. 589; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 22, p. 1).—See note 1.

WON.—See MINES AND MINING CLAIMS, vol. 15, p. 506.

WOOD—WOODS—(See also TREES, vol. 26, p. 557; TIMBER, vol. 26, p. 22).—The word "wood" has several well defined and recognized meanings:

1. A thick collection of trees, a forest.²

The court said: "The alteration of the record was charged to have been 'willingly' done. The language of the statute is 'wittingly.' While it is not always necessary to follow the literal language of the act in framing indictments for statutory offenses, it is essential that either the same words, or words of equivalent meaning, and substantially synonymous, should be used. Section 2884, Code 1871; *Kline v. State*, 44 Miss. 317. 'Willingly' and 'wittingly' are not synonymous words, and do not convey the same idea. The one relates to the will, and means 'freely,' or 'voluntarily;' while the other relates to the wit or understanding, and means 'knowingly,' or 'designedly.'"

1. In *Com. v. Bennet*, 2 Va. Cas. 237, the court said that it was at a loss to see a distinction between a "woman child" and "a female child."

Woman and Female Synonymous.—In *Myers v. State*, 84 Ala. 11, it was held that the use of the word "female," in an indictment, meant the same thing as "woman," and did not render the indictment insufficient. The court said: "The words female and woman, used as the former was in the indictment before us, mean the same thing, and the indictment is sufficient. 1 Brick. Dig. 499, § 736; *Sparrenberger v. State*, 53 Ala. 481; 25 Am. Rep. 643; *Smith v. State*, 63 Ala. 55; *Block v. State*, 66 Ala. 493; *Parker v. State*, 39 Ala. 365; *Watson v. State*, 55 Ala. 150."

Settlement of Pauper—Married Woman.—In *Somerville v. Boston*, 120 Mass. 574, it was held that the *Massachusetts* statute providing "that any woman of the age of twenty-one years, who resides in any place within this state for five years together, without receiving relief as a pauper, shall thereby gain a settlement in such place," applied only to unmarried women.

2. Worcester's Dictionary; quoted in *State v. Howard*, 72 Me. 459.

A field of broom sedge and wire grass, surrounded by an old fence and used as a pasture, is not a *woods* within the meaning of the *North Carolina* statute imposing a penalty for injury to an adjoining proprietor, arising from the owner burning off the same. The court said: "The case of *Hall v. Cranford*, 5 Jones (N. Car.) 3, in which it was held that 'an old field which had been turned out without any fence around it, and which had grown up in broom sedge and pine bushes, some of which were waist high and others head high,' did come within its meaning, stretched the doctrine of being liberal in construing statutes in order to reach the mischief intended to be remedied, as far as it is safe to follow." *Achenbach v. Johnston*, 84 N. Car. 265.

Forest Lands.—"We cannot imagine how, in any proper sense, the burning of log heaps in one's own inclosed field can be called burning his woods. The term 'woods,' as used in the statute (see Rev. Stat., ch. 16; Rev. Code, ch. 16, § 1), means forest lands in their natural state, and is used in contradistinction to lands cleared and inclosed for cultivation. The statute is a penal one, and must, therefore, be construed strictly; but, whether construed strictly or liberally, we are clearly of opinion that the facts proved do not bring the defendant either within the letter or spirit of it." *Averitt v. Murrell*, 4 Jones (N. Car.) 323.

Woodhouse.—A policy of insurance on a "dwelling-house and woodhouse," described in the application as "occupied for the usual purposes," covers a building, built at one time, with a single frame and roof, and designed for one building, for a carriage house and woodhouse, of which the wood room constitutes two-thirds, and is separated from the carriage room by a loose partition extending to the eaves on one side, and halfway to the roof

2. The substance of trees ; trees sawed or cut for agricultural or other purposes ; timber.¹

on the other; and evidence is admissible that the whole building was called by the tenants and neighbors the "woodhouse." *White v. Mutual F. Assur. Co.*, 8 Gray (Mass.) 566.

Whether "Wood" Will Carry Soil.— "Wood, *boscus*, contains timber or hautboys and underwood or *subboscus*. Both the trees and the soil on which they stand pass by the grant of a wood or *boscus* (Co. Litt. 4 b. *Compare Doe v. Bevis*, 18 L. J. C. P. 128; 7 C. B. 456; 62 E. C. L. 456). In like manner, by an exception in a lease of the woods and underwoods growing or being on the property demised, the soil itself on which they grow is excepted (*Ive's Case*, 5 Coke 11 a; *Hide v. Whistler*, Pop. 146; *Whistler v. Paslow*, Cro. Jac. 487. On the other hand, by an exception of 'trees' (*Liford's Case*, 11 Coke 46b), 'saleable underwoods' now growing on the premises (*Pincomb v. Thomas*, Cro. Jac. 524), the soil itself is not excepted. *Glover v. Andrew*, 1 And. 7." *Elph. on Interpretation of Deeds* 631. See also *Shep. Touch.* 94, 95; *Stanley v. White*, 14 East 332.

"Under the term 'wood,' used as synonymous with the Latin word *boscus*, not only the trees, but the soil upon which they are, will pass; and where there was a lease of a manor, 'always excepting the wood and underwood,' it was held that the soil itself was excepted; but where the grant or exception is of timber trees, no soil passes or is excepted but so much as is necessary for the nutriment of the granted trees. *Whistler v. Paslow*, Cro. Jac. 487; *Leigh v. Heald*, 1 B. & Ad. 622; 20 E. C. L. 458. Or, as it was said in another place, the grantee of the trees has 'an interest in the soil for a particular use,' *Clap v. Draper*, 4 Mass. 266; 3 Am. Dec. 215; he is entitled 'to sufficient nutriment out of the land to sustain the vegetative life of the trees, for without that the excepted trees cannot subsist.' *Liford's Case*, 11 Coke 49. To the same effect is *Tucker v. Andrews*, 1 Me. 122, where it was held that by a conveyance reserving all the pine timber of a particular size, the trees remain the property of the grantor, with as much soil as is necessary to support them. From these ascertained principles, it would seem to follow that the owner of growing trees

has, technically speaking, an interest in the close where they are situate; for close does not so much mean an inclosure as an interest in the land itself. It was accordingly decided in *Rolls v. Rock*, 2 Selw. N. P. 1287, that where trees are absolutely excepted in a lease, the land on which they grow is necessarily excluded also; consequently, if the tenant cut down the trees, the landlord may maintain trespass for breaking and entering his close and cutting down his trees; the landlord's possession being, in legal contemplation, exclusive." *Boults v. Mitchell*, 15 Pa. St. 380.

1. *Worcester's Dictionary*; *quoted in State v. Howard*, 72 Me. 459.

Lumber and Bark.—A conveyance was conditioned upon the grantee applying to the purchase-money the avails of any wood cut from the land, other than that necessary for sugar wood. It was contended that this did not include lumber and bark. The court said: "The defendant claims that the word 'wood,' as used in the condition of the deed, cannot be construed to comprehend lumber and bark, and so that no recovery can be had for the avails thereof. But it appears that the parties had given it that construction, and we give it the same construction; for it is evident that it is used in its generic sense, which, of course, includes all the growing trees upon the lot." *Hutchinson v. Ford*, 62 Vt. 97.

Refuse Wood and Timber.—Sawdust and shavings are "refuse wood and timber." *State v. Howard*, 72 Me. 459. This was an indictment for throwing such stuff into the Penobscot river, from a sawmill. The court said: "The word 'wood' has several well defined and recognized meanings. Among them, as given by Worcester, are: '1. A large and thick collection of trees; a forest. 2. The substance of trees; trees sawed or cut for architectural or other purposes; timber. 3. Trees sawed or cut for fuel.' In what sense is the word used in the act under consideration? The subject-matter to which the act relates is the business of manufacturing logs, as cut in the forest and floated to the mills, into various kinds of lumber; and the manner in which, at the time of the passage of the act, at the mills, on the Penobscot

3. Trees sawed or cut for fuel.¹**WOOL.**—See MANUFACTURE, vol. 14, p. 262.**WORDS.**—(See also INTERPRETATION, vol. 11, p. 507; STATUTES, vol. 23, p. 140).—Words are the common signs that mankind make use of to declare their intention to one another; and

river, the manufacturer was accustomed to get rid of the refuse or waste, or such portions of the log as were not utilized for any purpose and were valueless, by casting them into the river to be floated away from the mill. It was found that this practice was fast filling up the channel of the river and greatly impeding its navigation; and the object sought to be accomplished by the act was to prevent it. Having in view the subject-matter to which the act relates and the object to be accomplished by it, it cannot be supposed that the word wood was used in its commercial sense, as designating 'trees cut or sawed for fuel,' as the materials which it was intended to designate were not subjects of commerce but such as were cast off as waste or refuse, of no value. We think it was used in its generic sense as designating 'the substance of trees,' or of the logs to be manufactured. But it is contended in argument that the use of the adjective 'refuse,' to qualify and limit the word 'wood,' is inconsistent with this interpretation; that 'refuse,' used to qualify and limit wood or timber, means unmerchantable, of inferior quality, and is not an apt or appropriate word to describe such portions of the substance of the log as are cast off in its manufacture; but that for that purpose the apt and appropriate word is waste. The answer to this argument is that standard lexicographers use 'refuse' as synonymous with 'waste.' Thus, Worcester: 'Refuse, *a*—left as worthless when the rest is taken; worthless; waste;' and one of the meanings given by him of waste is refuse. Moreover, the title of this act is: 'An act to prevent the throwing of slabs and other refuse into the Penobscot river.' Here it is obvious that 'slabs, board or lath edgings, bark, grindings of edgings, wood, bark or lumber,' named in the act, which it is claimed are properly called waste, are all designated by the word 'refuse.' Then the word 'sort' has some significance in pointing the meaning of other words. It does not appear to be used in reference to the different kinds of wood, but

rather in reference to the form or shape of the refuse wood or timber. The great purpose sought to be accomplished by the act was to prevent obstructions to the navigation of the river by throwing into it the waste or refuse made in the manufacture of logs into the various kinds of lumber; and, that this purpose might not be defeated, the legislature, after naming several articles of refuse or waste, added the general description of 'refuse wood or timber of any sort.' Both of the materials involved in this indictment are a part of the substance of the log; they are refuse or waste; and when thrown into the river tend to obstruct and impede its navigation; and we are of opinion that they are embraced in the general description in the act, and that throwing them into the river is inhibited by it."

1. Worcester's Dict.; *quoted in State v. Howard*, 72 Me. 459.

Standing Wood.—A sale of "standing wood" includes trees suitable for timber as well as those for fuel. *Strout v. Harper*, 72 Me. 270. The court said: "True, the word 'wood' is often used to designate fuel. But when so used it means fuel wholly, or at least partially, prepared for the fire. The term 'standing wood' cannot be so used. It can apply only to trees. And when there is nothing in the context, or in any other part of the deed, to indicate that it is used in a more limited sense, we think it must be held to include all the trees—trees suitable for timber as well as those fit only for firewood."

Firewood; Cord Wood.—Under a statute requiring "firewood" to be measured, it is not necessary to measure trimmings of lumber, consisting of pieces from one or two inches to one or two feet long, and sold by the cart load. The court said: "We cannot doubt that it means cord wood of the usual length. It could never have been the intention of the legislature that chips or the trimmings of lumber, which is sold by the load and not by the cord, should be surveyed." *Duren v. Gage*, 72 Me. 118.

when the words of a man express his meaning plainly, distinctly and perfectly, there is no occasion to have recourse to any other means of interpretation.¹

WORK—WORKS, ETC.—See note 2.

1. *Pea Patch Island*, 1 Wall. Jr. (C. C.), app., p. cxlv.

Words are nothing except in connection with the intention with which they are used, or taken. The *animus* of a look, or other expressions of countenance, is as perceptible to the eye as words are to the ear, and often much more capable of correct understanding. That this is so is self-evident. *Ray v. State*, 50 Ala. 107.

Confined to Written Words.—In *State v. McArthur*, 5 Wash. 558, it was held that the Penal Code of *Washington* did not abolish the distinction between libel and slander. The court said: "It is true that the use of the expression 'words,' if construed without reference to the rest of the section, would probably lead us to that conclusion; but while the rule is undoubted that, in construing statutes, words must be given their ordinarily accepted meaning, yet that must be taken in consideration with, and made subservient to, another imperative and absolutely necessary rule, that 'the whole section must be construed together;' and considering the descriptive part of this section in connection with the latter part, which provides that every person who makes, composes or dictates a libel, or who publishes or willfully circulates such libel, etc., shall be punished, etc., plainly indicates that the expression 'words,' used in this section, has reference to written or printed words. This view is strengthened by the provisions of section 18, which define what publication of a libel is. There is no provision in said section for the publication of a libel by oral language, as there certainly would have been if it had been the intention of the legislature to incorporate spoken words into the definition of libel."

General Words.—By general words are meant such terms as, according to the common use of language, can, without doing them violence, be made to stand in agreement with the rest of the descriptive phrases. *Evens v. Griscom*, 42 N. J. L. 588.

Defamatory Words.—See **LIBEL AND SLANDER**, vol. 13, p. 297.

Insulting Words.—See **INSULTING**, vol. 11, p. 277.

2. Works, Mines, Manufactory.—A statute declared its purpose to secure money due "for labor and services rendered by any miner, mechanic, laborer or clerk, for any person or persons or chartered company employing clerks, miners, mechanics or laborers, either as owners, lessees, contractors or underowners of any *works, mines, manufactory*, or other business where clerks, miners or mechanics are employed." It was held that the statute contemplated a business complete and independent and of a fixed and permanent character, as opposed to a temporary employment, cutting sawlogs, for example. The court said: "The words '*works, mines, manufactory*,' thus employed in the act, have a definite signification, well understood in their general and popular acceptance. *Ex vi termini* the branches of business intended to be described by them are, in a certain sense, complete and independent, and of a fixed and permanent character, as opposed to a temporary employment that is merely incidental to any particular branch of business. It will scarcely be pretended that either of these words fitly describes the business in which appellant was employed." *Pardee's Appeal*, 100 Pa. St. 412.

Stove Works—Burglary.—An allegation in an indictment charging defendant with breaking and entering "stove works" is not a sufficient allegation that he broke or entered a building, the words "stove works" not necessarily implying an inclosure or building. The court said: "The words 'stove works' do not necessarily imply a place inclosed by a fence. Still less do they imply of necessity a building. These words are used to mean all the grounds used by a manufacturer for the manufacture of stoves. They include the buildings, and also the grounds about the buildings, whether such grounds are fenced in or not. They are words of the most general meaning. Webster's Dictionary, under 'work.' One who entered into grounds used for the

manufacture of stoves might, in the legal phrase, be said to break into the close of the owner. And plainly the allegation of the indictment does not necessarily include the breaking into any building, or even into any grounds inclosed by a fence." *People v. Haight* (Supreme Ct.), 26 N. Y. St. Rep. 33.

Works—Stipulation in Conveyance.—In *South St. Joseph Land Co. v. Pitt*, 114 Mo. 135, it was held that a stipulation that a company should transfer its works to a certain place, was fulfilled by the removal of the building and machinery, although the factory was not put in operation. The court said: "The word *works* is often used as meaning 'an establishment for manufacturing, or for performing industrial labor of any sort; generally, in the plural, including all the buildings, machinery, etc., used in the required operations, as iron works,' Century Dictionary. The word was, we think, used in this sense here, that is to say, meaning the buildings and machines of the *Omaha* plant. The parties could not have used the word in any other sense, when they say the *works* shall be transferred from *Omaha*; for the works at that place were not, and had not been, in operation for fourteen months."

Mechanics' Liens.—(See also *MECHANICS' LIENS*, vol. 15, p. 1.)

In *Price v. Kirk*, 35 Leg. Int. 325, it was held that a claim by an architect, for preparing drawings and specifications for a house, was not subject to a mechanic's lien. The drawing of plans and specifications, of itself, is not "work" within the meaning of the statute. But in *Pennsylvania Bank v. Gries*, 35 Pa. St. 423, the court held that an architect who drew plans and specifications for a building, directed and superintended the work done in pursuance of them by the various mechanics, inspecting materials, examining accounts, countersigning orders, and generally occupying the builder's place, and discharging his duties throughout, performed "work about the erection or construction of the building," and included the drawing of plans and specifications necessary to enable him to perform this work within the act.

In *Hughes v. Torgerson*, 96 Ala. 346, an architect was held within the protection of the *Alabama* code. The court said: "Are such services by an architect, 'work or labor upon . . . a building or improvement on land,' within the meaning of the statute?

Code, § 3018. It is plain that a contractor for the construction of the building is within the protection of the statute. If he was also intrusted with the planning of the building, and with the sole supervision of its erection, we think it is equally plain that his services in these particulars could be regarded as properly a part of his work 'upon the building,' and that compensation therefor might be included in the amount, for the security of which he could acquire a lien under the statute. There is nothing in the circumstance that such services were rendered by another person to put them beyond the protection of the statute. Under a *New York* statute a lien was authorized in favor 'of any person who shall perform any labor, or furnish any materials, in building, altering or repairing any house, etc., by virtue of any contract with the owner,' etc. 'This language,' it was said in *Stryker v. Cassidy*, 76 N. Y. 50; 32 Am. Rep. 262, 'is general and comprehensive, and its natural and plain import includes all persons who perform labor in the construction or reparation of a building, irrespective of the grade of their employment, or the particular kind of service. The architect who superintends the construction of a building, performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. . . . The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, directs, and applies the labor of others. . . . The general principle upon which the lien laws proceed, is that any person who has contributed, by his labor, or by furnishing materials, to a structure erected by an owner upon his premises, shall have a claim upon the property for his compensation.' The claim of an architect was allowed in that case. What was there said seems eminently sound, and is equally applicable to the *Alabama* statute. An architect who prepares the drawings, plans and specifications for a building, and superintends the erection thereof, may as truly be said to perform labor thereon as anyone who takes part in the work of construction. That he is within the protection of the statute is a proposition well supported by adjudications upon other similar statutes." *Phillipson Mechanics' Liens* (2d ed.), § 158."

Loss of time for men was held, in *Lee v. Brayton* (R. I. 1893), 26 Atl. Rep. 256, not to be subject to a mechanic's lien, as it is not work or material.

Persons who occupy the positions of managing agent and superintendent of trains, but who also, on occasion, run trains, clean cars, repair track, and act as "general utility" men, must be considered as performing "work and labor," within the *Montana* railroad lien law (Comp. Stat. *Montana*, ch. 25, § 707); but it is not so with one who merely has charge of the office and of the receipts, and keeps in a book the time of the workmen as handed in to him. *Mining Co. v. Cullins*, 104 U. S. 176.

Works—Employers' Liability Act.—In the English Employers' Liability Act, 1880 (43 & 44 Vict., ch. 42), § 1—defining the liability of employers for personal injury caused to their workmen "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer"—the expression "works" must be taken to mean works already completed and not works in course of construction which are, on completion, to be connected with or used in the business of the employer. *Howe v. Finch*, 17 Q. B. Div. 187. See also the article **WAYS**.

Works—Charter of Railway.—A provision in the charter of a railway company providing that the "works hereby required" should be finished within ten years, does not restrict the right, also contained in the charter, to construct branch roads after the expiration of ten years; the "works required" were the building and equipping of the main stem. *Blanton v. Richmond, etc.*, R. Co., 86 Va. 618; 43 Am. & Eng. R. Cas. 617.

Work or Supplies—Highest Bidder.—In *Davies v. New York*, 83 N. Y. 207, it was held that the renting of chambers for the city recorder did not fall within the provision requiring *work or supplies* to be let by contract to the lowest bidder.

So, the statute does not apply to a contract for carriage hire of aldermen or councilmen while engaged in public duties. *Smith v. New York*, 21 How. Pr. (N. Y. C. Pl.) 1.

Nor does it apply to professional services, for example, those of a surveyor in preparing a map. *People v. Flagg*, 5 Abb. Pr. (N. Y. Supreme Ct.) 232.

Working the Quarry.—The words "working the quarry," in a lease providing for forfeiture for "not working the quarry for a space of three successive months," include the work of removing water which has flooded the mine. *Miller v. Chester Slate Co.*, 129 Pa. St. 81.

Working Hours—Charter Party.—This term, as used by a charter party, was construed in *The Principia*, 34 Fed. Rep. 667. The court said: "In the absence of special proof of some different meaning, the words of the contract must be construed in their ordinary sense. Twenty-four working hours in this view would mean those hours during which work was ordinarily done about the business to which the clause relates. If, for instance, it was the usual practice in this port to work day and night consecutively, during good weather, the words would be construed to mean consecutive hours during such weather. Holidays would be admitted or excluded, according as by usage they were deemed, or were not deemed, a ship's working hours in port. The burden of proof is upon the libelants to establish the fact that 'working hours' in this port means consecutive hours day and night; because, without that construction, the damage in this case, and the repairs on the ship, did not prevent the working of the steamer for so many as twenty-four working hours."

Wagon Work.—In *Johnson v. Seymour*, 19 Ind. 24, an action upon a note, payable in "wagon work," the court thus construes the term "wagon work": "The appellant argues that the 'wagon work' mentioned in the note should not be regarded in the light of specific articles, but as *labor*, and hence, that the plaintiff or holder of the note should have made some designation of the labor to be performed. Whether or not the conclusion would follow from the premises, we need not determine, as we cannot adopt the premises thus assumed. The terms 'wagon work,' as used in the note, unexplained by circumstances or otherwise, evidently do not mean *labor*, as hauling or otherwise, with a wagon or wagons; nor do they mean simply labor or work to be performed by the maker of the note in the construction of wagons. But they do mean, as we think, wagons, or, perhaps, parts of wagons; wagons either complete or incomplete, including both the materials and the labor bestowed upon them."

Work in the Sense of Duty.—In *Chicago, etc., R. Co. v. Bragonier*, 119 Ill. 63, it was held that in an action involving the question of a brakeman's negligence, either party has the right to prove what were the customary and usual duties of brakemen. And where counsel proved what was termed the "work" of brakemen, the court said: "It may also be further remarked, in this same connection, that while plaintiff's counsel disclaimed any purpose to prove what were the customary or usual duties of brakemen on defendant's road, he was permitted to and did prove what was termed the 'work' of brakemen. The word 'work,' in the sense used, could mean nothing else than 'duty.' As used, the words are convertible terms, and obviously mean the same thing. Either party has the right to prove what were the customary and usual duties of brakemen, as to the inspection of the brakes, but that privilege was denied, by the rulings of the court, to defendant. In this there was error."

Exemption — Working Tools. — (See also **TOOLS**, vol. 26, p. 69.)

In the 8th section of the *Rhode Island* "act prescribing the forms of writs and the manner of serving them," which exempts from attachment, in favor of the housekeeper, "the working tools necessary for his usual occupation," to the value of fifty dollars, and, in favor of any debtor, "his working tools," to the same value, the same meaning is to be attached to the language in both instances, and should be construed to include not only such tools as are indispensably necessary to the mechanic, or even such as are in general use by individuals of the same craft, but also such as the individual in question has adopted to facilitate and diminish his labor, and not only working tools so called in the dictionary and by learned men, but such as are so called by the craft, such as the individual uses and has set apart as tools for the advantageous prosecution of his business. *Healy v. Bateman*, 2 R. I. 454.

A threshing machine is not exempt. The court said: "It is insisted by the plaintiff that this threshing machine is a 'working tool,' within the definition of that term as used by the act of 1842. That act has received a liberal construction from the courts. The word team has been held to embrace a buggy, wagon or gig used by a physician in his practice; a horse and cart used by

a carman in his business; a single harness necessary in the business of the owner; and the single horse of a physician. (*Wheeler v. Cropsey*, 5 How. Pr. (N. Y. Supreme Ct.) 288; *Lockwood v. Younglove*, 27 Barb. (N. Y.) 505; *Eastman v. Caswell*, 8 How. Pr. (N. Y. Supreme Ct.) 75; *Harthouse v. Rikers*, 1 Duer (N. Y.) 606; *Hutchinson v. Chamberlain*, 11 N. Y. Leg. Obs. 248.) And it is undoubtedly the duty of the court, since these acts 'concern the public good,' to give them an enlarged and liberal construction. (*Carpenter v. Herrington*, 25 Wend. (N. Y.) 370; 37 Am. Dec. 239.) I have examined the question involved in this case, in the spirit of the rule laid down by the courts in the several cases cited, but have been unable to bring my mind to the conviction that the complicated machine described in the case is within the most liberal definition of the words 'working tools,' or that the legislature intended these words should have a signification broad enough to cover it. The common understanding of those words would never embrace such a machine. If the plaintiff were to sell to another all his working tools, by that description, it would not be thought by him or the purchaser that it included his threshing machine. The word 'tool' is never applied to such a machine. No lexicographer can be found who gives such a signification to the word, or defines it in any way that would justify its use in that sense. The courts, so far as I am able to find, have not enlarged the sense of those terms sufficiently to include the machine in question.

"In *Buckingham v. Billings*, 13 Mass. 82, it was held that a printing press was not a tool, and therefore not exempt under the statute of that state, which provided 'that the tools of any debtor, necessary for his trade or occupation, shall be altogether exempted from attachment and execution.'

"In *Danforth v. Woodward*, 10 Pick. (Mass.) 423; 20 Am. Dec. 531, it was held that printing types and forms were not tools, and were not exempt from attachment; and *Wilde, J.*, said: 'The word tool is not understood, either in its strict meaning or popular use, as designating complicated machinery, which, in order to produce any useful effect, must be worked by combining distinct parts, or separate pieces, the aid of more hands than one being necessary to perform the operation.'

WORKING CONTRACTS.—(See also ARBITRATION AND AWARD, vol. 1, p. 646; CONTRACT, vol. 3, p. 823; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15; CORPORATIONS (PRIVATE), vol. 4, p. 184; DAMAGES, vol. 5, p. 1; EASEMENTS, vol. 6, p. 139; FELLOW-SERVANTS, vol. 7, p. 821; FRAUDS, STATUTE OF, vol. 8, p. 685; GUARANTY, vol. 9, p. 67; HIGHWAY, vol. 9, p. 362; LATERAL AND SUBJACENT SUPPORT, vol. 12, p. 933; LEASE, vol. 12, p. 974; LIENS, vol. 13, p. 574; MASTER AND SERVANT, vol. 14, p. 740; MECHANICS' LIENS, vol. 15, p. 1; MUNICIPAL CORPORATIONS, vol. 15, p. 949; NEGLIGENCE, vol. 16, p. 386; NUISANCES, vol. 16, p. 922; PAYMENT, vol. 18, p. 148; REASONABLE TIME, vol. 19, p. 1089; SPECIFIC PERFORMANCE, vol. 22, p. 908; STREETS, vol. 24, p. 1; SURETYSHIP, vol. 24, p. 714; TENDER, vol. 25, p. 897.)

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"In *Kilburn v. Demming*, 2 Vt. 404; 21 Am. Dec. 543, it was held that a portable machine called a 'Billy and Jenny,' used for spinning and manufacturing cloth, was not a tool, and not exempt.

"In *Batchelder v. Shapleigh*, 10 Me. 135; 25 Am. Dec. 213, a mill saw was held not to be a tool. 'It is not,' said the court, 'an instrument worked by hand, or by muscular power,' but part of a mill propelled by water.

"In the case at bar, the machine required 'a horse power,' and the use of eight or ten horses and ten men, for its propulsion. Without all these it could be applied to no practical use, and would be valueless as a means to provide for the support of the plaintiff's family."

Exemption—Work Horse.—The term

"work horse" has been held not limited to a "draft horse," but extending to a horse performing, or intended to perform, the common drudgery of the family. *Noland v. Wickham*, 9 Ala. 169; *Allman v. Gann*, 29 Ala. 240. The term applies to a colt not yet fit for service. *Winfrey v. Zimmerman*, 8 Bush (Ky.) 587.

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I. DEFINITION.—A working contract is one under which work or labor is to be performed in the erection, construction, or repairing of some edifice, structure or other work.¹

II. FORMATION OF THE CONTRACT—1. **Generally.**—In all contracts there must be a proposal and acceptance—an agreement of minds—and a valuable consideration.² The general principles

1. See CONTRACT, vol. 3, p. 825; Lloyd's Law of Building (2d ed.), § 1. **General Contractor.**—The term "general contractor" includes all persons furnishing materials for, or doing work upon, a building, under a contract made by such persons directly with the owner. *Merchants', etc., Sav. Bank v. Dashiell*, 25 Gratt. (Va.) 616.

2. *Talmadge v. Spofford*, 41 N. Y. Super. Ct. 428.

A promise by a building contractor to put another coat of oil on the inside of a house, made after he had fully complied with his contract, and without any additional consideration, is a mere gratuity; and his failure to put on the additional coat will not preclude

touching the formation of contracts are treated elsewhere.¹ A mere bid in answer to an advertisement for proposals does not constitute a contract.² There must be an unconditional acceptance of the proposition as made, even an innocent mistake in the

him from recovering the full amount due under the contract. *Widiman v. Brown*, 83 Mich. 241.

A contract by which a party building a house for his own occupancy upon land of another is to receive, on surrender of the house to the owner of the land, the cost of the materials used in its construction, is not void for want of consideration. *Stevenson v. Robertson*, 55 Iowa 689.

A joint contract was made by two persons to erect a church, at a certain price, which contract was by them abandoned. A contract was then made by one of the building committee, in his own right, with one of the contractors to erect said house, at the same price, and he to pay the additional actual cost, and it was held that this contract was founded on a good consideration, and would sustain an action. *Morrison v. Heath*, 11 Vt. 610.

Contractors to grade the roadbed of a certain railway, sublet a portion of the contract to one D., who was insolvent, and had taken the contract for less than cost. The contractors, finding the amount due for labor exceeded the estimates, and to prevent the filing of liens against the railway, which they had agreed to prevent, demanded and obtained from D. the pay rolls, and undertook to pay the hands employed by him. It was held that they were liable to the full amount of their wages to such hands, since the prevention of liens was a sufficient consideration for their agreement. *Carlile v. Dauchy*, 26 Neb. 337.

The agreement of a railroad construction company to commute its contract rate of compensation for finished work to a lower rate, because of the work not being completed as agreed, in consideration of which the other party consented to accept the work in its unfinished condition, afforded a sufficient consideration to sustain the stipulated reduction. *Fitzgerald v. Fitzgerald, etc., Constr. Co.* (Neb. 1894), 59 N. W. Rep. 838.

1. See *CONTRACT*, vol. 3, pp. 823, 841 *et seq.*

A mere schedule of prices for work and materials, signed by the parties, is

not a written agreement to erect a building. *Eyser v. Weissgerber*, 2 Iowa 463.

Where one party to a contract at the time he executes it so conducts himself as to lead a reasonable man to believe that he understands and assents to its terms, and the other party, so believing, executes and performs it on his part, the former is precluded from asserting that he did not so understand and assent, and is bound by it. *Phillip v. Gallant*, 62 N. Y. 256.

Delivery of Contract.—Where the contract was signed and left with the architect, who held it for the benefit of both parties, it was held to be a sufficient delivery. *Coey v. Lehman*, 79 Ill. 177; *Blanchard v. Blackstone*, 102 Mass. 343.

2. *Doyle v. Desenberg*, 74 Mich. 79.

Advertising for bids is not an offer; it merely asks for offers, and does not agree to accept any. *Howard v. Maine Industrial School*, 78 Me. 230.

A person asking bids from contractors for the construction of a house, has a right to inquire into the fitness and skill of the respective bidders to fulfill the contract, and is not bound to award it to the lowest bidder. The fact that on the opening of the bids either the person letting the contract or his architect said to one of the bidders, "you are the lucky man," is merely a recognition that he is the lowest bidder, and is not equivalent to awarding the contract to him. *Leskie v. Haseltine*, 155 Pa. St. 98.

In an action for the breach of an alleged contract to accept the lowest bid for the construction of a brewery, the president of the defendant company testified that he informed the plaintiff that the company would not bind itself absolutely to accept the lowest bid, but that if it concluded to let out the work by contract it would accept the lowest bid. The plaintiff asserted positively that no reservation was made. His bid was for forty-one thousand dollars, but this sum did not include the cost of iron-work, which was estimated at twelve thousand nine hundred and thirty dollars. The testimony of the company's architect, which was corroborated by the president and one of the directors,

terms of the acceptance invalidating it.¹ A direction to a bidder to go on and do the work will amount to an acceptance.²

was that he had put in a bid for fifty-two thousand dollars, including their iron-work. It was held that a judgment for the defendant would be affirmed. *Reusch v. American Brewing Assoc.*, 44 La. Ann. 1111.

A, a railway contractor, met B and several others, in order to receive tenders with reference to certain work. A read a specification with reference to the work; after which B and the others handed in their tenders. B's tender was signed with his name; but there was no evidence that it was in his handwriting. It was held, notwithstanding, that such tender, taken with the specification, sufficiently proved the contract. *Allen v. Yoxall*, 1 C. & K. 315.

1. Thus, a building committee advertised for proposals for labor and materials, as per plans and specifications, for the erection of a school-house. Certain parties proposed to do work for "forty-five hundred and fifty dollars," which the committee found to be the lowest bid, and awarded them the contract. The record of the committee showed, however, that the contract was awarded to them for "forty-five hundred and twenty-five dollars," and that it was "voted that the committee require a bond from the contractors to the amount of contract, for fulfillment; also forfeiture for delay in completing the work." Upon a controversy subsequently arising as to the erection of the building, it was held that no contract had ever existed between the parties. *Howard v. Maine Industrial School*, 78 Me. 230. And see *Hughes v. Clyde*, 41 Ohio St. 339.

A contract is completed upon an acceptance of the proposal and notice to the bidder. *Highland County v. Rhoades*, 26 Ohio St. 411.

Where a village advertised for bids for building a town hall according to plans and specifications, and the council ordered that the bid of plaintiff "be accepted and the job awarded to him," it was held that the acceptance of the bid gave to the bidder only a right to a contract embracing the stipulations expressed or implied in the records, or files relating to the improvement, including amongst them the notice, the plans and specifications, the bid and the

resolution of acceptance. *Hughes v. Clyde*, 41 Ohio St. 339.

Where an engineer, with the approval of the county commissioners, advertised for sealed proposals for a certain improvement on the roads, and accepted the proposal of the lowest bidder, and notified him thereof, and afterwards tendered him a formal written contract for his signature, which contained certain stipulations not before named, it was held that the contractor was justified in refusing to sign it. *Highland County v. Rhoades*, 26 Ohio St. 411.

Where A proposed by letter to B to put the gutter of a mill "in proper shape," which B accepted, stating the proposal in his letter of acceptance to be "to repair and renew, so far as necessary, the gutter," it was held that the contract contained in the letters only required A to make such repairs and renewals that the gutter should do all that it was capable of doing, when in good condition, according to its original plan of construction, and not to build a new gutter of a different construction, even if the original plan was defective. *Dwight v. Ludlow Mfg. Co.*, 128 Mass. 280.

In *Bull v. Talcot*, 2 Root (Conn.) 119; 1 Am. Dec. 62, where a written promise was made to pay a certain sum to such persons as should build a courthouse of a particular description, it was held that the plaintiffs, having erected the courthouse according to the proposals, were entitled to recover the sum proposed.

A contract for sinking wells recited that defendant called for proposals for bids for sinking "one or more" wells, and that plaintiff's assignors filed a bid to sink "said wells," and were awarded the contract for sinking "five wells." It provided that they should furnish material to complete "said five wells," that no payment was to be demanded on "any well" until it was sunk 200 feet, and that 25 per cent. of the price was to be detained until "each well" was completed, etc. It was held that the contract was for the sinking of five wells. *Sandford v. East Riverside Irrigation Dist.*, 101 Cal. 275.

2. *Burch v. New Lindell Hotel Co.*, 7 Mo. App. 583. In this case A was

A written contract, though signed by only one party, is valid, if acted upon by the other party and treated by him as binding.¹

Parties may be bound to a working contract through the action of a duly authorized committee;² but a majority of the committee must concur in making the contract.³

2. Parol Contracts.—Parol working contracts are perfectly valid and binding save where affected by the Statute of Frauds,⁴ though the most important classes of such contracts, such as building

directed by B to do certain work which A had proposed to do on certain terms specified in his written bid. The work was done as directed, and it was held that A was entitled to recover according to the terms of his written proposal.

1. Where the contract, by which one party was to build a dam and the other to pay therefor in certain installments, was signed only by the first party, but it appeared that the other party had paid his installments as provided, and that both had acted upon the contract as binding, it was held that a finding of the district court that it had been executed and was binding on both parties, would not be disturbed. *Reedy v. Smith*, 42 Cal. 245. And see *Methodist Episcopal Parish v. Clarke*, 74 Me. 110. But the presumption which naturally arises from the failure of one party to sign, is that the contract has been entirely abandoned, and to overcome this presumption the party signing it should show that the other party in some way authorized or encouraged him to proceed with the work. *Keller v. Blasdel*, 1 Nev. 491.

2. *Kerfoot v. Cromwell Mound Co.*, 115 Ill. 502.

3. Where one party, as a corporation, acts through a building committee, a majority of the committee must concur in making any contract, or in varying one already made. *Howard v. Maine Industrial School*, 78 Me. 230. But a majority of the committee may act. *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277.

A major part of the committee is necessary to constitute a quorum, and the act of a majority of a quorum is the act of the committee. *Damon v. Granby*, 2 Pick. (Mass.) 345.

Where a contractor made and executed on his own part, an agreement under seal, to slate the roof of the plaintiffs' meetinghouse in a good, substantial, and workmanlike manner, and to warrant the same against leaking for ten years from the completion

of the job, and the instrument was executed by only one of the plaintiffs' building committee of three, and there was never any vote authorizing the committee to enter into a contract under seal, but the plaintiffs paid the sum agreed to the defendant, and allowed it in the settlement of its treasurer's accounts, it was held that the defendant was liable for any breach of his covenants, notwithstanding the contract was not so executed by the plaintiffs in the outset as to enable him to maintain an action of covenant against them thereon, and that he could not take exceptions to instructions authorizing the jury to find that the plaintiffs had ratified the contract, and made it a valid and binding contract between the parties, if their acts and doings satisfied the jury that such was their intention. *Methodist Episcopal Parish v. Clarke*, 74 Me. 110.

4. *Central Lunatic Asylum v. Flanagan*, 80 Va. 110. A building contract need not be in writing, although the contractor may, at his option, perform the agreement after the expiration of one year. It is only where it appears by the whole tenor of the agreement that it is to be performed after the year that a note in writing is required. *Plimpton v. Curtiss*, 15 Wend. (N. Y.) 336. See *Baughart v. Flummerfelt*, 43 N. J. L. 28. And see *FRAUDS, STATUTE OF*, vol. 8, p. 685; *Talmadge v. Spofford*, 41 N. Y. Super. Ct. 428.

Where a contract is to be reduced to writing, it is not binding upon the parties until reduced to writing and signed by them. *Congdon v. Darcy*, 46 Vt. 478.

A parol promise by defendant to pay for the lumber which had been furnished a contractor and used in the construction of his house, if the plaintiff would not file a statutory lien, is a promise to answer for the debt of another, and void under the Statute of Frauds. *Clark v. Jones*, 85 Ala. 127. And so much the more when the

and construction contracts, are usually made in writing.¹ Where the consideration of a working contract is the conveyance of land, it must be in writing or it will be void under the statute,² though

promise is to pay if the principal contractor does not. *Warner v. Willoughby*, 60 Conn. 468.

So, also, is a promise by the owner, after the work has been completed, to see that the workmen of a subcontractor are paid. *Dirringer v. Moynihan* (C. Pl.), 10 N. Y. Supp. 540. And see *Preston v. Zekind*, 84 Mich. 641.

An instruction to the effect that if the jury find from the evidence that the agreement "was a mere guaranty to answer for the debt of another *previously incurred*, such a guaranty is a collateral contract, and within the Statute of Frauds," is not rendered erroneous by the insertion of the words in italics. *Stoelker v. Chicago Bldg. Supply Co.*, 22 Ill. App. 625.

But if, during the progress of the work, the supply of lumber is about to stop because the contractor is not considered safe, and the owner of the building procures its continuance by promising to pay the bill, his undertaking is not collateral but original, and he will be bound thereby. *Sext v. Geise*, 80 Ga. 698; *Yeoman v. Mueller*, 33 Mo. App. 343; *Parkes v. Stafford* (Supreme Ct.), 16 N. Y. Supp. 756; *Bayles v. Wallace* (Supreme Ct.), 10 N. Y. Supp. 191. And see *Wiggins v. Guthrie*, 101 N. Car. 661; *Holmes v. Shands*, 26 Miss. 639.

In *Indiana*, it is held that where a specific lien or substantial benefit is surrendered upon an express promise by a third person to pay for the materials furnished, or work done, the promise is an original undertaking, and not within the statute. *Parker v. Dillingham*, 129 Ind. 542; *Luark v. Malone*, 34 Ind. 444; *Spooner v. Dunn*, 7 Ind. 81; 63 Am. Dec. 414; and see the dissenting opinion of Stone, C. J., in *Clark v. Jones*, 85 Ala. 127.

A verbal promise by the owner to the contractor, before the completion of the house, to pay the outstanding claims of laborers and material men, if the contractor will surrender the contract, is supported by a sufficient consideration, and is not within the statute. But if the contractor has already abandoned the contract, and there is nothing due him, the promise is without consideration, and will not support an action against

the owner by such laborers and material men. *Clark v. Jones*, 85 Ala. 127.

In *Parker v. Dillingham*, 129 Ind. 542, it is said that a verbal agreement by the owner of the property to pay the debt of a contractor to the material man, in a case where the owner owes the contractor nothing, is within the Statute of Frauds, and void, even where, by reason of such verbal promise, the material man furnished the materials, completed the improvements, and forbore to file his lien within the allotted time; but that if the owner was indebted to the contractor, his agreement to pay for the materials will in such case be an agreement to pay his own debt to a third person, and is not within the statute.

Recording.—A contract between the owner of land and one agreeing to construct a building thereon for him is void, if not filed for record as provided for by *California Code Civ. Proc.*, § 1183, and therefore it follows that no recovery can be had for damages for prevention of performance of such a contract, which has not been recorded. *Palmer v. White*, 70 Cal. 220.

Burden of Proof.—The burden of proof is upon the party setting up an informal contract, to show that both parties acted upon it. *Lloyd on Building and Buildings* (2d ed.), § 2.

1. "Building agreements are almost invariably reduced to writing. Great care should always be exercised in the preparation of these contracts. The contingencies to be provided for, the technicalities of many branches of the builder's trade, and the numerous stipulations as to quantities and qualities of materials, as to extras, alterations, etc., are confusing, besides which there are many important factors apt to be overlooked." *Lloyd's Law of Building and Buildings* (2d ed.), § 3.

In an action for work done on a building, where defendant pleads a special contract in writing, and full performance under it, and plaintiff claims to recover on a verbal contract, and the evidence is conflicting as to whether the contract was verbal or in writing, the question is for the jury. *Jones v. Sherman*, 34 Neb. 452.

2. Where plaintiffs entered into a

a parol promise to pay for work and improvements upon land is not within the statute.¹ After the partial performance of a parol contract the parties may reduce it to writing, thereby merging the parol contract in the written one;² and the written contract may be waived and a parol agreement substituted.³

3. Contracts with Corporations.—A corporation, if acting within the legitimate scope of the purposes of its institution, may enter into working contracts,⁴ and will be bound by such contracts made by its authorized agents, whether in writing or by parol;⁵ but one entering into a contract with a corporation should see to it that the work to be performed is within the province of the corporation, or can be reasonably implied from its charter,⁶ that

parol agreement to prepare the plans of a building for defendants, and to superintend its construction, in consideration of the conveyance of a certain lot, it was held void under the Statute of Frauds. *Koch v. Williams*, 82 Wis. 186.

Where labor is performed under an agreement that it shall be applied to the purchase price of land which the employer agrees to convey, or where, after the performance of the work, it is agreed that the amount due therefor shall be applied on the purchase price, if the employer fails or refuses to convey the land, the servant must sue for the breach or to enforce the performance of the special agreement, and cannot maintain an action to recover payment for the work done. *Cameron v. Austin*, 65 Wis. 652. If, however, the workman enters into possession of the land under the contract and makes improvements, and the amount due for his work is applied to the purchase price, the contract will be enforced. *Cameron v. Austin*, 65 Wis. 652.

1. Improvements upon land, distinct from the title or possession, are not an interest in the land within the meaning of the statute. They are only another name for the work and labor bestowed on the land, and a parol promise to pay for the work already done or to be done upon the land never has been held to come within the statute. *Lower v. Winters*, 7 Cow. (N. Y.) 263; *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272; 4 Am. Dec. 356; *Benedict v. Beebee*, 11 Johns. (N. Y.) 145; *Scoggin v. Slater*, 22 Ala. 687; *Thouvenin v. Lea*, 26 Tex. 612. See also *Keyser v. School Dist. No. 8*, 35 N. H. 477; *Clark v. Shultz*, 4 Mo. 235; *FRAUDS, STATUTES OF*, vol. 8, p. 698.

2. *Cable v. Foley*, 45 Minn. 421.

3. A written contract may be annulled and a parol one substituted. *Lawall v. Rader*, 24 Pa. St. 283; *Church v. Florence Iron Works*, 45 N. J. L. 129; *Cooke v. Murphy*, 70 Ill. 96.

The right to contract includes the right to modify, change, or abrogate a preëxisting contract; therefore, any contract not under seal, whether in writing or verbal, may, by a subsequent verbal contract, be annulled or changed, and the last contract, if supported by a consideration, will bind the parties. *Bishop v. Busse*, 69 Ill. 403.

Where a contract has been reduced to writing, a party thereto is not authorized to rely upon the statements of the agent of the other party to the contract, varying or modifying its terms. *Grimes v. Simpson Centenary College*, 48 Iowa 208.

4. *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 280.

5. *Columbia Bank v. Patterson*, 7 Cranch (U. S.) 299. Where the charter of a company provides that all contracts and engagements must be entered into under seal, no recovery can be had upon a contract not under seal. *Crampton v. Varna R. Co.*, L. R., 7 Ch. 562. And see *Frend v. Dennett*, 4 Jur. N. S. 897.

6. *Lloyd's Law of Building and Buildings* (2d ed.), § 5; *Chicago v. Shober, etc., Lithographing Co.*, 6 Ill. App. 560. And see *CORPORATIONS (PRIVATE)*, vol. 4, p. 184; *MUNICIPAL CORPORATIONS*, vol. 15, p. 1080. Every one dealing with corporations must be taken to know what are their powers of contracting, and must make a contract accordingly. *Crampton v. Varna R. Co.*, L. R., 7 Ch. 568.

One contracting with a city through its officers, is bound at his peril to take

it has been duly authorized,¹ and that its representative, with whom he executes the contract, is acting within the scope of his authority.² If the work is a public one, he should also see that

notice of their powers, and also of the legality of its ordinances. *Keating v. Kansas City*, 84 Mo. 415.

Where a corporation has the right, under its charter, to make all contracts necessary for the erection of a specified building, it has the power to accept for payment an order in favor of a material man, drawn by the contractor for the erection of the building, payable out of the money due the latter by the corporation. *Prairie Lodge v. Smith*, 58 Miss. 301.

1. Where work is ordered by the corporate authorities, it must be shown that the order was regularly adopted with proper formalities, and the authority of a board of county commissioners cannot be shown by proving the separate individual assent of the members of the board. *Eigemann v. Posey County*, 82 Ind. 413; *Campbell v. Brackenridge*, 8 Blackf. (Ind.) 471; *Archer v. Allen County*, 3 Blackf. (Ind.) 501. But in order to make a private corporation liable upon a working contract it is not necessary to show an express resolution passed at a meeting of the directors. *Cunningham v. Massena Springs, etc.*, R. Co., 63 Hun (N. Y.) 439.

If a paving contract with a city is void through a defect in the ordinance, there can be no right of action against the city. *Keating v. Kansas City*, 84 Mo. 415. And see *Baltimore v. Eschbach*, 18 Md. 276, where it was held that a paving contract made by the city commissioner upon the application of the owners of a majority of feet fronting on a street not formally condemned, was invalid, and that no action could be maintained against the city by the contractor.

Where Congress authorizes the secretary of the treasury to erect a building, but expressly limits the cost to a fixed amount, and the whole of that amount is paid to one contractor, he cannot charge the defendant with any further liability. A contractor doing all the work under such a statute is chargeable with notice of the restriction set upon the cost of the building by Congress, and cannot set up a breach of contract which will, in effect, do away with the restriction. *Trenton Locomotive, etc., Mfg. Co. v. U. S.*, 12 Ct. of Cl. 147.

2. *Chicago v. Shober, etc.*, Lithographing Co., 6 Ill. App. 560; and see *Mobile, etc., R. Co. v. Worthington* (Ala. 1893), 10 So. Rep. 839; *Travers v. U. S.*, 5 Ct. of Cl. 329; *Thompson v. U. S.*, 9 Ct. of Cl. 187; *Southworth v. Flanders*, 33 La. Ann. 190.

A person contracting for the construction of a building, with a committee appointed by a town to procure plans and estimates for a public schoolhouse, and to contract for the erection of the building, is bound to take notice of a limitation on their power, and where the cost is limited to fifty-five thousand dollars, the committee has no power by its contract to render the town liable for a larger sum. *Turney v. Bridgeport*, 55 Conn. 412. And one contracting with a city commissioner to build a jail, in pursuance of a resolution of the mayor and city council, must see to it that the commissioner does not exceed the powers granted him by the resolution. *Baltimore v. Reynolds*, 20 Md. 1; 53 Am. Dec. 535.

The authority of the president of a corporation will not be presumed. *Ashuelot Mfg. Co. v. Marsh*, 1 Cush. (Mass.) 507; *Lyndon Mill Co. v. Lyndon Literary, etc., Inst.*, 63 Vt. 581. In this last case it was held that the president of the defendant literary and biblical institution had no authority, either from the corporation or its trustees, to bind it by a purchase of materials for repairs of its building.

Where a county board, by resolution, directed a party to build so much of the dome of a courthouse being erected as was necessary to inclose the building, under the architect's supervision and subject to his valuation of the same, it was held that the architect, under such resolution, had authority only to supervise the work directed to be done and make a schedule of prices for the same, and that any order of his for work outside of the terms of the resolution was not binding on the county. *Sexton v. Cook County*, 114 Ill. 174.

In *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, a building committee of five, appointed by the defendant's directors to procure plans and specifications and to make all con-

all statutory requirements have been complied with.¹ The representative of the corporation should be careful not to sign the

tracts for the erection of a building subject to the directors' approval, sent, to selected builders, plans and specifications, with a "notice to builders" attached, containing the terms of the bidding, and reserving the right to reject any and all bids. All the builders save one declined to submit bids, and a conference was held between them and four members of the committee. There was evidence, which was contradicted, that among other changes the committee orally agreed to accept the lowest bid, in case the building was erected substantially in accordance with the plans and specifications submitted, without reserving the right to reject bids in that case, and that the fifth member subsequently consented to the agreement. There was also evidence that the committee assumed to make changes in the terms of the competition at its own will, and that the directors, though informed of their proceedings and holding monthly meetings as a board, did not object to their action, nor inform the bidders that they could not safely deal with the committee. It was held that a finding was warranted that such an oral agreement, varying the terms of the notice to bidders, was entered into by the committee, and that such an agreement was within their ostensible authority, and was valid.

A committee chosen by a town "to procure a master builder and superintend the building of a meetinghouse for the town," and with authority to borrow money if necessary, has the power to make contracts for the building where no special committee is appointed for that purpose. *Damon v. Granby*, 2 Pick. (Mass.) 345.

Where the contractor for the construction of a county building abandons his contract after a material portion of the work has been performed, a board of county commissioners has incidental power to take charge of the work and complete the building without adopting new plans, and specifications or making a new contract, and the county is liable for money, labor, or materials furnished at the request of the board and used in the construction of the building; but the board has no power to assume any indebtedness of the contractor for materials furnished

to him, and for such indebtedness the county cannot be made liable. *Bass Foundry, etc., Works v. Parke County*, 115 Ind. 234.

Legislative ratification of a contract can be shown only by some action of both houses, by statute or resolution, and appropriations of money for the prosecution of a public work will not be deemed a ratification of engagements entered into by the commissioners in charge of it, merely because the engagements are set forth in previous reports of their doings, made by the commissioners to the governor or to the legislature. *Shipman v. State*, 42 Wis. 377.

1. Thus, where a city charter provided that contracts for certain work should be subjected to a public competition, and given to the lowest bidder, it is a violation of the statute if the bids are tested by a comparison which omits a substantial part of the work to be contracted for, since the lowest bidder by that means cannot be ascertained, and no recovery can be had upon a contract entered into under such circumstances. *Brady v. New York*, 20 N. Y. 312, *aff'd* 2 Bosw. (N. Y.) 173.

Where the plaintiff entered into a contract with the commissioner of public works, for laying water pipes in the city of New York, and performed work and furnished materials thereunder, and the contract was not founded upon sealed bids or proposals, made in compliance with public notice, as required, *New York Laws of 1870*, ch. 133, § 104, the contract was held void. *Greene v. New York*, 3 Thomp. & C. (N. Y.) 753; 1 Hun (N. Y.) 24.

Where public agents are required to let public work to the lowest responsible bidders, upon notice of the work or material required, such notice should give all the necessary information to enable the parties desiring to bid to make estimates. Resort cannot be allowed to merely verbal explanations to ascertain substantially all that is contemplated to be done, as that might lead to favoritism, or other mischief intended to be avoided by the statute. *Littler v. Jayne*, 124 Ill. 123.

Where the contract is with a state for the construction of a building or other public work, the state stands in the same position as an individual, and

contract in such a manner as to render himself personally liable,¹ though even if the contract is so executed as to bind the representative personally, or is one which he has no authority to make,

may at any time abandon the enterprise and refuse to allow the contractor to proceed, or it may assume control and do the work embraced in the contract by its own immediate servants and agents, or enter into a new contract for its performance by other persons, without reference to the contract previously made, although there has been no default on the part of the contractor. The state, in such case, would violate the contract, but the obligation of the contract would not be impaired by its refusal to perform it, and it cannot be compelled to proceed with the prosecution of the work at the instance of the contractor; the latter would have a just claim against the state for any damages sustained by him from the breach of the contract, and, although the claim could not be enforced through an action at law, he would have the remedy by appealing to the legislature, which can, and it must be presumed will, do whatever justice may require. *Lord v. Thomas*, 64 N. Y. 107.

Where all municipal contracts are required to be in writing, all variations of such contracts must also be in writing. *Malone v. Philadelphia*, 147 Pa. St. 416.

1. Merely affixing his official title after his signature, is not sufficient to relieve him from personal liability. In *Sharp v. Smith*, 32 Ill. App. 336, certain school directors entered into a contract for the erection of a school-house, and in the body of the contract described themselves as "Directors of District No. 2," and in signing the contract simply wrote "Directors" after their names. They were held personally liable.

Where the contract read, "We, the undersigned, a committee chosen by the town of A to finish the basement of their town house, do hereby agree to pay," etc., for the finishing of said basement, and was signed and sealed by the committee as "A committee for the town," it was held to be a contract of the individuals who signed it and not the contract of the town. *Fullam v. West Brookfield*, 9 Allen (Mass.) 1.

A contract, not under seal, purporting to be a "specification for building a town way in A," and providing that

the same be to the "acceptance of the road commissioners of A," together with a provision, appended thereto, that "the subscribers, road commissioners aforesaid, agree to pay to C. the price," etc., signed "M., W., commissioners of A," was held to be the contract of the town of A. *Cutler v. Ashland*, 121 Mass. 588.

Where individuals subscribed their proper names to a promissory note given in payment of building materials, it was held that *prima facie* they were personally liable, although they added a description of the character in which the note was signed as "Trustees of Baptist Society," but that such presumption of liability might be rebutted by proof that the note was in fact given by the makers as agents of the corporation for a debt of the corporation due the payee, and that they were duly authorized to make such note as agents of the corporation; and that such facts might be pleaded in bar of an action against the makers personally, averring knowledge on the part of the payee. *Brockway v. Allen*, 17 Wend. (N. Y.) 40.

Where a corporation duly appointed certain parties its building committee, and authorized them to contract for materials for erecting a building in which to conduct its business, who entered into a written contract under their respective hands and seals, describing themselves therein as the "building committee," and signing it as such, for the purchase of a quantity of brick, it was held that the corporation was liable on the contract, notwithstanding the seals of the defendants were affixed thereto. *Haight v. Sahler*, 30 Barb. (N. Y.) 218. And see, to the same effect, *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; 10 Am. Dec. 193; *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285; *Damon v. Granby*, 2 Pick. (Mass.) 345.

In *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; 10 Am. Dec. 193, it is said that there is a distinction between the contracts of public agents, who assume to act on behalf of the government, and the contracts of private agents, who represent individual persons or corporations; that, in the first case, although the government cannot be sued, yet the

if it is for the exclusive use and benefit of the corporation, and the latter subsequently recognizes the contract as existing, and accepts the benefit thereof, it may be held responsible.¹

One contracting with an unincorporated religious association should remember that it cannot be sued.²

4. Implied Contracts.—Where one party requests another to perform certain work, or even, without such request, stands by and sees him working and accepts the benefit of his labor, the law will raise an implied contract on his part to pay for it.³ But where

agent is not personally liable, the public faith being the only security; but that in the latter, the person who assumes to contract as agent for an individual or a corporation, must see to it that his principal is legally bound by his act, for if he does not give a right of action against his principal, the law holds him personally liable.

1. *Columbia Bank v. Patterson*, 7 Cranch (U. S.) 299; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; 10 Am. Dec. 193; *Haight v. Sahler*, 30 Barb. (N. Y.) 218; *Bass Foundry, etc., Works v. Parke County*, 115 Ind. 244; *Bicknell v. Widner School Tp.*, 73 Ind. 501; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Clark v. Cuckfield Union*, 1 B. C. C. 81; 16 Jur. 686. And see *infra*, this section, *Implied Contracts*.

Where a party does work or furnishes materials to a corporation under a contract with one assuming to act as its agent, with the knowledge of its officers and without dissent on its part, the corporation will be held to ratify the contract. *Cunningham v. Massena Springs, etc.*, R. Co., 63 Hun (N. Y.) 439.

Where a corporation, having the power to contract for the erection of a certain building, has made the contract for such purpose, and received the benefit thereof by the erection of the building, it cannot avoid its liability in an action for money due upon such contract, by showing that the provision of its charter authorizing the erection of the building is invalid. *Prairie Lodge v. Smith*, 58 Miss. 301.

Where the president of a corporation ordered materials for repairs upon the understanding of the trustees that he was to furnish them as a gratuity, the fact that the corporation received and used them will not of itself make it liable as upon an implied contract. *Lyndon Mill Co. v. Lyndon Literary, etc.*, Inst., 63 Vt. 581.

2. A religious society which is not

incorporated according to law, or which has not recorded its name and objects as provided by *Georgia Code*, § 2347, cannot be sued as such on a working contract. *Wilkins v. St. Mark's Protestant Episcopal Church*, 52 Ga. 351.

Religious societies incorporated under the provisions of the *Illinois Rev. Stats.* 1845, and the Act of 1855, relating to such bodies, can only be reached by a suit through their trustees. *Ada St. M. E. Church v. Garnsey*, 66 Ill. 132.

Where a religious society contracts for the erection of a church, and the names of its members are stated in the body of the instrument, but one of them does not sign it, the one failing to sign cannot be held liable under the agreement, as merely stating his name in the body of the instrument does not make him a party to the contract. *Thomas v. Caldwell*, 50 Ill. 138.

In *Wilkins v. St. Mark's Protestant Episcopal Church*, 52 Ga. 351, it is said that the members of an unincorporated congregation may be charged as joint promissors, contracting through an agent, or as partners contracting in a firm name.

3. *Blount v. Guthrie*, 99 N. Car. 93; *Holmes v. Shands*, 26 Miss. 639; *Reiser v. Stauer*, 73 Wis. 477; *Gilman v. Gard*, 29 Ind. 291. And see *Brady v. New York*, 20 N. Y. 312; *Tebbetts v. Haskins*, 16 Me. 283.

Evidence that defendants knew that plaintiff was doing work under an incomplete contract, and made no objection, is admissible as tending to show that the parties intended such contract to be complete. *Hodges v. Sublett*, 91 Ala. 588.

In *Hazard Powder Co. v. Loomis*, 2 Disney (Ohio) 544, it was held that where a builder, or material man, has begun to furnish work or materials toward the erection or repair of a building without any agreement as to the amount of material or duration of his

one enters upon another's land without color of right, and

employment, but under a reasonable expectation that further work or material will be required of him to finish the undertaking, and he is afterward called upon, from time to time, to furnish the same until the building is completed, he may recover therefor as though acting under an original contract for the entire labor or materials so furnished.

If a person requests another to perform work for him, without specifying the compensation, or if he stands by and allows the work to be done by another, who is acting in good faith, and afterwards takes possession of the work, and converts it to his own use, he is liable on a *quantum meruit*. *Thomas v. Walnut Land, etc., Co.*, 43 Mo. App. 653.

The employing of a professional person implies an undertaking to remunerate him, but the inference may be rebutted by circumstances. *Manson v. Baillie*, 2 Macq. H. L. Cas. 80.

In *Holmes v. Shands*, 26 Miss. 639, it was held that where material or labor was bestowed by contract with a third party and on his account, such third person being under contract with the owner of the property to do the work and furnish the materials, there was no liability on the part of the owner of the property but to the party with whom he contracted. And see *Reed v. Baggott*, 5 Ill. App. 257; *Walker v. Brown*, 28 Ill. 378; 81 Am. Dec. 287.

Where the owner discharged the builder for drunkenness before the plumbing work was done, and the plumber, who had made the subcontract with the builder to do the plumbing of the house, went on with his work, and when it was done sued the owner for the price, and it was proved that the owner had seen the work going on and given some directions about it, it was held that the jury, if they found the facts warranted it, might require the owner to pay the plumber at least the value of the work done by him after the discharge of the builder, and this although it seemed that money enough to pay the plumber under his subcontract had been paid over to the builder. *Blount v. Guthrie*, 99 N. Car. 93.

Where work is done under the direction of an agent, who has authority to direct its performance, it is imma-

terial whether he agrees to pay what it is reasonably worth, as the law will imply such a promise. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260.

Where one, by fraudulently representing himself to be the owner of land, induces another to bestow labor upon it in the expectation of enjoying the property as a joint owner, the party performing the work may, upon the discovery of the fraud, abandon the contract and recover the value of the work done on the common count of *indebitatus assumpsit*. The law will imply a promise to pay for the labor. *Rickard v. Stanton*, 16 Wend. (N. Y.) 25. And see *Rumsey v. North Eastern R. Co.*, 32 L. J. C. P. 244.

Where a written contract, for work and materials in erecting a building, is void because not recorded as required by the *California Code of Civ. Proc.*, § 1183, the one performing such labor and furnishing such materials may maintain an action on an implied contract for the value thereof. *Rebman v. San Gabriel Valley Land, etc., Co.*, 95 Cal. 390. And it has been held that where the plaintiffs have rendered services under a contract, void under the Statute of Frauds, they may recover the value thereof upon a *quantum meruit*. *Cadman v. Markle*, 76 Mich. 448; *Wonsettler v. Lee*, 40 Kan. 367; *Koch v. Williams*, 82 Wis. 186; *Springer v. Bien* (C. Pl.), 10 N. Y. Supp. 530. But see *M'Corkle v. Doby*, 1 Strobb. (S. Car.) 396; 47 Am. Dec. 560.

United States Rev. Stat., § 3744, provides that the secretary of the interior shall cause all contracts made by him on behalf of the government to be reduced to writing, which shall be then signed by him; yet, although, in such case, a parol agreement enlarging the quantity of work required by the contract is not obligatory on the government, if the work be actually done thereunder, a recovery may be had upon an implied assumpsit. *Wilson v. U. S.*, 23 Ct. of Cl. 77.

In a suit to recover for work done on a public street, defendant, an abutting owner, testified that he never authorized the work. It was held that the fact that he saw the work going on upon the street without further protest raised no implied promise or liability to pay for it. *Nagle v. McMurray*, 84 Cal. 539.

performs work, and makes improvements thereon, he cannot recover therefor, even though the owner subsequently promises to pay him;¹ nor can any recovery be had from a party for labor or services voluntarily performed without his privity or request, however meritorious or beneficial they may be.²

III. TENDERS—1. Definition.—A tender is a formal offer to undertake the performance of certain work for a price named, either directly or indirectly referring to some announcement or proposal requesting such offer.³

2. Acceptance of Tender.—Upon the acceptance of the tender, a binding contract results;⁴ but the acceptance must be before the tender is withdrawn and in the terms offered.⁵ After acceptance the tender cannot be withdrawn.⁶ If the tender is conditional, the completion of the contract is delayed until the condition is complied with.⁷

1. There is neither legal nor moral obligation on the part of the owner to pay for the work and labor done upon his land by one who has entered without consent, or under color of right, and held possession against him. *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272; 4 Am. Dec. 356.

2. Such as saving his property from fire, or from water, securing boats astray, etc. *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; 11 Am. Dec. 237; *Sheldon v. Sherman*, 42 Barb. (N. Y.) 372; *Binstead v. Buck*, 2 W. Bl. 1117; 1 Esp. 86; 1 M. & S. 290. And see *White v. Jones*, 14 La. Ann. 692.

3. *Lloyd's Law of Buildings* (2d ed.), § 56.

The notice soliciting tenders should give all the necessary information to enable parties desiring to bid to make estimates. *Little v. Jayne*, 124 Ill. 123.

4. *Great Northern R. Co. v. Witham*, L. R., 9 C. P. 16. But an unaccepted proposal is not a contract. *Forster v. Ulman*, 64 Md. 523.

A contract for the construction of a road improvement at the expense of a county was awarded, under advertisement for sealed proposals, to R., as the lowest bidder, and the county commissioners notified him of their acceptance of his bid. It was held that the contract was then complete. *Highland County v. Rhoades*, 26 Ohio St. 411. But in *Hughes v. Clyde*, 41 Ohio St. 339, it was held that the acceptance of a legally made bid for a proposed building, did not, in itself, constitute a contract, but entitled the bidder to one in accordance with the proposals.

The acceptance of a bid made under

an advertisement for sealed proposals for constructing a public work, if the bid is regularly made, and is the lowest one, creates a vested right to the contract, of which the bidder cannot be deprived by subsequent legislation, without compensation. *Matter of the Protestant Episcopal School*, 58 Barb. (N. Y.) 161; 40 How. Pr. (N. Y.) 139.

5. A mere bid, in answer to an advertisement for proposals, does not constitute a contract. *Howard v. Maine Industrial School*, 78 Me. 230.

Where, after the acceptance of a tender, the formal written contract, tendered to the contractor for signature, contained stipulations not in the advertisement and proposal and records, etc., relating to the improvement—in particular, a provision that the grade or line might be changed in a certain contingency—the contractor was held entitled to refuse to sign it. *Highland County v. Rhoades*, 26 Ohio St. 411.

Where a bid was made for certain work, and subsequently the bidder signed an agreement which covered the terms of the bid, with some additional provisions, the bid was held merged in the subsequent agreement. *Taylor v. Fox*, 16 Mo. App. 527.

6. *Lewis v. Brass*, 3 Q. B. Div. 667.

7. *Howard v. Maine Industrial School*, 78 Me. 230.

An intimation, in the written acceptance of a tender, that a contract will be afterwards prepared, does not render the acceptance conditional and prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby

3. Rights of Lowest Bidder.—There is no obligation upon a party requesting bids for the construction of work to accept the lowest bid tendered; he may consider the responsibility of the bidder, his judgment, skill, etc.,¹ and a request for bids often reserves the right to reject any and all bids.² But where public work is required to be let to the lowest responsible bidder, after advertisement for bids, a contract not so entered into is void.³ The term "responsible," in such cases, is used in a broader sense than mere pecuniary responsibility, and has reference to the skill, ability, and integrity of the one making the tender, and as to which bidder would be the most likely to do faithful, conscientious work, and to fulfill the terms of the contract.⁴ Where the tender is made to a building committee for the construction of some public work, the powers of the committee in deciding upon the responsibility of the bidder are deliberative and discretionary, and *mandamus* will not lie to compel a modification of their decision, even though erroneous, in the absence of clear proof of fraud or bad

to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language. *Lewis v. Brass*, 3 Q. B. Div. 667.

1. *State v. Board of Education*, 42 Ohio St. 374. And see *Spencer v. Harding*, L. R., 5 C. P. 561.

In *Doyle v. Desenberg*, 74 Mich. 79, the plaintiff sued for damages caused by the failure of defendants to carry out an alleged contract for the erection of a building for them by the plaintiff, alleging that he was the lowest bidder, and that there was an agreement that he should have the job. Defendants denied the employment or any agreement with plaintiff. The evidence showed no definite agreement; that plaintiff's bid was an unsigned memorandum, without reference to any building and without names of parties or specifications, and no mutuality of obligation was shown. It was held that the court properly ordered a verdict for defendants.

2. *State v. Board of Education*, 42 Ohio St. 374.

3. *Littler v. Jayne*, 124 Ill. 123.

If the lowest bidder for a contract for erecting public buildings, under 66 Ohio Laws 52, fails to give bond within a reasonable time, the right to the contract passes to the next lowest bidder, upon condition of his giving bond within a reasonable time. *State v. Licking County*, 26 Ohio St. 531.

4. *Com. v. Mitchell*, 82 Pa. St. 343; *Hoole v. Kinkead*, 16 Nev. 217.

One is not to be deemed a responsible bidder because he offers adequate security for the performance of the contract. He must be able to respond or answer in accordance with what is expected or demanded of him. *People v. Dorsheimer*, 55 How. Pr. (N. Y. Supreme Ct.) 118.

In *Com. v. Mitchell*, 82 Pa. St. 343, the court said: "It is scarcely open to doubt but that the word under consideration (responsible), as it is used in the statute, means something more than pecuniary ability. In a contract, such as the one in controversy, the work must be promptly, faithfully, and well done—it must, or ought to, be conscientious work; to do such work requires prompt, skillful and faithful men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good, and even capable of bearing its duty for a time, which in the end may prove to be a total failure and worse than useless. Granted that from such a contractor pecuniary damages may be recovered by an action at law, this is, at best, but a last resort that often produces more vexation than profit—a mere patch upon a bad job; an exceedingly meager compensation, at best, for the delay and incalculable damage resulting to a great city from the want of a competent supply of water. The city requires honest work, not lawsuits. Were we to accept the interpretation insisted upon by the relators, the difference of a single dollar, in a bid for the most important con-

faith.¹ All bids must substantially conform to the proposals made.²

4. **Agreements to Stifle Competition in Bids.**—An agreement between intending bidders to stifle competition in bids is against public policy and void,³ and if it results in the letting of the contract at an unreasonable price, the party defrauded may repudiate the contract and recover damages.⁴

tract, might determine the question in favor of some unskillful rogue as against an upright and skillful mechanic."

1. *Com. v. Mitchell*, 82 Pa. St. 343; *Hoole v. Kinkead*, 16 Nev. 217; *Weed v. Beach*, 56 How. Pr. (N. Y. Supreme Ct.) 470; *People v. Contracting Board*, 27 N. Y. 378. In *State v. Board of Education*, 42 Ohio St. 374, it is said: "If the lowest responsible bid be rejected, and any other be accepted, the action of the board may be controlled by *mandamus* without violating the rule that a matter of discretion is not subject to control by proceedings in *mandamus*. In order to entitle the relator to the relief prayed for, however, he must show a clear legal right in himself."

2. *Weed v. Beach*, 56 How. Pr. (N. Y. Supreme Ct.) 470. But in this case it was held further that where state officers have endeavored to obtain bids in a certain form and failed, they are at liberty, as against such faulty bidders, to examine all bids, and, according to their best judgment, award the contract to the lowest bidder.

3. *People v. Lord*, 6 Hun (N. Y.) 390; *People v. Stephens*, 71 N. Y. 527; *Woodworth v. Bennett*, 43 N. Y. 273; 3 Am. Rep. 706; *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 389.

Thus, where, in the case of a letting of work on a canal, certain persons agreed for a consideration of four hundred dollars, paid by a higher bidder, to withdraw their bids, the court held the agreement illegal, and refused to enforce a division of the four hundred dollars among the parties. *Woodworth v. Bennett*, 43 N. Y. 273; 3 Am. Rep. 706. And where the postmaster general had given notice of proposals for conveying the mail, and the defendant agreed to pay the plaintiffs, who intended to make proposals, one thousand dollars if they would not bid, the agreement was held illegal. *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 389.

But where two bidders for a public improvement agreed to become part-

ners in doing the work in the event that the contract should be awarded to either of them, and that any benefit derived from the contract should inure to the firm, and the one to whom the work was awarded refused to perform it in partnership, and assigned the contract to a stranger for a valuable consideration, it was held that the agreement was valid, it not appearing that the intent, effect or necessary tendency of the contract was to stifle fair competition at the letting. *Breslin v. Brown*, 24 Ohio St. 565; 15 Am. Rep. 627. And see *Whalen v. Brennan*, 34 Neb. 129.

But see *Atcheson v. Mallon*, 43 N. Y. 147; 3 Am. Rep. 678, where an agreement between two bidders on a public work, whereby it was agreed that if the contract should be awarded to either, both should share equally in the profits, if any, and contribute equally to the losses, was held to be void as against public policy, although it did not appear that such agreement did really produce any result detrimental to the public interest.

4. *People v. Lord*, 6 Hun (N. Y.) 390; *People v. Stephens*, 71 N. Y. 527.

Where, however, the contracting board, having full power to act and reject proposals, in case they deem them disadvantageous, with full knowledge of all the facts, adjudges a proposal not excessive in price or disadvantageous, and accepts it and enters into a contract in pursuance thereof, in the absence of any evidence that the board acted corruptly or in bad faith, the contract will be held binding, and an action cannot be maintained to recover damages for an illegal combination. *People v. Stephens*, 71 N. Y. 527.

Substitution of Bidder.—An agreement whereby A is to enter into and perform a contract with the state for the construction of a swamp land state road, and to give B, who, at the public letting of the work, under the statute, had been the lowest bidder, as a bonus for being allowed to take his place in

IV. SPECIFICATIONS—1. Definition.—"The specification is the written statement containing a minute description of the particulars of the work to be executed, and is generally made with reference to the drawings and the building contract."¹

2. Binding on Contractor.—The contract usually refers to the plans and specifications for the details of construction, and they thus become constructively a part of the contract,² just as binding upon the contractor as if embodied in it, and the latter cannot justify any departure from them.³ But he is only bound by the

the contract, a portion of the swamp lands to be secured from the state for the performance of the work, is void as being against public policy. Besides, the provision of the statute that contracts to construct such roads shall "in all cases be let to the lowest responsible bidder," does not admit of the substitution of another person as contractor in place of such bidder; and any contract based upon such illegal substitution is void. *Hannah v. Fife*, 27 Mich. 172.

1. *Lloyd's Law of Building* (2d ed.), § 54.

In *Gilbert v. U. S.*, 1 Ct. of Cl. 34, Casey, C. J., said: "Specifications in architecture embrace, as understood by the profession, not only the dimensions and mode of construction, but a description of every piece of material—its kind, length, breadth and thickness—the manner of joining the separate parts together."

Where an architect prepares specifications, they ought to be in detail to enable parties to judge not only of the gross quantities, but also of the quantity of labor to be employed. *Kemp v. Rose*, 4 Jur. N. S. 919.

2. The specifications, so far as referred to in the contract, become constructively a part of it. *New England Iron Co. v. Gilbert, etc.*, R. Co., 91 N. Y. 153; *Cook v. Allen*, 67 N. Y. 578; *Tonnele v. Hall*, 4 N. Y. 140. And see *White v. McLaren*, 151 Mass. 553.

Admissible in Evidence.—Where specifications are embraced in an advertisement for proposals to do work, and a contract results on which suit is brought, the specifications, being the basis of the contract, cannot be excluded as evidence. *Campbell County v. Youtsey* (Ky. 1891), 12 S. W. Rep. 305.

Warranty.—The specifications not being signed, and being referred to only to show the kind of work and materials,

a clause therein that the work is to be "warranted tight, including the roof, for two years," does not constitute a continuing warranty, but a stipulation as to the quality of the roof. *White v. McLaren*, 151 Mass. 553.

3. *Coey v. Lehman*, 79 Ill. 173.

Even with the assent of the superintendent. *Adlard v. Muldoon*, 45 Ill. 193. Thus, a specification in a building contract that the plastering should be done with K.'s cement, under the direction of a superintendent of K., followed by one that the cement and sand should be mixed in equal parts, merely relates to supervision of the manner of the work, and does not authorize the superintendent to direct a different mixture. *Fitzgerald v. Moran*, 141 N. Y. 419, affirming 65 Hun (N. Y.) 621. And see *infra*, this title, *The Architect*.

Where the owners consent to variations from the plans, the contractor is not liable for non-compliance with the specifications in those particulars. *Beswick v. Platt*, 140 Pa. St. 28.

Where a contractor agrees to perform work according to certain plans and specifications, and such directions as the supervising engineer may give, he is bound only by such directions as look to a completion of the work according to, and not different from, the plans and specifications. *Burke v. Kansas City*, 34 Mo. App. 570.

The plaintiff contracted to construct a building for defendant according to the plan and specifications which were made a part of the contract, and which expressly stipulated that he should not vary in any manner from the plan and specifications without the written consent of defendant. In an action for breach of contract, it was held that the specifications having fixed the character and size of the columns to be used, evidence that columns of a different size were more in accord with the plan

copy of the specifications shown him,¹ and can only be required to perform the work in the manner set forth in the plans and specifications.²

was immaterial. *Linch v. Paris Lumber, etc., Co.* (Tex. 1890), 14 S. W. Rep. 701.

Where the specifications of a building contract contained a general heading or title called "Plastering," under which, in subtitles called "Deafening," "Lathing" and "Plastering," the whole title was described, and a contractor undertook "to do the plastering and stucco work" according to the specifications, there was no ambiguity raised by the double use of the word "Plastering," and it was construed to mean all included under the general title, and not that alone described under the subtitle "Plastering," and this, although the specifications called for wire lathing, and not the ordinary wooden slip. *Mellen v. Ford*, 28 Fed. Rep. 639.

1. *Sexton v. Chicago*, 107 Ill. 323.

A contract to do grading did not fix the amount of work to be done, except by reference to the accompanying drawings and specifications. The drawings and specifications actually annexed to the contract did not fix the amount of such work. In an action on the contract it was held that a writing which was prepared by the agent of one party and furnished to the other party to estimate and bid thereon, and upon which he made his proposals, which were accepted, and which specified within limits the amount of such work, was properly admitted in evidence as an accompanying specification. *Monmouth Park Assoc. v. Warren* (N. J. 1893), 27 Atl. Rep. 932.

Where a contract for the construction of a house stipulates that the work shall be done according to the attached plans and specifications, and a dispute arises as to how part of the work should be done, the builder may put in evidence a plan not attached to the contract, but which was exhibited to him at the time he made the contract, as explaining how the work should be done about which the dispute subsequently arose. And he may also show that the architects who drew the plans and supervised the work explained the variance to him, and stated that the work should be done as indicated by the specification that was not attached to the contract. *Myer v. Fruin* (Tex. 1891), 16 S. W. Rep. 868.

Where a granite company agreed that it would work for an armory building "on trucks agreeably to the drawings and specifications made by L., architect, . . . and hereto annexed," would provide all proper and sufficient material for "finishing all the granite work for specification and plan figured on at the office of this company," it was held that the contract did not require the company to furnish all the granite work shown by the architect's drawings, but only such as was described in the specifications and plan figured on at the office of the company. *Millstone Granite Co. v. Dolan* (Super. Ct.), 18 N. Y. Supp. 791.

But see *Harvey v. U. S.*, 8 Ct. of Cl. 501, where it was held that where a contract provides for the construction of piers and abutments for a bridge, in accordance with such plans and specifications as may be fixed by the proper authority acting for the *United States*, the contractors are bound by the terms of the contract, notwithstanding that the plans and specifications subsequently fixed upon by the officers of the government materially differ from plans and specifications exhibited to the contractors at the time they made their bid for the work, and materially affected the value thereof.

2. Where a contract to furnish the materials for the ironwork of a building, and do the work necessary, refers to plans and specifications which show only openings for skylights, giving no sizes, weights, or data to guide in their construction, so that the contractor cannot make them without additional plans and specifications, the construction of such skylight cannot be held to have been included in the letting and contract, and the contractor may well refuse to make the same. *Sexton v. Chicago*, 107 Ill. 323.

A contract for the repair of a building called for a combination passenger and freight elevator, without more particular specification. It was held that the contractor could not be made liable for a failure to put gates on the elevator, in the absence of proof that the understanding in the trade was to supply gates in the absence of specifications. The testimony of witness that, in his

They are frequently attached to the contract, thus making identification much easier, and more satisfactory,¹ but this is not necessary to their validity.² The contract, when once signed, merges all prior agreements respecting changes in the specifications.³ Where there are no plans or specifications in the contract indicating the character of the work, this may be shown by other evidence.⁴

3. Variance Between Specifications and Contract.—It is a general principle that where the specifications and contract differ, the latter instrument governs,⁵ but they should be reconciled if

opinion, gates were proper and necessary was not sufficient. *Horgan v. McKenzie* (C. Pl.), 17 N. Y. Supp. 174.

1. *New England Iron Co. v. Gilbert El. R. Co.*, 91 N. Y. 153.

It need not be identified by the signatures of the parties. If otherwise sufficiently identified, the fact that it was not signed is immaterial. *White v. McLaren*, 151 Mass. 553.

Where specifications are attached to the contract and expressly made a part of it, a guaranty contained in the specifications becomes a part of the contract, and is binding upon the contractor. *Lake View v. MacRitchie*, 134 Ill. 203.

2. *New England Iron Co. v. Gilbert El. R. Co.*, 91 N. Y. 153.

That the specifications referred to in a building contract were not signed by the parties is immaterial, if they were otherwise sufficiently identified. *White v. McLaren*, 151 Mass. 553.

3. *Coe v. Lehman*, 79 Ill. 173; *Taylor v. Fox*, 16 Mo. App. 527.

Where the plaintiff built a house for the defendant under a written contract and specifications which did not require him to do the papering, it was held, upon the defendant claiming there was an oral agreement made at the time allowing him to deduct \$50 for doing the papering, that such oral agreement was inconsistent with the written one, and could not have the effect to vary it. *McGuinness v. Shannon*, 154 Mass. 86.

4. *Doane College v. Lanham*, 26 Neb. 421.

5. In *Tischler v. Apple*, 30 Fla. 132, the contract required cornices to be run in twenty-five rooms, and the specifications, in halls and all rooms. The owner of the building selected twenty-five rooms to be corniced under the contract, and the contractors ran cornices therein. In a suit by the contractors for extra work in running cornices in

halls and other rooms, it was held that the testimony of one of them that the selection did not include the halls and storerooms in which the cornices were charged for as extra was admissible, as the contract, rather than the specifications, governed as to the amount of cornicing to be done.

As between the positive requirement of a written clause in the contract, and a plan referred to, which, though perfect in other respects, shows an omission to indicate thereon a certain matter of detail, the written clause must control the mere implication derived from the omission in the plan. *Smith v. Flanders*, 129 Mass. 322.

Where a building contract provides a mode of determining as to extras, and the specifications, referred to by and made a part of the contract, provide a different and inconsistent mode, the contract prevails. *Meyer v. Berlandi*, 53 Minn. 59.

A building contract provided that the work was to be done "without unnecessary delay as soon as ordered." The specification provided that "the building will be completed within three months from the date of the contract." The carpenter's work was all that defendant undertook. It was held that the specifications were controlled by the contract, and defendant was not obligated to finish his work in three months. *Boteler v. Roy*, 40 Mo. App. 234.

When a contract requires work to be done according to sample and specifications, and, the two being irreconcilable, the engineer in charge orders a modification to which the contractors assent, the modified work must be regarded as performed and accepted at the contract price. *Gallagher v. District of Columbia*, 19 Ct. of Cl. 564.

Variance Between Plans and Specifications and "Working Plans."—A bid for a building contract was made and

possible.¹

4. **Implied Warranty.**—There is some conflict of authority as to whether there is any implied warranty by the employer that the work can be successfully constructed according to the plans and specifications, a leading English case holding that there is none, and that the remedy of the contractor, if any, must be for compensation as upon a *quantum meruit*,² while a *Wisconsin* case holds that the employer assumes the risk of the sufficiency and efficiency of the plans and specifications, and must bear any loss resulting from defects therein,³ and it has been repeatedly held

accepted solely on the plans and specifications, and the contractors began work. Soon afterwards the detailed "working plans" were handed them, whereupon they claimed there was a material variance therein from the original plans, involving much additional labor, and refused to continue the work at the contract price. The owner then procured others to do the work at an increased compensation, and afterwards sued the contractors for the difference. The latter counter-claimed for the partial work done by them, and it was held that if there was a material variance, the contractors were entitled to recover on their counter-claim, and there being a fair conflict of evidence on this point, a refusal to submit the same to the jury was erroneous. *Williams v. Bohan* (Super. Ct.), 17 N. Y. Supp. 484.

1. In an action for a breach of a building contract, a charge that, "in deciding whether or not plaintiff was proceeding with said building in compliance with the contract, . . . there must have been a substantial compliance in every material particular, . . . as called for by a fair, reasonable, and practical construction of the contract, plans, and specifications taken together, and where there is a conflict, if any, in these, this should be reconciled in a practical, workmanlike manner, so as to arrive at the fair and reasonable intention of the same," is correct; and does not leave the construction of the written contract to the jury. *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23.

2. T. contracted with a corporation to take down an old bridge and build a new one. Plans and a specification prepared by the engineer of the corporation were furnished to him, and he was required to obey the directions of the engineer. The descriptions given

were stated to be believed to be correct, but were not guaranteed; and, in one particular matter at least, he was warned to make an examination for himself. Part of the plan consisted in the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wholly lost, and the bridge had to be built in a different manner. In this way much labor and time were wasted. The contract contained provisions as to the payment for extra work, and that work had (with the contract work) been duly paid for. The contractor sought for compensation for his loss of time and labor occasioned by the failure of the caissons, and in his declaration alleged that the corporation had warranted that the bridge could be inexpensively built according to the plans and specification. There was no express warranty to that effect in the contract, and it was held that none could be implied. *Thorn v. London*, L. R., 1 App. Cas. 120; 45 L. J. Exch. Div. 487; 24 W. R. 932; 34 L. T. N. S. 545. See also *Sharpe v. San Paulo R. Co.*, L. R., 8 Ch. 597.

3. An act of the *Wisconsin* legislature authorized the construction of wings to the state capitol, and required a board of commissioners to let the contract after procuring "suitable and proper plans, drawings, and specifications," and to employ an architect to superintend the work, the architect to certify to the board monthly estimates of all materials furnished and labor performed. The board procured and adopted plans and specifications, and entered into a contract with plaintiffs, whereby all the materials were to be furnished, and all the work done, according to the plans and specifications, and under the direction and to the entire satisfaction of the architect. The architect was authorized to vary from such plans,

in the *United States* that a contractor constructing work in accordance with the plans and specifications furnished by the employer is not liable if it subsequently gives way by reason of defects in the plans.¹

The employer does not warrant the accuracy of the bill of quantities,² but is bound by representations as to the character of the work.³

the value of alterations to be added to or deducted from the contract price, and any doubt as to the quality of materials and workmanship, or as to allowances for extras, to be determined and adjusted solely by the architect. After the contractors had, in good faith, according to the plans and under the directions of the architect, constructed a large portion of one wing, and the materials and work had been approved and accepted by the architect, and by the board, the wing fell, owing to defects and inefficiency of the plans. It was held that the state warranted the plans, and was liable to the plaintiffs for the expense of restoring the portion of the building so destroyed. *Bentley v. State*, 73 Wis. 416.

Where a contractor is bound by contract to follow the specifications strictly in the construction of a tunnel, and they are so defective that when followed the arch of the tunnel falls, the contractor can recover under the contract. *Byron v. New York*, 54 N. Y. Super. Ct. 411.

1. The undertaking of the contractor is simply to do the work with reasonable skill, after the designs furnished by the architects. They are not guarantors as to the strength of the edifice when finished, or its capacity to withstand the violence of the winds. *Clark v. Pope*, 70 Ill. 128. And see *Schwartz v. Saunders*, 46 Ill. 18; *Burke v. Dunbar*, 128 Mass. 499; *MacRitchie v. Lake View*, 30 Ill. App. 393. If he faithfully executes the work according to the plans and specifications, he is not responsible if it is valueless. *Graves v. Caruthers*, Meigs (Tenn.) 58; *Loundsberry v. Eastwick*, 3 Phila. (Pa.) 371; *Wade v. Haycock*, 25 Pa. St. 382.

Where the owners of a wharf contract for its extension, and furnish the plans and specifications to the contractor, who builds it in accordance therewith, he is not liable for its giving way because of defects in the plans. *Beswick v. Platt*, 140 Pa. St. 28.

A contractor working under the plans

and direction of an architect only undertakes that his work shall be skillful and workmanlike, and if performed in accordance with the plans, he cannot be held answerable in damages for an accident which occurs from the falling of the building, owing to defects in the plan unknown to him. *Daegling v. Gilmore*, 49 Ill. 248.

A guaranty clause in a contract is not to be so construed as to make the contractors liable for the failure of the work to remain in good condition, by reason of defects in the plan or design, or of the work being done, in certain particulars, in accordance with the express direction of the supervising engineer. *MacRitchie v. Lake View*, 30 Ill. App. 393.

2. The mere employment of an architect to prepare plans and a specification for a house, and to procure a builder to erect it, does not render the employer responsible for the accuracy of the bill of quantities furnished by such architect to the builders. *Scrivener v. Pask*, 18 C. B. N. S. 785. Especially where the proposals for bids stated that "the quantities and amounts given in these forms of proposals must be verified by the proposer, as the company will not be responsible for any error resulting from their use. They can be verified by the plans." *St. Paul, etc., R. Co. v. Bradbury*, 42 Minn. 222. And see *Sullivan v. Sing Sing*, 122 N. Y. 389.

If a surveyor makes an estimate which turns out to be incorrect to a considerable amount, through his omitting to examine the ground for the foundation of the work, he is not entitled to recover anything for his plans, specifications, or estimates made for that work. *Money Penny v. Hartland*, 1 C. & P. 352; 2 C. & P. 378.

3. At the end of the plans and specifications for proposed waterworks for a village was a note stating that the "pipe line is mostly, and the tunnels are entirely, to be in soft, shale rock." It appeared that plaintiff, whose bid

V. BILL OF QUANTITIES.—The bill of quantities is the schedule of the materials to be furnished and of the work to be performed, several copies of which are usually prepared and submitted to the contractors bidding for the work.¹ Assigning the prices for the various items mentioned is called "taking out quantities."² It is customary in *England* to employ a person called a surveyor to take out the quantities, who is usually paid by the successful bidder,³ and the architect employed to furnish plans and specifications may have implied authority to engage

for constructing the waterworks was accepted, relied, in making his bid, on the representations as to the character of the excavations, and it was held that such representations were part of the contract, and a warranty as to the quality of the excavations. *Delasfield v. Westfield*, 77 Hun (N. Y.) 124. And see *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396; *Grand Rapids, etc., R. Co. v. Van Deusen*, 29 Mich. 431.

1. A written contract provided for the furnishing of material for certain houses and for the doing of work on these houses for a gross sum, the contract being silent as to quantities. It was held that it must be rejected as a contract for want of certainty, and that the recovery for furnishing the materials and doing the work must be on a *quantum meruit*. *Isaacs v. Smith*, 55 N. Y. Super. Ct. 446.

2. *Lloyd's Law of Building* (2d ed.), § 55.

Plaintiff agreed in writing to do all the fireproofing work to be done on defendant's building, according to the drawings and specifications made by the architects, "which said drawings and specifications shall be considered a part of, and equally binding with, the contract." The price stated was thirteen thousand dollars, the defendant reserving "the right to throw out any part of the work called for on the 'bill of quantities' and from the above amount to deduct at the rate of charge in said 'bill of quantities,' and extra work shall be charged in accordance with the figures on said 'bill of quantities.'" "For the several dimensions, the arrangement, and construction of said building, reference will be had by the contractor to the accompanying design, . . . which design consists of the following drawings, to wit, all necessary plans and specifications, and the hereto attached bid and bill of quantities." It appeared that plaintiff's bid had been larger, but he reduced it,

it being understood that any deductions or extras were to be charged for at the rate mentioned in the bid, and for convenience the figures which accompanied the bid were attached to the contract. It was held that the "bill of quantities" was not intended to be a limitation upon, or express the amount of work to be done for thirteen thousand dollars, but merely to furnish a basis for computing deductions or extras. *Haydnville Min., etc., Co. v. Art Institute*, 39 Fed. Rep. 484.

3. The defendants employed an architect to draw a specification of a building, and he employed the plaintiff to make out the quantities; the plaintiff's work was to be paid for by the successful competitor for the building contract; but a dispute having arisen between the architect and the defendants, they refused to go on with the building, upon which the architect sent in his bill to them, together with the plaintiff's bill for making out the quantities. They paid the architect's account only, and it was held that as they had by their own acts rendered it impossible that the successful competitor should defray the plaintiff's charges, according to the understanding, they were liable to him for the amount of his charges. *Moon v. Whitney Union*, 3 Bing. N. Cas. 814; 5 Scott 1; 3 Hodges 206.

The defendant, a builder, contracted with the plaintiff, a building surveyor, that if he would supply the quantities for a certain projected building, the defendant would, if he was accepted as the building contractor, pay him out of the first installment. The plaintiff furnished the quantities, but the defendant subsequently abandoned the building contract; and it was held, first, that it was implied that the defendant should duly proceed with the building contract, and that the performance of his contract with the plaintiff having been rendered impossible by his own act, he

him.¹ As has been seen, the owner is not responsible for the accuracy of the bill of quantities.²

VI. THE ARCHITECT—1. Definition.—An architect is a person skilled in the art of building; one who understands architecture, or whose profession it is to form plans and designs of buildings, and superintend the execution of them.³

2. Contract with—Submission of Plans.—By calling upon an architect to furnish plans and specifications, and receiving them, a party renders himself liable to pay the architect for them whether he uses them or not,⁴ unless it is clearly understood that

was bound to pay him for the quantities furnished. *M'Connell v. Kilgallen*, 2 Ir. Q. B. D. 119.

The owner of a house, desiring to make alterations, employed an architect to prepare plans. The architect, having done so, employed the plaintiff, a surveyor, to take out the quantities, which were lithographed, and sent to various builders—including the defendant and his son, who were in partnership—to invite tenders, the circular informing them that the builder whose contract was accepted should pay the plaintiff's fees. The defendant and his son had themselves, previously to the employment of an architect, prepared a plan for the owner, but one with which he was not satisfied. The tender of the defendant and his son was the lowest; but, it being greatly in excess of the expenditure contemplated by the owner, the plaintiff prepared a bill of reduction, but this reduced plan the owner also considered too expensive, and then employed the defendant (whose son had since died) to execute a modification of the original plan prepared in his office. The works were eventually executed by the defendant under a contract, in which it was agreed between the owner and the defendant that the latter should not be liable for the plaintiff's fees. The plaintiff brought an action for his fees against the defendant, relying on a custom of the building trade, by which the builder whose tender is accepted, or who is employed to carry out the plans, or any modification of them, is directly liable for the surveyor's fees, the owner being liable if the work is abandoned altogether, or he adopts an entirely independent plan. Evidence to support this custom was given, but one of the plaintiff's witnesses stated that, in his opinion, the liability depended on the agreement between the owner and the builder. The

defendant's foreman stated that the works were carried out according to the defendant's own original plan, and that the plaintiff's calculations were not used at all for them. The plaintiff's witnesses stated that there was the strongest similarity between the work as carried out and the plaintiff's reduced plan, and it was held that the plaintiff was not entitled to recover. *Taylor v. Hall*, 4 Ir. R. C. L. 467.

1. *Moon v. Witney Union*, 3 Bing. N. Cas. 814.

Proof of a custom of the building trade by which the architect is empowered to employ a surveyor to take out the quantities, may be shown. *Taylor v. Hall*, 4 Ir. R. C. L. 467.

2. See *supra*, this title, *Specifications—Implied Warranty*.

3. *Century Dict.*

"The architect is the recognized head of the building trade. He is supposed to be especially skilled in the art of planning and designing architectural structures of every description. His duty is to draw plans and make out specifications, and generally superintend the execution of the work." *Lloyd's Law of Building and Buildings*, § 7.

The Revenue Act of July 13, 1866, 14 Stat. at L. 121, contains a provision that every person whose business it is to plan, design, or superintend the construction of buildings, ships, roads, bridges, canals, or railroads, shall be regarded as an architect and civil engineer; provided, that this shall not include a practical carpenter who labors on a building.

4. In *Kutts v. Pelby*, 20 Pick. (Mass.) 65, the plaintiff, having been requested by the defendant to prepare plans for a theater, drew a sketch of the front, which was presented to the defendant and kept by him a week, who being pleased with it, directed the

plaintiff to make the plans. The defendant's master builder called at his request on the plaintiff and took the plans to make an estimate of the costs of the structure, kept them a week, made an estimate on them, and delivered it to the defendant. The defendant concluded not to build by those plans, and they were in the possession of the plaintiff and produced by him at the trial. It was held that the evidence proved a delivery of the plans to the defendant and that the plaintiff was entitled to recover compensation for his services. And see *Nelson v. Spooner*, 2 F. & F. 613; *Marcotte v. Beaupre*, 15 Minn. 152; *Shipman v. State*, 42 Wis. 377.

A committee appointed by a board of school directors to procure plans for a building, having selected one from plaintiff and directed some modifications, which he made, it was held that the directors were bound to pay for plaintiff's work, though they did not finally act on his plan. *Driscoll v. Independent School Dist.*, 61 Iowa 426.

Where an architect, under the expectation of being employed to superintend the construction of a building, voluntarily draws plans, he cannot recover for the plans, if not employed as superintendent. *Allen v. Bowman*, 7 Mo. App. 29. In this case the plaintiff, learning that the defendant was about to build a house, solicited from him the superintendence, as an architect, of the intended building, calling on the defendant and having interviews with him, at which the defendant talked of the cost of the building, etc. The defendant went to the plaintiff's office on one occasion, when the plaintiff made a sketch for such a house as the defendant described. Sketches of ground-plans and a front elevation were made out, and were offered in evidence upon the trial. These were taken by the plaintiff to the defendant's place of residence, where the plaintiff asked the defendant's wife to make suggestions, who accordingly made some, which the plaintiff noted. The plaintiff left these sketches with the defendant for a few days, after which time they remained permanently in the plaintiff's possession, never having been used by the defendant. The plaintiff afterwards, finding that the defendant had employed another superintendent, sent in a bill for sixty dollars, telling the defendant that the bill would never have

been presented but as he had employed another superintendent he was forced to send it. It was held that there could be no recovery.

An architect devoted several years to the preparation of plans for the construction of the congressional library building, but there was no contract entered into with him by any commission or officer empowered to adopt plans, employ architects, or enter upon the construction of the building, until Act April 15, 1886, ch. 50 (24 Stat. at L., p. 12), which adopted the architect's plan. It was held that the act did not constitute a contract, but only declared the legislature's intention, and might have been rescinded by either party, without liability, at any time before the architect entered upon the performance of the work. *Smithmeyer v. U. S.*, 147 U. S. 342.

A county and city within its limits proposed to erect public buildings, the portion appropriated to the use of each to be paid for by them respectively. They jointly offered a premium for plans. A furnished one, and received the promised compensation; there was no further contract between the parties. The city and county severally adopted a resolution accepting his plans, subject to such modifications as should be thereafter determined upon, if his estimate as to the cost of construction should be verified. He brought suit against them to recover five per cent. of the estimated costs of the building, and it was held that the joint resolution did not amount to a contract, and that he was not entitled to recover, and that evidence of the value of his services in making the estimates was properly excluded, inasmuch as he failed to show that they had been rendered at the instance of the defendant. *Tilley v. Cook County*, 103 U. S. 155.

An architect, it seems, cannot recover for his plans, even though they have been accepted by the employer, where he recommends him to build upon soil which he has examined, and which his knowledge of such things should have told him is unsuitable for the purpose. *Whitty v. Dillon*, 2 F. & F. 67.

And see *Moneypenny v. Hartland*, 1 C. & P. 352; 11 E. C. L. 414, where a similar ruling was made in the case of an engineer who failed to examine the ground for the foundation of the work, and, as a result, made a considerable error in his estimates.

they are to be submitted subject to approval.¹ Where public buildings are to be erected, it is usually the custom to invite architects to submit plans in competition, the one deemed best to be accepted,² in addition to which premiums are frequently offered for the two or three next in order of merit.³ Plans are often accepted conditionally, usually that the building can be

1. Where an architect agreed with the committee of visitors of a lunatic asylum to prepare the requisite probationary drawings for the approval of the committee, and all other drawings and documents required to be submitted to the commissioners of lunacy, and afterwards to the secretary of state, pursuant to the statutes, and subsequently to prepare the whole of the working drawings, estimates, and specifications for an asylum to contain two hundred patients, for an agreed sum, it was held that the term "probationary drawings" meant drawings to be approved of by the committee, and, if approved, then to be submitted to the commissioners of lunacy and secretary of state, and that, it appearing that the committee had disapproved of the drawings submitted to them, there could be no recovery. *Moffatt v. Dickson*, 13 C. B. 543; 76 E. C. L. 543.

Where an architect agrees to submit plans for the approval of a committee he must do so within a reasonable time, and after he has submitted several plans, which are rejected, the committee are justified in procuring plans elsewhere. *Moffatt v. Dickson*, 13 C. B. 543; 76 E. C. L. 543.

2. Where architects are requested to submit plans in competition, the one deemed best to be accepted and its designer made architect and superintendent, the architect whose plans are accepted as the most meritorious has a right of action for a refusal to employ him as architect and superintendent. *Walsh v. St. Louis Exposition, etc., Assoc.*, 90 Mo. 459, *affirming* 16 Mo. App. 502.

Failure of Carrier to Deliver Plans in Time for Competition.—Where a committee for the erection of a public building advertised for the submission of plans and specifications, and offered a premium to the successful competitor who should present the same on or before a given date, and an architect prepared and forwarded a set of plans and specifications by an express company, but in consequence of the latter's negligence they were not delivered until

after the specified time, it was held that the measure of damages, in an action against the express company, was not the value of the time and labor expended in making the plans and specifications, but the value of the plaintiff's chance in obtaining the premium; and that in the absence of proof of any probability that he would have obtained the premium had his plans and specifications been delivered in time, only nominal damages could be recovered. *Adams Express Co. v. Egbert*, 36 Pa. St. 360; 78 Am. Dec. 382. See also *Watson v. Ambergate*, 15 Jur. 448.

Agreements to Stifle Competition.—*Flanders v. Wood*, 83 Tex. 277, was a suit between architects for an accounting. It appeared that each had put in plans and specifications for the erection of a courthouse; that there was competition between the plans offered, and that it was unknown whose plan would be accepted. The architects agreed among themselves to abstain from further advocacy of their plans and to divide the proceeds should the plan of any one of them be accepted. It was held that the promises of the parties, being mutual and simultaneous, constituted a valuable consideration for the agreement, and that it was not against public policy, nor to prevent rivalry, etc., since, as the plans were not withdrawn and each competed, it was not calculated to stifle competition.

3. See *Walsh v. St. Louis Exposition, etc., Assoc.*, 101 Mo. 534; *Walsh v. St. Louis Exposition, etc., Assoc.*, 90 Mo. 459; *Tilley v. Cook County*, 103 U. S. 155.

Ownership of Plans Where Prize Is Offered.—In order to obtain a number of plans from which to select, prizes are frequently offered to the several deemed the most meritorious. When such is the case, a question sometimes arises as to the ownership of the successful plans. In *Tilley v. Cook County*, 103 U. S. 162, the plaintiff offered to prove a custom of architects that when prizes were offered, the successful competitor remained the owner of his own designs, and that, if they were adopted,

erected for a certain sum, in which case there can be no recovery for them unless the condition is complied with.¹ Nor, it seems, can there be any recovery where the architect submits estimates of the probable cost of the work, unless the estimate is reasonably near the actual cost;² but architects' fees cannot be

he was entitled to compensation therefor in addition to the prize, but the evidence was rejected, on the ground that in that case the building was never erected and the plans never used. But in *Walsh v. St. Louis Exposition, etc., Assoc.*, 101 Mo. 534, where an association invited architects to submit designs for a building, the seven deemed most meritorious to be accepted and awarded five hundred dollars each, except the one selected as the best of all, the designer of which was to be engaged as the architect, it was held that, upon the tender of the award of five hundred dollars to the successful competitors, the association became the owner of their plans and entitled to use them as they chose.

1. Where various plans were drawn and presented for a church building, and that of the plaintiff was accepted upon condition that the building under his plans should be built for a certain sum, and when it was ascertained that it could not be built for such sum the plans were rejected, and the evidence failed to show any promise to pay for the plans, it was held that the plaintiff was not entitled to recover for them. *Ada St. M. E. Church v. Garnsey*, 66 Ill. 132.

Where plans are accepted on condition that a bid is received from a reliable party to construct the building in accordance with the plans for the amount limited, and who is willing to enter into a sufficient bond therefor, it is not necessary to the fulfillment of the condition that the bids be actually accepted. *Hall v. Los Angeles County*, 74 Cal. 502.

An association invited architects to submit designs for a building, the cost of which was not to exceed four hundred thousand dollars. Of the designs submitted, the seven deemed most meritorious were to be accepted and awarded five hundred dollars each, except the one selected as the best of all, the designer of which was to be engaged as architect and superintendent. The directors selected seven from the designs submitted, and invited the architects to explain their plans. The

plaintiff offered his bond that his plan would not cost over four hundred thousand dollars. The directors resolved to select the favorite plan by ballot, with the understanding that the plan should be so modified or changed as to suit the wishes of the board, the cost not to exceed four hundred thousand dollars. The vote resulted in the selection of the plaintiff's plans. The plaintiff was selected as architect, to become so in fact when his amended plans, and the contract and bond under which the building was to be erected, were approved by the board. The alterations desired added to the cost of the building, and the plaintiff demanded that the limit be fixed at four hundred and twenty-five thousand dollars. After much negotiation, he notified the board that, unless this concession could be made, he declined entering into the proposed contract. The board then employed another architect, who made new plans. It was held that the selection of the plaintiff's designs was conditional only, and did not entitle him to be employed as architect of the building, and that there was evidence that he had waived the right to have a selection made in accordance with the terms on which the competition was invited. *Walsh v. St. Louis Exposition, etc., Assoc.*, 101 Mo. 534.

2. *Money Penny v. Hartland*, 1 C. & P. 352; 11 E. C. L. 414.

In an action by an architect whose plans, after having been accepted, are rejected on the ground that the work cannot be done for the amount of his estimates, it is for the jury to say whether the estimates are reasonably near the actual cost. *Nelson v. Spooner*, 2 F. & F. 613. In this case an architect made plans for a schoolhouse for a board of trustees who had only one thousand three hundred and fifty pounds in their hands to pay for it. After making the plans the architect estimated the cost at one thousand five hundred and forty-five pounds, and repeatedly assured the trustees that his buildings "never exceeded the contracts" unless changes were authorized by the owners themselves. He afterwards suggested

regarded as part of the estimate.¹ A contract with an architect may be rescinded if procured through fraudulent representations.²

3. The Contract a Personal One.—The contract with an architect is one strictly personal in its nature; it rests upon the confidence of the employer, in the ability and skill of the architect in his profession, and hence, the performance cannot be delegated to another without express authority, or undertaken by his assignee in bankruptcy.³ The contract is terminated by the death of the architect, and the right to execute it does not survive to his executor, nor can he be compelled by the other party to perform it.⁴

some changes which he said he thought could be included in the estimated price. Upon submitting the plans to builders for bids, the lowest bid received was for two thousand and fifty-six pounds. The trustees then refused to do anything further about the matter and returned the drawings to the architect, who sued them for his pay. Upon the question being submitted to the jury, they disagreed as to whether the estimate was reasonably near the bids.

In *Smith v. Dickey*, 74 Tex. 61, which was an action by an architect for preparing plans and estimates for a hotel building, the defendant testified that the plans were to be for a building to cost not more than seventy-five thousand dollars, while the architect testified that it was to cost "about one hundred thousand dollars." The estimates amounted to a little more than one hundred and two thousand dollars, which, if the architect's fees were added, would have been increased to one hundred and seven thousand five hundred and eighty-nine dollars. The court charged the jury that if the defendant stipulated that the plans should be made for a hotel that would not cost more than seventy-five thousand dollars, the plaintiff could not recover, but that if the building was to cost "about one hundred thousand dollars," estimates of a building to cost one hundred and two thousand dollars, exclusive of the architect's fees, or even with the fees included, was a sufficient compliance with the contract, which charge was held correct.

1. *Smith v. Dickey*, 74 Tex. 61.

2. A board of county supervisors who have adopted the plans of an architect for the erection of a county jail, are justified in rescinding the contract, if they have been induced to exe-

cute it through the fraudulent representation of the architect; but cannot rescind it on the ground that the architect has slandered certain members of the board. *Hall v. Los Angeles County*, 74 Cal. 502.

3. *Lloyd's Law of Building and Buildings* (2d ed.), § 12; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Stubbs v. Holywell R. Co.*, 36 L. J. Exch. 166; *AGENCY*, vol. 1, p. 360.

An architect to whom is given the sole power of arbitration of all matters concerning the materials and character of the work, cannot delegate this power to his partner without the consent of the parties. *Wright v. Meyer* (Tex. Civ. App. 1894), 25 S. W. Rep. 1122.

4. *Stubbs v. Holywell R. Co.*, L. R., 2 Exch. 311; *Boast v. Firth*, L. R., 4 C. P. 1; 38 L. J. C. P. 1; *Lloyd's Law of Building and Buildings* (2d ed.), § 9.

Where the performance is personal, the executors are not liable. *Taylor v. Caldwell*, 3 B. & S. 826; 113 E. C. L. 826.

Where the contract is dependent upon the personal skill of the artist, it is, though no condition is expressed in words, based on the presumption of sufficient health, and is subject to an implied condition that if the artist is, without any fault of his own, disabled by illness, to perform, he will be excused. *Robinson v. Davison*, L. R., 6 Exch. 269; 40 L. J. Exch. 178.

In *Hall v. Wright*, El. Bl. & El. 746; 96 E. C. L. 746, *Crompton, J.*, said: "Where a contract depends upon personal skill, and an act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture, who is struck blind, it may be that the performance can be excused."

But although a contract involving personal confidence is put an end to by

4. Degree of Skill and Care Required.—An architect is presumed to possess the requisite ability and skill for the practice of his profession,¹ and will be liable in damages for a failure to furnish good and sufficient plans and specifications.² When required by contract to supervise the construction of a building, he will be held to the exercise of reasonable care and diligence in seeing that the work is properly performed;³ and he will be held to

the death of the party confided in, it is not thereby rescinded so as to take away the right of action already vested; as where S. was employed as consulting engineer for fifteen months to complete certain works, to be paid five hundred pounds for his services in equal quarterly installments, and before the work was finished, and whilst two quarterly installments, which were due him, were still unpaid, he died, it was held that his personal representative was entitled to recover them. *Stubbs v. Holywell R. Co.*, L. R., 2 Exch. 311.

1. In *Harmer v. Cornelius*, 5 C. B. N. S. 246, Willes, J., said: "The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill."

Expert Evidence—Qualification of Architect.—An architect who testifies that he has had experience in the erection of a large number of buildings, and has been in the habit of observing the length of time required to procure materials and do the work, will be deemed competent to answer the question whether or not it would have been safe to run up the brick walls of a building in six weeks, and where he swears that he has had practical personal experience in removing the débris of buildings destroyed by fire, has himself had débris removed, and has seen it removed by others, he is shown competent to testify how long, in his opinion, it should have taken to remove débris to permit rebuilding to commence. *Chamberlain v. Dunlop* (Supreme Ct.), 8 N. Y. Supp. 125.

2. See *Erskine v. Johnson*, 23 Neb. 265.

An architect may be held to reasonable skill as such, both in planning the building and superintending its construction; and may be liable for defects in his plans or superintendence resulting from his lack of reasonable skill and diligence, notwithstanding the adoption of his plans or a ratification of his superintendence by the accept-

ance of the building without objection, if the defects are patent to an expert, but latent to a non-expert. *Shipman v. State*, 43 Wis. 381. And see *Money-penny v. Hartland*, 1 C. & P. 352; 2 C. & P. 378.

Where, in the building of apartment houses to be heated by steam, it appeared that the sectional area of the boiler flues for the steam heating apparatus was largely in excess of the sectional area of the chimney flues designed to receive the smoke and gases from the boiler fires, thus preventing proper combustion in the furnace, and entailing on defendant the cost of building new chimney flues, it was held that the architects were bound to know how to proportion the chimney flues to the boilers, and could not excuse themselves by proof that they conferred with the contractor for the steam heating apparatus and obtained from him the dimensions of the chimney flues. *Hubert v. Aitken*, 15 Daly (N. Y.) 237.

Where an action is brought against an architect, to recover damages alleged to have resulted from a defect in the plans and specifications furnished by him, the plaintiff must prove a substantial compliance with the plans and specifications, and when a variance appears, involving the integrity of the mode of construction of the affected part, and so far material that it would have been the direct cause of the injury complained of, the architect is not liable, and a submission to the jury of the question as to whether or not the variance did or did not cause the injury, is error. *Lake v. McElfatrick*, 139 N. Y. 349, *reversing* (Supreme Ct.) 19 N. Y. Supp. 494.

3. It is the duty of the architect to exercise proper vigilance and skill in the supervision of the work; to see that it is done in the manner contemplated by the specifications, and in a good, workmanlike and substantial manner. *Gilman v. Stevens*, 54 How. Pr. (N. Y. Super. Ct.) 197.

An architect in the supervision of the work is bound to exercise only reasonable care, and to use reasonable means of observation and detection, and where he appears to have done this, the mere fact that inferior material has been used by the contractor in some instances, and that the plumbing has been carelessly done, does not establish, as a matter of law, that he has not fully performed his contract. *Hubert v. Aitken*, 15 Daly (N. Y.) 237. *Larremore, C. J.*, in delivering the opinion of the court in this case, said: "The learned counsel would not claim that an architect is bound to spend all his time at a building which is going up under his professional care, so that no fraud or negligence can be committed by any of the contractors. The counsel would not contend that the architect is an insurer of the perfection of the mason work, the carpenter work, the plumbing, etc. He is bound only to exercise reasonable care, and to use reasonable powers of observation and detection in the supervision of the structure. When, therefore, it appears that the architect has made frequent visits to the building, and, in a general way, has performed the duties called for by the custom of his profession, the mere fact, for instance, that inferior brick have been used in places, does not establish, as matter of law, that he has not entirely performed his contract. He might have directed at one of his visits that portions of the plumbing work be packed in wool; upon his next return to the building the pipes in question might have been covered with brick work in the progress of the building; if he had inquired whether the wool-packing had been attended to and had received an affirmative answer from the plumber and the bricklayer, I am of opinion that his duty as an architect, in the matter of the required protection of said pipes from the weather, would have been ended. Yet, under these very circumstances, the packing might have been intentionally or carelessly omitted in fraud upon both architect and owner, and could it still be claimed that the architect had not fully performed his work? The learned counsel for appellant is, in effect, asking us to hold that the defects of the character above named establish, as matter of law, that plaintiffs have not completely performed their agreement. An architect is no more a mere overseer, or foreman, or watchman, than he is a

guarantor of a flawless building; and the only question that can arise in a case where general performance of duty is shown, is whether, considering all the circumstances and peculiar facts involved, he has or has not been guilty of negligence. This is a question of fact and not of law."

In *Petersen v. Rawson*, 34 N. Y. 370, the plaintiff agreed to furnish the plans, etc., and superintend the construction of the building. The contract with the mason provided that he should "lay out his work himself." The sills of the front first story windows were set two and three-quarters inches higher from the floor than those of the rear windows on the same story, although they were intended to be at the same level. The balcony in front of the house, possibly in consequence of the mistake in the sills, was set too high, and the first step to the front door was set too low. When the finish was put in, the trim of the front first story windows cut into the plaster cornice, injuring the appearance of the room. The plaintiff refused to give the mason his final certificate, amounting to one thousand nine hundred dollars, on account of these mistakes, but the owner paid the mason in full without a certificate, and refused, on account of these mistakes, to pay the balance to the architect who brought suit for it. The referee found by the witnesses that the architect was "diligent in his attendance upon the building." Several architects testified, their evidence being conflicting, as to when the error should probably have been discovered. It was held that the architect was not liable.

In *Newman v. Fowler*, 37 N. J. L. 89, it was held that where a house was badly built in consequence of the joint neglect of the contractor performing the work and the architect employed to supervise the construction, a suit founded on such neglect would lie against the architect alone, nor would the fact that the owner of the house refused the contractor part of the money due him, on the ground that the house was badly built, bar such suit.

In *Schreiner v. Miller*, 67 Iowa 91; 56 Am. Rep. 339, it was held that an architect employed to furnish the plans for the building and superintend its construction, is liable for damages if, through his lack of skill or care, the foundations are so defective as to cause the walls to fall.

Where the contract of employment

the same degree of care and diligence in regard to issuing certificates as to the work done.¹

The negligence or want of skill of the architect is a question of fact and not of law,² and the burden of proof is upon the party seeking to establish it.³

5. Architect as Agent of Employer.—The employer, by empowering an architect to superintend the construction of a building, constitutes him his agent for all purposes necessary to secure the erection and safety of the building.⁴ Where found necessary,

was oral, and the nature and extent of the architect's duties as superintendent were in controversy, an instruction which virtually left the whole matter as to what it was "proper" for the architect to do, to the judgment and caprice of the jury, unrestrained by the evidence in the case, was, under the peculiar circumstances of the case, held erroneous. *Vigeant v. Scully*, 20 Ill. App. 437.

In *Lottman v. Barnett*, 62 Mo. 159, an architect, having the general charge and superintendence of the construction of a building, was held responsible for the killing of a workman, caused by the falling of a wall which resulted from the giving way of supports on which it rested under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person employed by the owner of the building, while the architect was absent, where it appeared that the manager of the jackscrew was employed on the advice of the architect, and subject to his direction, and that he knew and approved of the method adopted for effecting the raising. It was said that whether the wall fell because the plan for raising it was a bad one, or because the supports were inadequate, in either case the disaster was attributable to positive misfeasance for negligence in the work which the architect undertook, but in which he failed to exhibit the care and skill which the law imposed upon him; that for such negligence he was responsible, not merely to his employer, but to those injured in consequence, and that the question whether and in what respect he was guilty of negligence was one for the jury under proper instructions.

1. Error in Certificate of Work.—Where, by his contract, an architect is required to give certificates from time to time for a certain per cent. of the

value of the work done by the contractor, it has been held in *Canada* that he will be liable to the owner for any loss resulting from his negligence in certifying for too much work. *Irving v. Morrison*, 27 U. C. C. P. 242. But in *Vigeant v. Scully*, 20 Ill. App. 437, it was held that an instruction was erroneous in announcing that the duty was imposed upon the architect to make a special inspection of the work before issuing any certificate sufficient to satisfy himself that the particular work for which the certificate was asked was done properly and in accordance with the plans and specifications; that no such duty was imposed by the terms of the contracts.

Where the superintendent is required to make monthly estimates of the work done, he cannot be required to furnish "correct and accurate estimates," monthly "estimates" being in their nature mere approximations. *Shipman v. State*, 43 Wis. 381.

2. *Hubert v. Aitken*, 15 Daly (N.Y.) 237.

3. The burden of proof is upon the party seeking to show that the architect failed to exercise ordinary care and diligence. *Gilman v. Stevens*, 54 How. Pr. (N. Y. Super. Ct.) 207.

4. A private agent, acting within the scope of his general authority, may bind his principal. *Baltimore v. Eschbach*, 18 Md. 276.

An architect has authority to proceed in the usual way, and where an architect employed to draw plans and specifications for a proposed building, employs a surveyor to make out the quantities, which work is to be paid for by the successful competitor for the building contract, the owners, having refused to allow the building to proceed, will be held liable to pay the surveyor for making out the quantities. *Moon v. Witney Union*, 3 Bing. N. Cas. 814.

therefore, in order to render the building secure, he may bind the employer for extra work and materials, or even vary from the strict letter of the original contract;¹ but otherwise he cannot, unless constituted the employer's agent generally for all purposes connected with the building² or specially authorized, make

Notice of Assignment of Building Contract.—An architect whose authority is specially conferred in a written contract for a building, is not authorized to receive notice of an assignment of the building contract so as to bind the owner of the building by such notice, unless such authority is expressly conferred. *Renton v. Monnier*, 77 Cal. 449.

No Authority to Supervise Employment of Men.—An architect employed to "superintend the construction of" a building, and "to see that the same is built in strict conformity to the specifications and plans," has no authority to supervise the letting of subcontracts and the employment of men. *Lewis v. Slack*, 27 Mo. App. 131.

1. Where an architect, appointed by the board of county commissioners to supervise the construction of a courthouse, ordered the substitution of eight-inch iron pillars in place of six-inch pillars as called for by the contract, which caused an increase in the expense, and the commissioners accepted the building, it was held that the county was liable for such extra work, although there was no agreement as to the price, and the contract was not in writing and attached to the original contract with the contractor, as provided for in such original contract. *Gibson County v. Motherwell Iron, etc., Co.*, 123 Ind. 364.

An architect employed only to supervise and direct the work done by a contractor, has no authority to employ another to do work on the building which the contractor has undertaken to do; thus, where the architect, upon finding that the brick piers were giving way owing to bad workmanship, ordered a subcontractor who was furnishing stone for the building, to put in stone piers in place of the brick ones, without knowing that he was a subcontractor, and supposing that the order was really given through him to the principal contractor, it was held that the architect had no authority to engage another to do the work of the principal contractor, and the fact that the owner saw the stone piers being built but made

no objection, did not amount to an acceptance of the benefit of his labor, as he had a right to suppose that it was being done by the principal contractor. *Campbell v. Day*, 90 Ill. 363.

The mere employment of an architect to prepare plans and specifications for a house, and to procure a builder to complete it, does not make him the agent of the employer to the extent of rendering the employer responsible for the accuracy of the bill of quantities furnished by the architect to the builder, and the builder having expended much more time and materials than contemplated, cannot recover from the owner more than the contract price. *Scrivener v. Pask*, 18 C. B. N. S. 785; 114 E. C. L. 785.

2. The employer may constitute the architect his agent generally for all purposes connected with the building, and that without any limitation as to the price. *Kimberley v. Dick*, L. R., 13 Eq. 1.

But where a person who has employed an architect to make plans and specifications for a house, and do such other acts as architects usually do as such, and has engaged a contractor to do all the work and furnish all the materials, and has placed the money which has become due to the contractor in the hands of the architect, to be paid on the contractor's order, these facts do not warrant a jury in finding that the architect was made the general agent of the employer, and authorized to bind him by new contracts for purchases with other persons. *Dodge v. McDonnell*, 14 Wis. 533.

It has been held in *Indiana* that where the board of county commissioners has power to appoint a superintendent to act for them in the supervision of work, he becomes the agent of the county for the purpose of constructing the work, and may bind the county for work done beyond that contemplated by the written contract. *Clinton County v. Hill*, 122 Ind. 215; *Gibson County v. Motherwell Iron, etc., Co.*, 123 Ind. 364; *Harris County v. Byrne*, 67 Ind. 21.

In *Benton County v. Patrick*, 54

alterations in the plans and specifications, or change the original contract.¹ But where the architect is authorized to order extras, and the employer specifies the manner in which it is to be done,

Miss. 240, where a contract had been duly made for the erection of a courthouse, and a commissioner regularly appointed by the board of supervisors to superintend the work and see that it was done according to the contract and specifications, it was held that the county would not, under *Mississippi Code 1871, §§ 1389, 1394*, be bound for the alterations or extra work made or authorized by such commissioner, although the board accepted the building so completed upon the report of the commissioner stating that he had authorized the extra work, and recommending payment for it, but at the same time refused to receive that part of the commissioner's report relating to such extra work, and denied their liability therefor.

1. *Woodruff v. Rochester, etc., R. Co.*, 108 N. Y. 39; *Rex v. Peto*, 1 Y. & J. 37; *Cooper v. Langdon*, 9 M. & W. 60; *Jones v. Reg.*, 7 Can. Supreme Ct. 570; *Reg. v. Starrs*, 17 Can. Supreme Ct. 118.

He has no right to excuse the contractor from any of the provisions of the contract.

In *Adlard v. Muldoon*, 45 Ill. 193, certain newel posts, brackets and cornices were not finished according to the specifications, and gas pipes were not put in some of the bedrooms, as required by the contract. The architect claimed that he had deducted these omissions, or set them off against extra work done. It was held, in an action by the contractor for the balance claimed to be due upon the contract, that the architect could not, unless specially authorized, change the terms of the contract, and that there could be no recovery until the specifications were complied with. And see *Bonesteel v. New York*, 22 N. Y. 162; *Burke v. Kansas City*, 34 Mo. App. 570; *Bond v. Newark*, 19 N. J. Eq. 376.

The acceptance, by the architect, of a different class of work from that called for by the contract, or of inferior materials, does not bind the owner nor relieve the contractor from the agreement to perform according to plans and specifications. *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449.

In *Bond v. Newark*, 19 N. J. Eq.

376, the court said: "An architect to whom, by the contract, everything was to be referred, could not hold that a brick house was a compliance with a contract to build one of marble; or that steps of blue flag were brown stone steps; or that a wall twelve inches thick complied with a contract to make one of sixteen inches. He could determine whether the marble front, the brown stone steps, or the sixteen-inch wall were put up in a workmanlike manner, but could dispense with no substantial matter expressly required by the contract. Such approval would not entitle the contractor to recover at law."

A letter from an architect to a subcontractor employed in constructing a building, complaining that he is not doing his work according to contract, or following the instructions of a designated superintendent, does not authorize such subcontractor to follow the instructions of the superintendent in respect to matters expressly fixed by the specifications. *Fitzgerald v. Moran*, 141 N. Y. 419.

A superintending architect has no power, merely by virtue of his position, and without authority from his employer, to authorize one who has a contract for the plastering, to have the mortar carried to the premises instead of having it made there, or to so vary the contract as to make the employer liable to pay a higher price for the mortar than that contemplated in the contract. *McIntosh v. Hastings*, 156 Mass. 344.

He has no authority to substitute a subcontractor for the principal contractor, either in the performance of the work or the payment therefor. *Bouton v. McDonough County*, 84 Ill. 384; *Campbell v. Day*, 90 Ill. 363.

In *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202, a contract was entered into for the erection of a cemetery gateway according to a certain specified plan, it being agreed in the contract that should any alteration be contemplated from the design it could be done, provided the parties agreed upon the price beforehand and indorsed it upon the contract, and that unless such agreement was entered into it was to be taken

the terms of his power should be strictly complied with, and unless the extras are ordered in the manner specified, the employer will not be bound.¹

An architect falsely representing himself as having authority to bind his employer for work and materials, may be held personally liable therefor.²

6. Must Act with Good Faith.—The position of an architect is one of trust and confidence, and he should act with the greatest good faith towards both his employer and the contractor.³ It is exceed-

to be an agreement to make the alteration without making any change in the price of the original contract. Two windows not contemplated in the original contract were afterwards placed in the gateway by direction of the architect; the agreement and price therefor not being indorsed upon the contract, and there being no evidence of a promise by the owners to pay for the same, it was held that the architect had no authority to order the alterations and bind the owners by promising in their name to pay for them.

The architect of a church was authorized by the contract "to order works omitted or overlooked in the specification, and to provide for contingencies which might arise during the execution of the work," and the contractor was bound by the contract to obey the architect's orders. The architect, without consulting the officials of the town, at whose expense the church was to be built, practically substituted a new plan for that which had been officially approved of, increasing all the dimensions of the building after the contract was made, thereby adding twelve thousand six hundred and seventy-five francs to the cost, and ordering changes in details of construction and decoration to the value of five thousand francs. Upon the town refusing to pay the bills for these extras, it was held that if the enlargement of the building did not better adapt it to the requirements of public worship so that the commune received some benefit from the change, the architect must pay the cost himself. In regard to the extra charge of five thousand francs, the court found that a part of it was for "changes in details fully justified by the necessities of good workmanship," but that two thousand francs "had been incurred through the exaggerated importance attached by the architect to the interior decoration, and the details of the tower, the entrance door, and the windows." On the

cost occasioned by the increased size of the edifice it was found by experts that the commune should bear a part, as being to a small extent benefited by the change, and the architect was condemned to pay a total of ten thousand five hundred francs. *Commune de Colombier-Saugniere v. Duchez et Savoye*, Dalloz, 1883, 392.

1. A provision in the contract that before any extra work shall be done, the contractor and superintendent shall agree thereto, and stipulate the price to be paid therefor, in writing, cannot be waived by the superintendent of the building, and there can be no recovery for extra work in such case, unless such written agreement is entered into. *Ahern v. Boyce*, 19 Mo. App. 552. And see, to the same effect, *Woodruff v. Rochester, etc., R. Co.*, 108 N. Y. 39. See *infra*, this title, *Extra Work*.

2. In *Randell v. Trimen*, 18 C. B. 786, the defendant, an architect employed by A and others to superintend the building of a church, falsely represented that he was authorized to order, and did order, stone of the plaintiffs for the building of the church, on account of and to be charged to A. The plaintiffs, relying on these representations and believing that the defendant had authority to order the stone, delivered the same, and it was used in the building of the church. The architect, in point of fact, had no authority to order materials for the building. Upon A's refusing to pay for the stone, the plaintiffs, trusting to the architect's representation, sued him for the price, and failed in the action, and had to pay A's costs and also the cost incurred by their attorneys; and it was held, in an action by them against the architect, that the plaintiffs were entitled not only to recover the value of the stone, but also the costs they had incurred and paid in a former action.

3. It is the duty of an architect superintending the erection of a building,

ingly improper, therefore, that he should have a pecuniary interest in the performance of the contract,¹ and the fact that an architect has accepted commissions from the contractor has been held good ground for his dismissal.²

7. Compensation.—The compensation of the architect should be stipulated for in the contract, and is usually a fixed commission or percentage on the cost of the structure.³ Where nothing

to act, in all things relating to his principal, solely for the latter's interest, and with fidelity to his employer and his trust. The law does not recognize or tolerate conduct on the part of the architect, which is hostile to his principal and in the interest of an adverse party with whom he is dealing for his principal. *Lewis v. Slack*, 27 Mo. App. 119.

Where the architect is empowered by the building contract to take possession of the building if the contractor fails to comply with the conditions of the contract, such power does not depend upon the architect's mere arbitrary discretion. *White v. Harrigan*, 41 Minn. 414.

The duties of a building superintendent are in their nature such that it would be improper that he should be appointed or controlled by the contractor; and the two positions being inconsistent, a contract will not be implied for the employment of the contractor as superintendent of his own work. *Friedland v. McNeil*, 33 Mich. 40.

1. An architect is entitled to no other profit from his transactions in his employer's behalf than the agreed compensation or reasonable fees. *Lloyd's Law of Building and Buildings* (2d ed.), § 11.

Where an architect has guaranteed his employer that the total cost of the work shall not exceed a certain sum, of which agreement the builder has no knowledge, he is an improper arbitrator, and the builder is not bound by a submission to his arbitration. *Kimberley v. Dick*, L. R., 13 Eq. 1; 41 L. J. Ch. 38; 25 L. T. N. S. 476; 20 W. R. 49. And the same ruling has been followed where the architect merely assured the owner that the building would not cost over a certain sum. *Kemp v. Rose*, 1 Giff. 258. But where the defendants employ an architect to superintend the construction of a building of which he is one of the contractors, they cannot plead that it is against public policy that he should occupy two positions, of

which the interests are in conflict, in defense of an action brought by him for services as superintendent. *Shaw v. Andrews*, 9 Cal. 73.

2. An architect cannot at one and the same time be employed by the proprietor and builder, and receive pay from them both; and the fact that an architect has covenanted with the builder to receive payment from him is sufficient to discharge the proprietor. *Tahrland v. Rodier*, 16 L. C. i. Rep. 473. And see *Norris v. Day*, 4 Y. & C. Ex. Eq. 475; 10 L. J. N. S. 43.

The supreme court of *Missouri* held that an agreement by a lumber dealer to pay the superintendent of a building, whose duty it was to pass upon accounts for materials furnished, but not to make purchases, a commission on all sales of lumber made to his employers through his influence, was against public policy and void. *Atlee v. Fink*, 75 Mo. 100; 42 Am. Rep. 385. But the same court held that words written of a supervising architect, charging him with having given work upon the building to certain parties who paid him a commission therefor, are not actionable *per se*. *Legg v. Dunleavy*, 80 Mo. 558; 50 Am. Rep. 512.

It has been held that advances or loans made to the architect by the builder can be proved by the owner as bearing upon the question of negligence alleged in the answer, fraud not being claimed. *Gilman v. Stevens*, 54 How. Pr. (N. Y. Super. Ct.) 197.

3. It is often provided that the architect shall receive a fixed commission or percentage on the whole contract price of the work. See *Irving v. Morrison*, 27 U. C. C. P. 242; *Shipman v. State*, 43 Wis. 381; *Raeder v. Bensberg*, 6 Mo. App. 445.

Where a party agrees to pay for certain plans and specifications for buildings, a percentage on their "estimated cost," and there is nothing in the contract to determine the matter, the "estimated cost" will be taken to mean the reasonable cost of buildings erected

is said upon the subject, he will be allowed a reasonable compensation.¹ It may be stated as a general principle that the obliga-

in accordance with the plans and specifications. *Lambert v. Sanford*, 55 Conn. 437.

Where there is a contract for the plans and superintendence of a building, at a percentage on the cost, and the architect is prevented by the owner from superintending, he may treat the contract as rescinded and sue for the value of the plans furnished. *Marcotte v. Beaupre*, 15 Minn. 152.

Suit for Compensation.—The plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge. It was held that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-plaintiff in the action, and give him the conduct of the action. *Emden v. Carte*, 17 Ch. Div. 768; 51 L. J. Ch. 41; 44 L. T. 636, *affirming* 17 Ch. Div. 169; 50 L. J. Ch. 492; 44 L. T. 344; 29 W. R. 600.

An architect, under a contract to plan and superintend the building of seven houses, having completed three and been paid for them, and having agreed to wait a reasonable time for the erection of the other four, for which he had made his plans and specifications, may, in a suit for the payment of his services on such four, declare the original contract, the other being merely an extension of time of payment. *Maack v. Schneider*, 51 Mo. App. 92.

Promise to Pay—Consideration.—Where the architect engaged in the erection of a brewery declines to proceed with his undertaking upon discovering that the contract for the refrigerating plant has been awarded to a business rival of the refrigerating company of which he is president, takes away his plans, and calls off his superintendent in charge of the building, a promise by the president of the brewery company, who was in great haste to have the building completed, to pay him a commission of five per cent. upon the cost of the refrigerating plant as an inducement to resume work, is void for want of consideration. *Lingenfelder*

v. Wainwright Brewery Co., 103 Mo. 578.

1. *Dull v. Bramhall*, 49 Ill. 364.

He will be allowed a reasonable compensation for his services, taking into consideration their professional character and the attendant circumstances. *Lloyd's Law of Building and Buildings* (2d ed.), § 8.

In *Knight v. Norris*, 13 Minn. 473, a charge of five per cent. on the estimated cost was held customary and reasonable. And to the same effect see *Mulligan v. Mulligan*, 18 La. Ann. 20.

An architect who has performed part of his contract according to its terms, and is prevented from completing it by the failure of the other party, is entitled to compensation for the work performed. *Chicago v. Tilley*, 103 U. S. 146.

In *Gilman v. Stevens*, 54 How. Pr. (N. Y. Super. Ct.) 197, the schedule charges of the American Institute of Architects, namely, two and one-half per cent. upon the contemplated cost of the building, was recognized as showing the customary legitimate rate of compensation for an architect's services.

In *Smithmeyer v. U. S.*, 147 U. S. 342, it was held that the acts of the parties in accepting salaries, one of eight thousand dollars per year as architect, and the other of three thousand dollars per year as principal draughtsman, indicated that the services of the plaintiffs should be estimated according to the rule of *quantum meruit*, and not according to the schedule of charges of the American Institute of Architects.

Usage Among Architects.—A usage among architects, especially if unknown to customers, will not entitle them to be paid for preliminary sketches and estimates on the basis of a percentage on their own estimates. Such services, unless volunteered, should be paid for, if at all, according to the time spent upon them, or according to such understanding as was had or was fairly implied from the circumstances. *Scott v. Maier*, 56 Mich. 554.

Change of Contract—Quantum Meruit.—Where an architect enters into a contract to furnish the plans and superintend the erection of a house for an agreed price, and the contract is afterwards changed so as to provide for

tion of paying for the plans rests upon the party ordering them.¹

8. Lien of Architect.—The question often arises whether an architect is entitled to a lien upon the building for his services, similar to that allowed mechanics and material men. The decisions upon this point are not uniform, depending in many instances upon the wording of the local statutes.² The *Pennsylvania* decisions allow him a lien where he furnishes plans and specifications, and superintends the erection of the building,³ but decline to allow it where such supervision is not given, but only plans and specifications provided;⁴ and in all the instances in which the lien has been allowed, the architect also acted as superintendent.⁵ In *Kentucky*,

plans for a more expensive house, with no price agreed on for the plans, the architect, in an action upon the *quantum meruit* for his services, may prove the value of such plans and additional services rendered by him not included therein. *Marcotte v. Beaupre*, 15 Minn. 152.

1. The obligation of paying for the drawings of an architect usually rests on the employer, and not on the mechanics or contractors employed in executing them. *Webb v. School*, 3 Phila. (Pa.) 125.

2. See *MECHANICS' LIENS*, vol. 15, p. 44.

3. In *Pennsylvania Bank v. Gries*, 35 Pa. St. 423, it is said that it seems that a mere architect, who only furnishes the plans and drawings, and performs no services in the construction of the building, is not entitled to a lien. Thompson, J., in delivering the opinion of the court, said: "The contract in this case denominates the plaintiff an architect. That he was at the same time a mechanic, is evident from the requirement not only to draw plans of the work to be done, but the duty of explaining and directing its proper execution. This is work often done by the master mechanic, and is as essential to the due construction of a building as is the purely mechanical part; for, without it, shape, symmetry, and proportion would be wanting—elements, not of beauty alone, but of strength and convenience, in every superstructure. To preserve these elements, some architectural skill is required, but is generally exercised, in ordinary buildings, by a mere mechanic by occupation. This would certainly not impair his right to a lien as such mechanic. A mere naked architect, and who may be such without being an operative mechanic, who

draws plans in anticipation of buildings usually, to enable the builder to determine the kind he will erect, could hardly be supposed to be within the act which provides a lien for work 'done for or about the erection or construction of the building.' But very distinguishable from this, is the case of a party employed to devote his entire time to a building, and who draws plans for every part of the work, and directs its execution according to such plans and specifications. This is labor—mechanical labor of a high order—contributing its proportionate value to the beauty, strength and convenience of the edifice."

4. An architect who simply provides the plans and specifications for a building is not entitled to a lien against the building for his labor. *Price v. Kirk*, 90 Pa. St. 47. And see *Rush v. Able*, 90 Pa. St. 153.

See *Pennsylvania, etc., R. Co. v. Leuffer*, 84 Pa. St. 168; 24 Am. Rep. 189, as to the right of a civil engineer to a lien upon a railroad for services rendered in its construction.

Claim Must Be Set Forth Distinctly.—In *Rush v. Able*, 90 Pa. St. 153, it was held that where an architect claims to have a lien for charges and fees, he must show work done for which the statute gives a lien, and such work is not shown by the name of his calling. Especially should the kind of work be set forth distinctly when it is claimed as extra work by the contractor, and a mere claim for "architect's charges and fees" is insufficient.

5. *Pennsylvania Bank v. Gries*, 35 Pa. St. 423; *Mutual Ben. L. Ins. Co. v. Rowand*, 26 N. J. Eq. 389; *Hubert v. Aitken*, 15 Daly (N. Y.) 237; *Stryker v. Cassidy*, 76 N. Y. 50; 32 Am. Rep. 262; *Knight v. Norris*, 13 Minn. 473;

Mulligan v. Mulligan, 18 La. Ann. 20; Arnoldi v. Gonrin, 22 Grant's Ch. (Ont.) 314.

Under a statute providing that "whoever performs labor or furnishes materials or machinery for erecting, constructing, altering, or repairing any house . . . or other building, . . . by virtue of a contract or agreement with the owner or agent thereof, shall have a lien to secure the payment of the same," it was held that an architect had a lien for furnishing plans and specifications for, and superintending the construction of, a building. The court said: "We are of opinion that services of the kind for which the plaintiff seeks the lien are embraced in the meaning of the statute. In rendering such services a party certainly 'performs labor' and furnishes labor and skill. The labor is performed and the labor and skill furnished 'for erecting' and 'constructing' a building. . . . The labor and skill of an architect and superintendent of the work upon a building are a part of the expense of erecting a building, and not unfrequently an indispensable and highly valuable part. As an item of such expense they enter into and help to form the value of the building, and we can conceive of no sound reason in the nature of things why the person who performs such labor and furnishes such skill should not receive the same protection as the carpenter, the mason, the lumber dealer, or the hardware merchant." Knight v. Norris, 13 Minn. 473. In this case it was also held that where an architect is to receive what his services are reasonably worth, and, before his contract is wholly performed, work on the building is without his fault suspended, he may file his account and claim a lien for his services up to that time, without waiting for the work to be resumed or completed.

In Hubert v. Aitken, 15 Daly (N. Y.) 237, the right to the lien was not questioned. And in Stryker v. Cassidy, 76 N. Y. 50; 32 Am. Rep. 262, Andrews, J., said: "The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of the most important character. It is not any the less labor, within the general meaning of the word, that it is done by a person who is fitted by a special training and skill for its performance."

Ericsson v. Brown, 38 Barb. (N. Y.) 390, may at first glance seem to be in

conflict with the *New York* cases cited above, but is easily distinguishable from them. It was there held that a consulting engineer, who rendered services as such, was not within the language or reason of a clause of a steamship company's charter, providing that the stockholders should be individually liable for debts due and owing to their "laborers and operatives" for services performed for the corporation. See Gurney v. Atlantic, etc., R. Co., 58 N. Y. 358, where this case is distinguished; and see also Stryker v. Cassidy, 76 N. Y. 50; 32 Am. Rep. 262.

In Taylor v. Gilsdorff, 74 Ill. 359, the claim was not for services as mere architects, but as architects and superintendents. The jury found in favor of the claimant, and the court, without saying how it might be with the mere architect, who simply draws a plan for the building, declined to disturb the verdict.

Under the *Louisiana* statute providing that "every mechanic, workman, or other person, doing or performing any work towards the erection, construction, or finishing of any building in the state, erected under a contract between the owner and builder, or other person, whether such work shall be performed as journeymen, laborer, cartman, subcontractor, or otherwise," should be entitled to a lien upon the building to secure the payment therefor, it was held that a supervising architect had a lien for his fees. Mulligan v. Mulligan, 18 La. Ann. 20.

In *Canada*, under the Mechanics' Lien Act of 1874, it is also held that an architect is entitled to a lien for moneys due him for making plans and specifications for, and superintending the erection of, buildings for the owner. Arnoldi v. Gouin, 22 Grant's Ch. (Ont.) 314; Proudfoot, V. C., in delivering the opinion of the court in this case, said: "The duties of an architect in preparing elevations, working plans, specifications, superintending the construction of the building according to the plans, and seeing that proper material is used, etc., are essential things to be done in the construction of the work, and the architect seems to me, if not comprehended under the designation of 'builder,' to come under that of 'other person.' There is nothing to show that the person to be protected must have actually carried the stone or brick, or hewn the wood used in the building. The man who designs the building and superintends its erection, as actually

Maine, and *Missouri*, a lien has been refused the architect, even though he superintended the construction of the building.¹

VII. PERFORMANCE OF CONTRACT—1. Implied Conditions.²—There is an implied condition in every working contract that the work shall be performed in a proper and workmanlike manner,³ within a reasonable time,⁴ and that it will be serviceable for the purpose for which it is constructed.⁵ It is also implied that the employer

does work upon it as though he had carried the hod.⁶

1. *Foushee v. Grigsby*, 12 Bush (Ky.) 75; *Ames v. Dyer*, 41 Me. 397; *Raeder v. Bensberg*, 6 Mo. App. 445.

In *Ames v. Dyer*, 41 Me. 397, plaintiffs sought to recover the value of their labor in making a set of moulds, by which the ship upon which the lien was claimed was constructed, and for materials used in making the same, and it was held that the plan of the house, the model of the ship, or the mould by which the ship's timbers are formed, do not enter into the structure, and cannot be regarded as within the statutes by which liens are given, in certain cases, to the material man and the laborer.

2. **Place of Performance.**—A covenant to make bricks and build a house, no place being appointed in the covenant, is to be performed wherever the obligee shall appoint, in the state. *Trabue v. Kay*, 4 Bibb (Ky.) 226.

3. *Lucas v. Godwin*, 3 Bing. N. Cas. 737; 32 E. C. L. 300; *Pearce v. Tucker*, 3 F. & F. 136. And see *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475.

Work, under a contract which omits to specify the manner of its being done, is, by implication of law, to be done in a workmanlike manner. And the fact that the price agreed to be paid was grossly inadequate, makes no difference. *Smith v. Bristol*, 33 Iowa 24.

Where one contracts to do all the millwright work necessary in the construction of a gristmill, he is bound to do it in a workmanlike manner, so that it will answer the purpose for which it is intended. *Wade v. Haycock*, 25 Pa. St. 382.

A workman being bound to do his work in a workmanlike manner, it is no excuse for his doing it so as to be useless, that it was not possible to do it otherwise, unless he told his employer so. *Pearce v. Tucker*, 3 F. & F. 136.

Where the work turns out to have been done in a negligent or unwork-

manlike manner, damages may be recovered. See *Van Buskirk v. Murden*, 22 Ill. 446.

Where a builder agrees to build a house and have it "fit for use and occupation," he is responsible for everything; but where he agrees to complete a partially existing building, his responsibility for the fitness of old walls, which he did not contribute, must depend upon a specific provision to that effect. *Gibbons v. U. S.*, 15 Ct. of Cl. 174.

4. See *infra*, this section, *Time of Performance*.

5. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.

Where the contract calls for the erection of a drawbridge upon which the cars of a railway company can cross, it implies that the bridge will be serviceable for that purpose and capable of being used with like facility as similar bridges properly constructed. *Florida R. Co. v. Smith*, 21 Wall. (U. S.) 255.

An agreement to dig a well does not imply that water other than surface water shall be obtained. *Littrell v. Wilcox*, 11 Mont. 77.

Where a plaintiff declares on a *quantum meruit* for work and labor, and materials, the defendant may reduce the damages by showing that the work was improperly done, and may entitle himself to a verdict by showing that it was wholly inadequate to answer the purpose intended. *Farnsworth v. Garrard*, 1 Campb. 38; *Grounsell v. Lamb*, 1 M. & W. 352.

See *American Well-Works v. Rivers*, 36 Fed. Rep. 880, where it was held that a written contract, by which plaintiff agrees to sink an artesian well for defendant, supplying a given quantity of water, does not require that the water should be potable and fit for washing and for making steam, though plaintiff knew defendant was an hotel keeper, and desired water of that character for hotel purposes.

will do all things necessary to be done by him for the completion of the contract, and within a reasonable time.¹

2. Substantial Performance.—A substantial performance of the contract is all that the law requires, and the employer will not be permitted to avoid payment because the strict letter of the agreement has not been carried out.² Slight deviations, there-

1. Such as furnishing materials, selecting an engineer or superintendent, etc. *Smith v. Boston, etc., R. Co.*, 36 N. H. 458.

The employer impliedly undertakes that the place shall be free from danger and fit for the work to be done there. *Sinnatt v. Mullin*, 82 Pa. St. 333.

Although a contract appears, upon its face, to be obligatory upon one party only, yet if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do, or allow to be done, the act or things necessary for the completion of the contract, will be necessarily implied. *Black v. Woodrow*, 39 Md. 194.

Place for Materials.—Under a building contract, unless especially provided, the owner is not required to furnish the contractor with a place to store the building materials. *Wright v. Meyer* (Tex. Civ. App. 1894), 25 S. W. Rep. 1122.

2. *Goldsmith v. Hand*, 26 Ohio St. 101; *Rose v. O'Riley*, 111 Mass. 57; *Cullen v. Sears*, 112 Mass. 299; *Nolan v. Whitney*, 88 N. Y. 648; *Smith v. Gurgerty*, 4 Barb. (N. Y.) 614; *Hunt v. Elliott*, 77 Cal. 588; *Miller v. Phillips*, 31 Pa. St. 218; *Woodruff v. Hough*, 91 U. S. 596. And see *Brabazon v. Seymour*, 42 Conn. 551; *Woodworth v. Hammond*, 19 Neb. 215.

A literal performance of a building contract in every detail is not a condition precedent to the right of the contractor to require payment. *Heckman v. Pinkney*, 81 N. Y. 211; *Woodward v. Fuller*, 80 N. Y. 312; *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449.

The performance need not in all cases be literal and exact to enable the contractor to recover the consideration due upon performance; it is sufficient if, acting in good faith and intending and attempting to perform, he does so substantially. He may then recover, notwithstanding slight or trivial defects for which compensation can be made by an allowance to the other party. *Nolan v. Whitney*, 88 N. Y. 648.

In an action on a contract, an instruction to find for the plaintiff the contract price, if the jury believe that he substantially complied with the contract, is not erroneous, though it fails to define what is meant by "substantial compliance." *Johnson v. White* (Tex. Civ. App. 1894), 27 S. W. Rep. 174.

Where one agrees to do work as an entirety, as, for instance, to lay pavement at a certain sum "per square yard, which shall include two feet of grading," he is entitled to the amount, notwithstanding that, in certain places, no grading was done. *Cranford v. District of Columbia*, 20 Ct. of Cl. 376.

A contract to well and sufficiently heat a building about to be erected is performed when the machinery and equipments furnished are sufficient in quality, size and power to heat the building as the same was exhibited in the plans shown to the contractor. *Phoenix Iron Co. v. The Richmond*, 6 Mackey (D. C.) 180. And a contract to rebuild a mill "to be furnished with machinery in all respects similar to that in the mill burned," is substantially performed by placing in the mill the machinery in actual use at the time of the fire. *Ellis v. Lane*, 85 Pa. St. 265.

A contract to construct an "adjustable stern dock" does not require a dock which is automatically adjustable, but one which is adjustable by cutting and filling in its gates so that they will conform to the contour of the hull of the vessel, especially where the term is treated as a technical one, and the experts agree upon that definition of it. *International Bow, etc., Dock Co. v. U. S.*, 60 Fed. Rep. 523.

A contract to erect a building of "the best lumber" means the best lumber of which buildings were ordinarily constructed at that place. *McIntire v. Barnes*, 4 Colo. 285.

A contract is substantially performed where the price of the work to be done is twenty-one thousand dollars and all had been done except small matters, which could be completed for one hundred and fifty dollars. *Monteverde v.*

Queens County (Supreme Ct.), 28 N. Y. Supp. 918; 78 Hun (N. Y.) 267. And the finding of a referee that a contract to build a house to cost seven thousand dollars, was substantially performed, though there were defects amounting to two hundred and seventy-five dollars, will be sustained on appeal, where it plainly appears that the builder intended to fulfill the contract. *Valk v. McKeize* (Supreme Ct.), 16 N. Y. Supp. 741.

The plaintiff contracted to erect a building for six thousand dollars. When he finished the work there were certain defects which it cost six hundred and fifty-six dollars and twenty-nine cents to remedy. Under a condition of the contract, the owner remedied the defects to the amount of four hundred and thirty-nine dollars and twenty-nine cents. It was held that a finding by the referee, debiting the contractor with the amount expended by the owner on remedying the defects, that the damage was not sufficiently great to show wanton neglect and that the contract was substantially performed, need not be set aside. *Crouch v. Gutmann*, 10 N. Y. Supp. 275; *affirmed* 134 N. Y. 45.

But in *Flaherty v. Miner*, 123 N. Y. 382, an allowance by the jury of six hundred dollars for uncompleted work, upon a contract for three thousand five hundred dollars, was considered to show a failure of substantial performance.

A provision in a contract, "all flooring to be laid smooth and level, and free from knots," means free from all kinds of knots, both hard and soft. *Rush v. Wagner* (Brooklyn City Ct.), 12 N. Y. Supp. 2.

A contract for repairs to a building called for an "O. gas engine of best capacity" to run the elevator, but no rate of speed or weight to be moved was specified. The engine was put in perfect, and was approved by the owner, but subsequently, not being considered strong enough, a larger one was substituted by the owner. It appeared that both sizes were used in running elevators of the kind in question, and it was held, in an action against the contractor for breach of the contract, that a finding for the defendant should not be disturbed. *Horgan v. McKenzie* (C. Pl.), 17 N. Y. Supp. 174.

The plaintiffs, in their contract with the defendant for drilling a well, guaranteed to get "the water from the bed

rock," unless they should find good water, acceptable to the defendant, at a less depth. It was held that the contract was satisfied by getting bed rock water, and could not be construed as guarantying good water, or as presenting a case of ambiguity admitting of evidence of the circumstances under which it was made to give such a meaning to the words. *Book v. New Castle Wire Nail Co.*, 151 Pa. St. 499.

In an action to recover the contract price for drilling and sinking a well, the plaintiffs testified that water in sufficient quantity was not reached until at the depth of two hundred and sixty-two feet, and was then obtained in abundance; that it was only requisite then to put on a screen at the bottom and clean out the sand; that in putting it down the screen got caught, and the defendant ordered them to stop work. It was held that the jury were warranted in finding a substantial compliance with the contract. *Madden v. Oestrich*, 46 Minn. 538.

In *Bohrer v. Stumpff*, 31 Ill. App. 139, the plaintiff sued to recover a balance due on a contract for sinking a well, under an agreement to continue the work until water should be found or the owner satisfied. It was held that under such agreement, a reasonable depth, considering the means to be used, need only be attained.

"Available" Work. — The plaintiffs agreed to manufacture for the defendants, out of material to be furnished by the latter, "available phosphoric acid." The defendants sold some of the acid to a third person, who, on examination, refused to accept it because of its inferior quality, but he afterward took it at a reduced price. It was held that the acid, being salable, was "available" within the meaning of the contract. *Clark v. Adams* (Super. Ct.), 3 N. Y. Supp. 819; 55 N. Y. Super. Ct. 560.

Evidence. — See *Lange v. Johnson* (Wis. 1894), 57 N. W. Rep. 1109.

In an action for breach of building contract, which, after specifying by numbers various materials to be used, recited: "The above numbers refer to P. Bros.' catalogue," evidence that a certain portion used by the builder, for which the contract called for "No. 47," was substantially like "P. No. 47," is admissible, as the contract meant simply that P. Bros.' materials of the specified numbers should be used as models. *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23.

fore,¹ or technical, unimportant, or inadvertent omissions or defects, will not bar a recovery.² The ornamentation of a building, however, is a matter of substance, and variations or omissions from the specifications have been held to constitute a breach of the contract.³

Where the contractor has substantially performed his part, but the result does not come up to the requirements of the contract owing to defects in the plans,⁴ or to defective work or machinery furnished by the employer, or some error or omission of the latter, the contractor cannot be held liable;⁵ nor is he chargeable with

In an action by contractors on a building contract, evidence to prove work done in a manner or with material essentially different from that specified in their contract is inadmissible, as contractors are bound to construct the building substantially as specified in the contract; but evidence that the work done in the manner specified in the contract was done in a workmanlike manner is admissible, especially when the defendant has pleaded that the work was not done so, and that by reason thereof she has suffered damage. *Aldrich v. Wilmarth* (S. Dak. 1893), 54 N. W. Rep. 811.

1. *Fauble v. Davis*, 48 Iowa 462.

There is a substantial performance of a building contract where the only deviation from the plans was an error in measurement, by which the roof of the rear addition of the house was built five inches too low, and it is undisputed that this deviation did not affect the appearance or value of the house. *Oberlies v. Bullinger*, 132 N. Y. 598, *reversing* 58 Hun (N. Y.) 601.

2. *Mehurin v. Stone*, 37 Ohio St. 55; *Smith v. School Dist.*, 20 Conn. 312; *Wollreich v. Fettretch* (Supreme Ct.), 4 N. Y. Supp. 326; *Flaherty v. Miner*, 123 N. Y. 382; *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449; *Boteler v. Roy*, 40 Mo. App. 238.

When building contractors have in good faith substantially complied with their contract, though there be slight defects caused by inadvertence or unintentional omissions, they may recover the contract price, less the damage sustained on account of such defects. *Aldrich v. Wilmarth* (S. Dak. 1893), 54 N. W. Rep. 811.

Where an oil well drilled under contract is so far perfected in accordance with the contract as to answer the intended purpose, and is taken possession of and turned to that purpose, no mere

imperfection, which is not willful, will prevent a recovery therefor; but the damage caused by such imperfection will be deducted from the contract price. *Holmes v. Chartiers Oil Co.*, 138 Pa. St. 546.

Small and unimportant portions of the work, remaining undone by the plaintiff, are not sufficient to preclude his right to a payment which is not a final payment, where such work could have been done readily thereafter, and there was no proof but that it would have been done had the payment been made. *Highton v. Dessau* (C. Pl.), 19 N. Y. Supp. 395.

3. *McEntyre v. Tucker*, 5 Misc. Rep. (N. Y. C. Pl.) 228; 23 Civ. Pro. Rep. (N. Y.) 171.

4. See *supra*, this title, *Specifications*. And see *Birmingham Fire Brick Works v. Allen*, 86 Ala. 185.

5. *Manville v. McCoy*, 3 Ind. 148.

Thus a contract to furnish a heating apparatus is performed properly where the apparatus conforms to the contract, but does not furnish sufficient heat for the building on account of a defective boiler furnished by the owner. *Knutzen v. Hanson*, 28 Neb. 591.

A contractor for the general work of certain sugarhouse improvements is not responsible for defects in the work of a carpenter and engineer with whom the owner had contracted directly for their specialties. *De Lambre v. Williams*, 36 La. Ann. 330.

In *Waggoner v. Stocks*, 41 Ill. App. 151, the plaintiff agreed to bore a well on the defendant's land that would permanently furnish sufficient water for his cattle, sixty days to be allowed in which to test the capacity of the well, and the permanency of the water supply. The well was dug, and the defendant put in a pump which lacked thirty-five feet of reaching the bottom. It was held that the fact that the flow

defects resulting from changes made during the progress of the building with the owner's consent.¹ If the contractor is to have the right to remedy defects in the work, and the employer refuses to permit it, he may also recover.²

But there must be a substantial performance of the contract before there can be any recovery;³ and where performance is

of water was not sufficient to supply the cattle did not show that the plaintiff had not complied with the contract.

If an owner interferes with a contractor, and subjects him to his command, the contractor is not liable for injuries to his work occasioned thereby. *Rohrman v. Steese*, 9 Phila. (Pa.) 185.

Where there has been a substantial compliance with a building contract, by the contractor, he is not chargeable with certain repairs and changes subsequently made by the employer, which are not due to defective work. *Coon v. Citizens' Water Co.*, 152 Pa. St. 644.

A contractor is not responsible for defects in the work arising out of the unfitness of the materials furnished him by the employer. *True v. Bryant*, 32 N. H. 241.

Where the defendants contracted to erect a cofferdam, to enable the plaintiffs to prosecute their work, they were not thereby required to raise or strengthen a contiguous dam, nor rendered liable for water coming through or over it. *Skelsey v. U. S.*, 23 Ct. of Cl. 61.

Under a contract for the erection of a monument, the inscription to include four lines of verse, it is the duty of the persons ordering the monument to furnish the verse, and, failing in this, the contractor may omit the verse, and recover the contract price, less the cost of the inscription. *Eastern Granite Co. v. Heim* (Iowa, 1894), 57 N. W. Rep. 437.

In *Strack v. Hurd* (Supreme Ct.), 16 N. Y. Supp. 566, it was held that the question whether the employer had failed to perform his part of the contract was properly submitted to the jury, on conflicting evidence.

In a suit by a contractor for the price to be paid him for building a house, it is error to charge the jury that, if the building does not come up to the requirements of the contract, and any deficiency was on account of the acts or interference of the defendant, the plaintiff is not at fault, and is entitled to recover, where the declaration fails to allege that the failure to build the

house according to the contract was caused by the acts or interference of the defendant, and the testimony totally fails to show any act or interference on his part. *Livingston v. Anderson*, 30 Fla. 117.

Defects in soil do not excuse performance of a contract to erect a building. *Stees v. Leonard*, 20 Minn. 494.

1. It must clearly appear that such consent was fairly obtained, and given with knowledge of all material circumstances. *Bryant v. Stilwell*, 24 Pa. St. 314.

Modification of Contract.—Although a contract for constructing a building is made under seal, and a performance of it, according to its terms, cannot be shown, yet, if there has been a modification of it by parol, and the contractor was prevented by this modification, and the acts of the employer, from performing according to the sealed contract, and has performed according to the parol modification, he may maintain an action for the reasonable value of his labor and materials. *Siebert v. Leonard*, 17 Minn. 433.

2. In an action to recover on a contract for digging a well, there was evidence that the plaintiff was to have the right to fix the well if it did not work, and that defendant refused to permit him to do so. It was held that a verdict for the plaintiff should not be disturbed. *Bennett v. Teetzel*, 34 Ill. App. 295.

3. *Mehurin v. Stone*, 37 Ohio St. 49; *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449; *Flaherty v. Miner*, 123 N. Y. 382; *Harris v. Rathbun*, 2 Abb. App. Dec. (N. Y.) 326; *Pullman v. Corning*, 14 Barb. (N. Y.) 174. And see *Edison General Electric Co. v. Canadian Pac. Nav. R. Co.*, 8 Wash. 370; *Philadelphia Hydraulic Works v. Schenck*, 80 Pa. St. 334; *Philadelphia v. Brooke*, 9 Phila. (Pa.) 168; *Veazie v. Bangor*, 51 Me. 509; *Burns v. Fairmont* (Neb.), 45 N. W. Rep. 175; *Mears v. Nichols*, 41 Ill. 207; 89 Am. Dec. 381; *Elliott v. Caldwell*, 43 Minn. 357. But see *Cairy v. Randolph*, 6 La. Ann. 202; *Wade v. Haycock*, 25 Pa. St. 382.

Before one can recover for work done under a special contract, he must show that he has done substantially that which the contract required that he should do. *Moll v. Foery*, 43 Hun (N. Y.) 476.

A party being entitled to receive certain bonds (left in escrow), on completion of a truss railway bridge within three years, must perform the condition strictly to entitle himself to the bonds. It is not enough that he builds a different kind of bridge, though as good as or better than a truss bridge, or that he builds the truss bridge after the three years. *Winona v. Minnesota R. Constr. Co.*, 27 Minn. 415.

No action will lie on a contract to furnish materials and work of a specific character to be paid for on performance, unless it is done substantially in the manner stipulated. *Lewis v. Yagel* (Supreme Ct.), 28 N. Y. Supp. 833; 77 Hun (N. Y.) 337. And a defect in the construction of a building may be a substantial defect, though it does not run through the entire structure, and can be remedied without disturbing or interfering with the main building. *Oberlies v. Bullinger* (Supreme Ct.), 27 N. Y. Supp. 19; 75 Hun (N. Y.) 248.

Where the jury allowed six hundred dollars for uncompleted work upon a contract for thirty-five hundred dollars, thus probably showing a want of substantial performance, the judgment will not be reversed nevertheless, where there is evidence that the defendants waived full performance. *Flaherty v. Miner*, 123 N. Y. 382.

The contractor cannot show that the work could not have been done in a workmanlike manner for the price. *Williams v. Keech*, 4 Hill (N. Y.) 168. But if the employer has the work done over, and in doing so uses the materials of the contractor, he must pay for them. *Elliott v. Wilkinson*, 8 Yerg. (Tenn.) 411.

What Is Not a Substantial Performance.—A contract for the erection of a building provided that a certain payment should be due "when the plastering was finished." The contractor abandoned the job, leaving the hall and parlor without their last coat of plaster, and the stairs, under which there should have been plastering, not put up. It was held that there was such a substantial failure to complete the plastering that the payment was not due. *Van Clief v. Van Vechten* (Supreme Ct.),

8 N. Y. Supp. 760; *modified* 130 N. Y. 571.

In an action for services rendered under a contract, it appeared that the plaintiff agreed to construct a stable floor so as to be water-tight. The ground floor below was to be used as a repository for carriages, and it was necessary that the stable floor be absolutely water-tight. It was held that the plaintiff could not recover where it appeared that the floor was not water-tight. *Sherwood v. Houtman* (Supreme Ct.), 26 N. Y. Supp. 150; 73 Hun (N. Y.) 544.

A contract to build a mill fifty feet by one hundred and fifty, is not substantially complied with by building one that is seventy-eight feet by one hundred; though the purpose of the contract was to give the vendor security for the purchase-money of the lot, and though the mill built costs more, and is better adapted to the purposes for which it was intended, than the one agreed to be built. *Swain v. Seamens*, 9 Wall. (U. S.) 254.

An agreement that subsills of sidewalks shall be of oak and two inches by six, is not complied with by putting in subsills of pine two inches by four, it appearing that those required would last twice as long as those furnished; nor can there be a recovery on a *quantum meruit*, the city for which the sidewalks were furnished refusing to accept them, and not having waived a performance of the contract. *Denton v. Atchison*, 34 Kan. 438.

In an action on a contract for putting parquet floors in the defendant's house, the work to be "first-class," the evidence showed that first-class work required the blocks to be so seasoned and so well laid that there would be no space between them; that after being laid the blocks shrank, and the plaintiff repeatedly repaired the work; and that after it was repaired the defendant expressed satisfaction with the work, but the blocks again shrank. It was held that a nonsuit was proper though the plaintiff gave evidence that the floors were of the best material and workmanship. *Boughton v. Smith*, 142 N. Y. 674.

The plaintiff contracted to construct a building for the defendant according to the plan and specifications which were made a part of the contract. Moreover, the contract expressly stipulated that the plaintiff should not vary in any manner from the plan and specifications without the written consent of

made a condition of payment and there is an important and voluntary deviation or omission, the contractor can have no remedy for the materials furnished and the services performed.¹ It is only where there is an honest intention to go by the contract and a substantial execution of it, or the work and materials are of value and benefit to the employer, and enjoyed by him, that he can be allowed to recover upon a *quantum meruit* or *quantum valebat*.²

the defendant. It was held, in an action for breach of contract, that the contract having called for a particular kind and make of columns, and it appearing that they could have been procured, evidence that the columns substituted for them were substantially like them was immaterial and irrelevant. *Linch v. Paris Lumber, etc., Co.* (Tex. 1890), 14 S. W. Rep. 701.

In *Zimmerman v. Jourgensen* (Supreme Ct.), 24 N. Y. Supp. 170, the plaintiffs agreed to make certain alterations in the defendant's building. The contract provided for three payments, the last ten days after completion, and further that, should the contractor refuse or neglect to supply a sufficiency of materials or workmen, the owner could provide them, after three days' notice in writing to finish the work, the expense to be deducted from the amount of the contract. After the first two installments had been paid, the defendant elected, under such provisions, to complete the work himself. The plaintiffs sued for the third installment, less the value of completing the building, alleging that the work was substantially completed when the defendant took possession. It appeared that at that time the floors were not laid; that portions of the building were exposed to the weather; that some of the work had to be done over, and that more was expended in completing the building than remained unpaid under the contract. It was held that the plaintiffs could not recover. The fact that the defendant, in completing the building, departed from the plans by introducing additional work, made no difference where the contract provided for alterations in the plans and it was not shown that such changes were made in bad faith.

Where a plaintiff agreed to dig a well for the defendant at a certain rate per foot, and to furnish him a sufficient quantity of water for his stock and family, the plaintiff is not entitled to

recover where the supply of water is altogether insufficient for the purposes intended. *Genni v. Hahn*, 82 Wis. 92.

Where a requirement of a building contract, that the cellar be made watertight (its situation making it subject to the flowing of water), is not performed, and the omission is not shown to have been unintentional, there is not a substantial performance of the contract; and the refusal of an architect to give the certificate required by the contract as a condition precedent to the last payment thereon is not unreasonable, and the builder cannot recover such payment. *Weeks v. O'Brien* (Super. Ct.), 12 N. Y. Supp. 720.

Evidence.—The employer may show in what particulars the contractors have done their work poorly, and how much it cost him to reconstruct their work and to complete the building. *Schuler v. Eckert*, 90 Mich. 165. And it is error to exclude testimony as to the difference between the buildings constructed, and others built in a good and workmanlike manner. *Kilbourne v. Jennings*, 40 Iowa 473.

1. *Obustead v. Beak*, 19 Pick. (Mass.) 528; *Faxon v. Mansfield*, 2 Mass. 147; *Ranscher v. Cronk* (Supreme Ct.), 3 N. Y. Supp. 470; *Smith v. Brady*, 17 N. Y. 173; *Crane v. Knubel*, 34 N. Y. Super. Ct. 443. See *Ellis v. Hamlen*, 3 Taunt. 53.

The doctrine of "substantial compliance" with building contracts does not apply when the omissions or departures from the contract are intentional, and so substantial as not to be capable of remedy, and that an allowance out of the contract price would not give the owner essentially what he contracted for. *Elliott v. Caldwell*, 43 Minn. 357.

2. *Preston v. Finney*, 2 W. & S. (Pa.) 53; *Liggett v. Smith*, 3 Watts (Pa.) 331; 27 Am. Dec. 358; *Marsh v. Richards*, 29 Mo. 99; *Gove v. Island City Mercantile, etc., Co.*, 19 Oregon 363; *Smith v. Brady*, 17 N. Y. 173;

The burden of proof rests upon the plaintiff, in an action upon the contract, to establish substantial performance of the contract.¹ Whether the defects are substantial, or technical and unimportant, is a question of fact for the jury,² and, where the

Mehurin *v.* Stone, 37 Ohio St. 56; Kelly *v.* Bradford, 33 Vt. 35; White *v.* Oliver, 36 Me. 92; Blakeslee *v.* Holt, 42 Conn. 226; Gallagher *v.* Sharpless, 134 Pa. St. 134.

In *Pinches v. Swedish Lutheran Church*, 55 Conn. 183, it was said that courts of eminent authority in *England* and *United States* have held that no recovery can be had for labor or materials furnished under a special contract, unless the contract has been performed according to its terms, or its performance has been dispensed with by the other party, but that the hardship of this rule upon the contractor who has undesignedly violated his contract, and the inequitable advantage it gives to the party who receives and retains the benefit of his labor and materials, has led to its qualification, and the weight of authority is now clearly in favor of allowing compensation for such services and materials, where the deviation was not willful and the other party has availed himself of and been benefited by, such labor and materials. And see *Hayward v. Leonard*, 7 Pick. (Mass.) 181; 19 Am. Dec. 269; *Smith v. First Cong. Meetinghouse*, 8 Pick. (Mass.) 178; *Moulton v. McOwen*, 103 Mass. 587; *Ingle v. Jones*, 2 Wall. (U. S.) 1; *Aetna Iron, etc., Works v. Kossuth County*, 79 Iowa 40; *Corwin v. Wallace*, 17 Iowa 374; *Byerly v. Kopley*, 1 Jones (N. Car.) 35.

Hence, where a schoolhouse, erected on the land of a district, was of real and substantial value for the purposes intended, and the builder had attempted in good faith to comply with his contract, it was held that he could recover what the building was reasonably worth, though it did not comply with the contract. *School Dist. No. 2 v. Boyer*, 46 Kan. 54.

Where one party has contracted to perform work for another and furnish materials, and the work is done and the materials are furnished, but not in the manner stipulated, so that he cannot recover the price agreed upon, if the work and materials are of any value and benefit to the other party, he may recover for the work done and the ma-

terials furnished. *School Dist. No. 46 v. Lund*, 57 Kan. 731.

The fact that some departures from the contract for erecting a school building have been made without the consent, express or implied, of the district officers, architect, or superintendent, and in disregard of their directions, will not bar a recovery for other portions of the work which have been duly approved; but the district would have a right to insist on the proper changes in the work to make it conform to the contract, and to recover any damages sustained by the failure; and this even after taking possession of the building and occupying it for school purposes. Such occupancy would not import an acceptance constituting an estoppel. *Willey v. Fractional School Dist. No. 1*, 25 Mich. 419.

The contractor may recover for the services and materials at the contract price, after deducting the diminution in value of the work to the employer on account of his departures from the contract. *White v. Oliver*, 36 Me. 95; *Jewett v. Weston*, 11 Me. 346; *Hayward v. Leonard*, 7 Pick. (Mass.) 181; 19 Am. Dec. 219; *Snow v. Ware*, 13 Met. (Mass.) 49; *Cullen v. Sears*, 112 Mass. 299; *Jewell v. Schroeppel*, 4 Cow. (N. Y.) 564; *Ladue v. Seymour*, 24 Wend. (N. Y.) 60; *Lucas v. Godwin*, 3 Bing. N. Cas. 737.

1. *Wollreich v. Fettretch* (Supreme Ct.), 4 N. Y. Supp. 326; *Mehurin v. Stone*, 37 Ohio St. 49.

Where, in a suit on a contract for sinking a well, the evidence is conflicting as to whether the plaintiff completed the well in accordance with the terms of the contract, a verdict for him will not be disturbed. *Colburn v. Wescott*, 36 Ill. App. 347.

2. *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449; *Johnson v. DePeyster*, 50 N. Y. 666; *Pitt v. Downing*, 52 N. Y. Super. Ct. 508.

A stipulation to use in a building "the best French plate double-thick glass, similar to that used" in a certain other building, requires the use of glass of a fair sample of the quality specified, and not that each plate should be the best possible specimen of its kind.

evidence is contradictory and conflicting, the question is peculiarly one for the jury.¹

But though slight deviations or imperfections will not bar a recovery, a just allowance for such defects, trivial though they are, must be made to the owner. A party is entitled to compensation for small or slight injuries as well as those of larger extent,² and the cost of supplying the omissions or making the alterations necessary to comply with the contract, will be deducted always.³

South Cong. Meetinghouse v. Hilton, 11 Gray (Mass.) 407.

1. The question, where the evidence is contradictory, is peculiarly one for a jury, and motions to dismiss and for the direction of a verdict, are properly denied. *Gibbons v. Russell* (Brooklyn City Ct.), 13 N. Y. Supp. 879.

In an action on a contract to lay a floor "free from knots," where the evidence as to the number of knots was conflicting, it was for the jury to determine whether such knotty condition was a trivial or material violation, of the contract. *Rush v. Wagner* (Brooklyn City Ct.), 12 N. Y. Supp. 2.

In an action for work done under an express contract, where the evidence shows that the work was not done originally in accordance with the contract, but that the plaintiffs, with the defendant's permission, undertook to remedy the defects, until finally the defendant expressed himself satisfied, it is proper to submit to the jury the question whether the plaintiffs substantially performed their contract. *Boughton v. Smith* (Supreme Ct.), 22 N. Y. Supp. 148; 67 Hun (N. Y.) 652.

In an action for the price of putting a tin roof on the defendant's house, it appeared conclusively that the proper manner of fastening it was to place cleats on it as near as possible to the seams, and to nail each cleat with two nails. There was evidence that much of the work was not so done, and that consequently the roof was torn off by the wind. As against this evidence, two of the workmen testified that they did all their work in the proper manner, and that, as far as they knew, it was all done so; but there was another workman, who was not a witness, and there was no evidence that his work was properly done. It was held that judgment should be rendered for the defendant without giving the case to the jury. *Muth v. Frost*, 75 Wis. 166.

2. *Heckman v. Pinkney*, 81 N. Y. 213; *Nolan v. Whitney*, 88 N. Y. 648;

Glaciuz v. Black, 50 N. Y. 153; 10 Am. Rep. 449; *Flaherty v. Miner*, 123 N. Y. 382; *Rush v. Wagner* (Brooklyn City Ct.), 12 N. Y. Supp. 2; *Boteler v. Roy*, 40 Mo. App. 238; *Van Buren v. Digges*, 11 How. (U. S.) 461; *Farnsworth v. Garrard*, 1 Campb. 38; *Grounsell v. Lamb*, 1 M. & W. 352.

A contractor is entitled to recover where there has been a substantial performance, but not necessarily the whole contract price. There may be defects in the fulfillment, of such a nature as not to preclude him from recovering, but for which the jury have a right to make a deduction as a compensation to the employer. *Monocacy Bridge Co. v. American Iron Bridge Mfg. Co.*, 83 Pa. St. 517.

In an action on a special contract for work done under the contract, and for work, labor, and materials generally, the defendant may give in evidence that the work has been done improperly, and not agreeably to the contract; and the plaintiff in that case will only be entitled to recover the real value of the work done and the materials supplied. *Chapel v. Hickes*, 2 C. & M. 214; 4 Tyr. 43.

The law does not require a party to pay for imperfect and defective work the price stipulated for a perfect structure; and, when that price is demanded, will allow him to deduct the difference between that price and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiffs. The deduction is allowed in a suit upon the contract to prevent circuity of action. *Florida R. Co. v. Smith*, 21 Wall. (U. S.) 255.

For defective execution of a contract, damages may be recovered, and if done knowingly, it is such *mala fides* as will prevent the recovery of any compensation. *Wade v. Haycock*, 25 Pa. St. 382.

3. *Flaherty v. Miner*, 123 N. Y. 382; *Blakeslee v. Holt*, 42 Conn. 226; *Kelly*

In some instances, where the cost of the alterations would be very large, the owner is allowed to deduct only the difference in the value of the work as constructed and as planned.¹

3. Acceptance as Waiver of Defects.—Where the employer accepts the work and makes use of it after completion, he will generally be held to have waived defects in the performance, and is liable to the workman for its reasonable value,² but the mere fact of

v. Bradford, 33 Vt. 35; *Corwin v. Wallace*, 17 Iowa 374; *Aetna Iron, etc., Works v. Kossuth County*, 79 Iowa 40; *Manville v. McCoy*, 3 Ind. 148.

1. In cases where only some additions to the work are required to finish it according to the contract, or where the defect may be remedied at a reasonable expense, it is proper to deduct from the contract price, the sum it would cost to complete it, but where it would be impossible to make the work conform to the contract without taking it partially down and rebuilding it at great expense, it is proper to allow the contract price of the work, deducting therefrom the diminution in value by reason of the deviations from the contract. *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183. And see *White v. Oliver*, 36 Me. 92.

2. *Harris County v. Campbell*, 68 Tex. 22; *Beswick v. Platt*, 140 Pa. St. 28; *Katz v. Bedford*, 77 Cal. 319; *Andrews v. Portland*, 35 Me. 475; *Oregon Imp. Co. v. Roach*, 117 N. Y. 527; *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285; *Neville v. Frost*, 2 E. D. Smith (N. Y.) 62; *Porter v. Stewart*, 2 Aik. (Vt.) 417; *Waters v. Harvey*, 3 Houst. (Del.) 430; *Trowbridge v. Barrett*, 30 Wis. 661; *Howard v. Oshkosh*, 37 Wis. 242; *Ford v. Smith*, 25 Ga. 675; *Hagerstown Presbyterian Church v. Hoopes Artificial Stone Co.*, 66 Md. 598; *Potomac Steamboat Co. v. Harlan, etc., Co.*, 66 Md. 42; *Garrison v. Dingman*, 56 Ill. 150; *Merrweather v. Taylor*, 15 Ala. 735; *Hawkins v. Gilbert*, 19 Ala. 54; *Bailey v. Woods*, 17 N. H. 365; *Lucas v. Godwin*, 3 Bing. N. Cas. 737. And see *Johnson v. Harvey*, 30 Md. 259; *Maysville, etc., Turnpike Road Co. v. Waters*, 6 Dana (Ky.) 62; *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96; *Jewett v. Weston*, 11 Me. 346.

Where a county drainage commissioner has accepted a drain he is estopped to deny that it was done according to the contract. *Cummings v. Pence*, 1 Ind. App. 317.

A verdict finding that the work of excavating and grading a street has been fully completed according to the terms of the contract, will not be disturbed where the evidence shows that the street committee, after personal inspection, aided by their engineer, under whose instruction the work was done, accepted the work as complete. *Cartwright v. Mt. Vernon* (Supreme Ct.), 3 N. Y. Supp. 296.

The acceptance of the work will operate as a waiver of any objection to the time of performance. *Emerson v. Coggs*, 16 Me. 77; *Smith v. Gurgerty*, 4 Barb. (N. Y.) 614; *Lucas v. Godwin*, 3 Bing. N. Cas. 737.

In *Veazie v. Bangor*, 51 Me. 509, it was said that the acceptance or voluntary use of the subject-matter of the contract is evidence of a performance or a waiver, though not conclusive.

If the work and materials are accepted and used by the employer he is answerable to the amount whereby he is benefited, upon an implied promise to pay for the value he has received. *McKinney v. Springer*, 3 Ind. 59; 54 Am. Dec. 470; *Thomas v. Ellis*, 4 Ala. 108.

Where the owners of a wharf contract for its extension, and furnish the plans and specifications to the contractor, who builds it in accordance therewith, and the owners accept the work after seeing it in progress and after it is done, they cannot recover from the contractor the money paid him for it because the wharf gives way afterwards. *Beswick v. Platt*, 140 Pa. St. 28.

Plaintiffs contracted to cut and stack lumber for defendants at two dollars per thousand feet, but during a large part of the time defendants kept an agent at the mill, who received the lumber without stacking. It was held that this was a waiver of the requirement, and plaintiffs could recover on the contract without showing that they stacked the remainder of the lumber.

taking possession of one's own land upon which a building has been erected, or permanent erections made, does not necessarily imply a waiver of strict performance.¹ A distinction exists

Bailey v. Knight (Tex. App. 1891), 17 S. W. Rep. 1062.

But part payment on account of the contract does not of itself amount to an acceptance of work not fully completed, *Katz v. Bedford*, 77 Cal. 319; *Morrison v. Cummings*, 26 Vt. 486; *Moulton v. McOwen*, 103 Mass. 587; and if the one making the payment is unaware that there is an insufficiency in the work, he does not waive an exact performance. *Veazie v. Bangor*, 51 Me. 509; *Andrews v. Portland*, 35 Me. 475; *Morrison v. Cummings*, 26 Vt. 486. And see *Petrie v. Grover*, 39 Ind. 343; *Van Buskirk v. Murden*, 22 Ill. 446; *Monroe Female University v. Broadfield*, 30 Ga. 1; *Hartup v. Pittsburgh*, 97 Pa. St. 107. But the fact of taking possession and occupying a building, and afterward making payments without objection, would have an important bearing on the question whether the rights were intentionally waived. *Willey v. Fractional School Dist. No. 1*, 25 Mich. 419. And see *Flannery v. Rohrmayer*, 46 Conn. 558; 33 Am. Rep. 36.

Where a railroad company contracts for building its road, agreeing to pay the contractor in bonds and stock of the company, payments to be made on completion of each mile of road, and allows the contractor to work along the line without completing any portion, and, with full opportunity for judging for itself, pays him on his own estimates, afterwards taking possession of, and running trains on, part of the uncompleted road, it cannot refuse to allow the contractor to complete the work, on the ground that he has been overpaid on his estimates, and did not fully complete the road mile by mile, as agreed. *Wood v. Boney* (N. J. 1891), 21 Atl. Rep. 574.

1. *Escott v. White*, 10 Bush (Ky.) 166; *Malbon v. Birney*, 11 Wis. 107; *Corwin v. Wallace*, 17 Iowa 374; *Mitchell v. Wiscotta Land Co.*, 3 Iowa 209; *Kilbourne v. Jennings*, 40 Iowa 473; *Smith v. Brady*, 17 N. Y. 173; *Vanderzee v. Herman*, 59 Hun (N. Y.) 617; 13 N. Y. Supp. 164; *Munroe v. Butt*, 8 El. & Bl. 738; *Ellis v. Hamlen*, 3 Taunt. 52; *Reed v. Board of Education*, 4 Abb. App. Dec. (N. Y.) 24.

The fact that a party accepts a house, built for him under contract, with knowledge that all the conditions of the contract were not complied with in its erection, does not amount to a waiver of said conditions. *Mohney v. Reed*, 40 Mo. App. 199; *Stewart v. Fulton*, 31 Mo. 59.

By continuing in possession and using a building in which alterations have been made, the owner does not waive a condition precedent as to payment. *Gove v. Island City Mercantile, etc., Co.*, 16 Oregon 93; *Crane v. Knubel*, 43 How. Pr. (N. Y. Super. Ct.) 389.

But taking possession and using a building may be considered, in connection with all the facts and circumstances of the case, as tending to show a waiver. *Boteler v. Roy*, 40 Mo. App. 234.

If the owner is satisfied to receive the house, if not at the contract price, at what it is reasonably worth, he is bound to pay the value received to an amount not exceeding the contract price. *Becker v. Hecker*, 9 Ind. 497.

In *Davis v. Badders* (Ala. 1892), 10 So. Rep. 422, it was held that where a contract for a building is not entirely performed, but the owner moves in before completion, and remains in possession after it is finished, he is liable for the labor and materials on an implied contract.

And in *Taylor v. Williams*, 6 Wis. 363, it was held that if a party enters into possession of a completed house, not built according to contract, he thereby admits that it is of some value, and he must pay the builder on a *quantum meruit*. And see *Gouldsmith v. Hand*, 26 Ohio St. 101.

The acceptance of work done under a non-apportionable contract to erect an addition to a building must be unequivocal, and cannot be presumed from ordinary acts done as owner of the realty. *Fildew v. Besley*, 42 Mich. 100; 36 Am. Rep. 433.

In an action for digging a well under a contract that the water furnished should be sufficient for defendant's stock and family, where defendant used such well only to test its capacity to afford sufficient water for the purpose intended, it was error to instruct the

between a permanent work erected on the land of the employer and a portable article that may be returned to the maker.¹ The acceptance of permanent erections, however, will operate as a waiver of any right to object to the location.² By accepting the work the owner does not waive his right to recoup damages growing out of the breach of contract.³

A contractor relying on an acceptance of the work as a waiver of substantial performance must both plead and prove it.⁴

4. Part Performance—*a.* GENERALLY.—Where the contract is entire and it appears to be the intention of the parties to require a full performance before any liability to pay arises, a contractor cannot recover for a partial performance of the contract,⁵ but

jury that, if defendant used the well to any extent, they should find for plaintiff. *Genni v. Hahn*, 82 Wis. 92.

1. *Hartuppee v. Pittsburgh*, 97 Pa. St. 107.

Where work and labor and materials have been expended in the production of an article not connected in any way with property belonging to the party at whose instance the work has been done, the latter is at liberty to accept it or not, and if he does accept, such acceptance is a waiver of any defect in performance. But where the work is done on property of the other party, so that its results cannot be separated from the necessary consequences of ownership, as work done on another's house or farm, the continued possession and use of such property by the owner is not a waiver of any such defense. *Yeats v. Ballentine*, 56 Mo. 530. See *Conery v. Noyes*, 17 La. Ann. 201, as to the effect of the acceptance of a steamboat.

2. Where one party contracts with another to fix on a proper location and erect a mill, the acceptance of the mill is a waiver of any objection to the location. *Emerson v. Coggs*, 16 Me. 77.

3. *Adlard v. Muldoon*, 45 Ill. 193; *Mitchell v. Wiscotta Land Co.*, 3 Iowa 209; *Wilkey v. Fractional School Dist. No. 1*, 25 Mich. 419; *Trowbridge v. Barrett*, 30 Wis. 661.

Where the work and materials upon a building are not as good as contracted for, the contractor can only recover their reasonable value, not exceeding the contract price, notwithstanding an acceptance of the building, unless it be in full discharge of the contract. *Estep v. Fenton*, 66 Ill. 467.

In *De Lambre v. Williams*, 36 La. Ann. 330, it was held that an owner

who had accepted a contractor's work, and settled therefor without objection, was estopped to claim damages for non-fulfillment in the quality of the materials used.

4. *Winona v. Minnesota R. Constr. Co.*, 27 Minn. 415.

5. See *CONTRACT*, vol. 3, p. 916; *Bowery Nat. Bank v. New York*, 63 N. Y. 336.

To entitle a party to recover for part performance of a contract, his contract remaining open and unperformed, the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial performance, and the mere fact that the partial performance is beneficial to a party is not enough from which to imply a promise to pay for it. *Elliott v. Caldwell*, 43 Minn. 357.

Where plaintiff agreed to construct a creamery and cold-storage building, and to furnish a patent deed conveying the rights under a certain patent, he cannot recover on the contract without proof that the deed was furnished, as that stipulation was a part of the contract. *Davis v. Jeffris* (S. Dak. 1894), 58 N. W. Rep. 815, 928.

In *Sullivan v. Grass Valley Quartz Milling, etc., Co.*, 77 Cal. 418, the defendant employed the plaintiff to do work at a specified price per foot, but inadvertently let the same work to L. on the same terms, and, on discovery of the mistake, arranged with plaintiff and L. that they do the work together, and agreed that, if plaintiff should find other work, he might terminate the contract. It was held that he having found such work, and notified defendant of the termination, and defendant having measured the work and promised to pay, could not object that the

otherwise he can recover the agreed price less the amount required to carry the work to completion.¹

contract was entire, and that there was not a complete performance.

1. *Wells v. Board of Education*, 78 Mich. 260; *Beha v. Ottenberg*, 6 Mackey (D. C.) 348; *Scofield v. Graw*, 63 Vt. 283.

In *Bush v. Jones*, 2 Tenn. Ch. 190; *Wolf v. Gerr*, 43 Iowa 339, it was said to be the settled law of those states that a person who performs work and furnishes material under a special agreement may recover compensation for a partial performance, equal to, and limited by, the value of the benefit conferred; in estimating which, the damages sustained by the failure to perform according to contract must be taken into consideration. And in *Linnenkohl v. Winkelmeyer*, 54 Mo. App. 570, it was held that a party who had performed work of value under a building contract could maintain an action of *quantum meruit* therefor, notwithstanding that he had failed, without justification, to complete his contract; nor would such right of action be affected by a provision of the contract that his compensation should be payable on the completion of the work and its acceptance by the architect.

Death of Contractor.—If a building contract has been dissolved by the death of the contractor, and the proprietor accepts the work done and materials furnished, he must account to the heirs for their value in the proportion such value bears to the price agreed upon for the construction of the entire building. *Thomas v. L'Hote*, 22 La. Ann. 73.

Rate of Recovery.—Where there has been only a part performance of a special contract for work at a specified price, the recovery on a *quantum meruit* (if any) cannot be at a higher rate than that stipulated; and defendant is entitled to offset his damages by reason of breach of contract on plaintiff's part. *Bishop v. Price*, 24 Wis. 480.

Entire Contracts.—A contract may be entire although payments are to be made periodically as the work progresses. *Quigley v. De Haas*, 82 Pa. St. 267.

If a contractor agrees with a railroad company to grade a section of its road, and do all necessary to make the road ready for the cross-ties and iron equipments, and to receive a fixed sum

for the work, to be paid from time to time as the work progresses, at the prices fixed and estimates of work done made by an engineer, the contract is entire. The provision for payments from time to time as the work progresses does not make it severable. *Cox v. Western Pacific R. Co.*, 44 Cal. 18.

A contract for the digging of an artesian well, which, in express terms, provides that the contractor shall be entitled to be paid for work done thereunder "only on the completion of the whole work," is an entire contract. *Simonds v. Pearce*, 31 Fed. Rep. 137.

A contract to deliver a certain quantity of timber at so much per foot, to be inspected, and to be delivered as fast as water will permit, and to be completed not later than a time specified, payment cash on handling specifications, is an entire and not a severable agreement. *Stokes v. Baars*, 18 Fla. 656.

Severable Contracts.—A contract for work consisting of separate items, the price being apportioned to each item or left to implication of law, is severable. So, also, if the price is clearly apportionable to the several parts of what is to be performed, though this be single and entire. *Dibol v. Minott*, 9 Iowa 403.

The plaintiff agreed to bore five wells for the defendant at one dollar per foot, and to furnish pipe at thirty-five cents per foot, and pumps and other appliances at prices specified for each separately. It was stipulated that, "in case of failure to get a good supply of water," plaintiff should have "no pay." It was held that the agreement was not an entire one, and that by failure to get a good supply of water from one of the wells the plaintiff did not forfeit his right to payment for the rest. *Spear v. Snider*, 29 Minn. 463.

A contract to repair a vessel is not entire, and a recovery can be had although the whole of the work has not been performed. *Baeder v. Carnie*, 44 N. J. L. 208.

Where one contracted to build a railroad to be paid for by installments as the work advanced, the contract was held not entire, and the contractor entitled to recover a ratable portion of the contract price, according to the

b. EMPLOYER PREVENTING PERFORMANCE.—Where the completion of the contract is prevented by the employer, the contractor may treat it as rescinded and recover as upon a *quantum meruit* the value of the services performed, irrespective of the rate of compensation specified in the contract,¹ together with any

amount of work done whenever the contract might be abandoned. *Wright v. Petrie*, 1 Smed. & M. Ch. (Miss.) 282.

1. *Blood v. Enos*, 12 Vt. 625; 36 Am. Dec. 363; *Derby v. Johnson*, 21 Vt. 17; *Bonnet v. Glattfeldt*, 120 Ill. 166; *Guerdon v. Corbett*, 87 Ill. 272; *Rayburn v. Comstock*, 80 Mich. 448; *Joyce v. White*, 95 Cal. 236; *Remy v. Olds*, 88 Cal. 537; *Ross Road Mach. Co. v. Forbus*, 23 N. Y. Wkly. L. Bull. 217; *Powers v. Hogan*, 12 Daly (N. Y.) 444; *Byron v. New York*, 54 N. Y. Super. Ct. 411; *Niblo v. Biusse*, 3 Abb. App. Dec. (N. Y.) 375; *Highton v. Dessau* (C. Pl.), 19 N. Y. Supp. 395; *McMaster v. State*, 108 N. Y. 542; *Simmons v. Lawrence Duck Co.*, 133 Mass. 298; *Ford v. Burchard*, 130 Mass. 424; *Bassett v. Sanborn*, 9 Cush. (Mass.) 58; *Kelly v. Rowane*, 33 Mo. App. 440; *Park v. Kitchen*, 1 Mo. App. 357; *McCullough v. Baker*, 47 Mo. 401; *Ahern v. Boyce*, 19 Mo. App. 552; *Caldwell v. Myers*, 2 S. Dak. 506; *Heaver v. Lanahan*, 74 Md. 493; *Hall v. Rupley*, 10 Pa. St. 231; *Potts v. Point Pleasant Land Co.*, 49 N. J. L. 411; *Wright v. Haskell*, 45 Me. 489; *Cook v. Hamilton County*, 6 McLean (U. S.) 612; *Ellithorpe Air-Brake Co. v. Sire*, 41 Fed. Rep. 662; *Roberts v. Bury Imp. Com'rs*, L. R., 5 C. P. 311. And see *Wise v. Chaney*, 6 Ill. 562; *Gilber, etc., Mfg. Co. v. Butler*, 146 Mass. 82; *Tone v. Doelger*, 6 Robt. (N. Y.) 251; *Gallagher v. Nichols*, 60 N. Y. 438; *Curnan v. Delaware, etc., R. Co.*, 138 N. Y. 480; *Sheldon v. Caples* (Tex. Civ. App. 1894), 26 S. W. Rep. 330.

When the party for whom the service is to be rendered, willfully delays and embarrasses the performance of the contract by the other party, who endeavors to complete it, and who is finally compelled to abandon the work, the rule that the special contract must control the rate of compensation no longer prevails, and the party is entitled to the actual value of his services, even though it is in excess of the measure of damages fixed by the contract. *Doughty v. O'Donnell*, 4 Daly (N. Y.) 60.

But see *Clark v. Scanlan*, 33 Ill. App.

48, and *Koon v. Greenman*, 7 Wend. (N. Y.) 121, where it was held that he could only recover according to the rate specified in the contract. See also *Rathbun v. Thurston County*, 8 Wash. 238, where it was held that in an action on a special contract, plaintiff's testimony that he was not permitted to do the work, justified a finding against him.

If the employer either prevents the contractor from completing the work, or refuses to permit him to complete it except on such conditions as he has no right to impose, he may recover the price of the work actually done. *Clark v. Franklin*, 7 Leigh (Va.) 1.

In *Jones v. Judd*, 4 N. Y. 411, it is said that where the completion of a job is arrested by the act or omission of the party for whom the work is done, the contractor has an election to treat the contract as rescinded, and recover on a *quantum meruit* the value of his labor, or he may sue upon the agreement and recover for the work completed at the stipulated price, and the loss in profits or otherwise sustained by the interruption. In this case a subcontractor was prevented from completing his contract to perform a portion of the work in constructing a canal by the work being stopped by the state officers and the original contract terminated by the legislature, and he was held entitled to recover the price agreed on for the work actually performed.

Where a person employed to move a building and place it upon a certain city lot is prevented by the city from fulfilling his contract, because no permission to place the buildings on said lot has been obtained from the city officers, he is, nevertheless, entitled to recover for the services actually rendered by him in attempting to move the building. *Theobald v. Burleigh* (N. H. 1891), 23 Atl. Rep. 367. But if the contractor is prevented from proceeding by the want of a license from the public authorities, he cannot pay the expense of the license and recover it from the employer without the latter's request. *Thorp v. Ross*, 4 Abb. App. Dec. (N. Y.) 416.

damages he may have sustained by such action,¹ and need not

In *Cargain v. Everett*, 62 Hun (N. Y.) 620, the plaintiff agreed to paint a house for defendant for one hundred dollars, material to be supplied by the defendant. When the work was partially done the material gave out, and defendant neglected to supply more, and it was held that the plaintiff was entitled to recover a *per diem* compensation for the work done.

Where the special contract is in existence and open, the contractor cannot sue on a *quantum meruit*, but where the employer prevents performance, the contractor may treat the contract as abandoned. *Planche v. Colburn*, 8 Bing. 14; 21 E. C. L. 203.

Where the employer prevented the plaintiff from completing his contract to put in an elevator, the latter was allowed to recover the value of his work and materials, *Ellithorpe Air-Brake Co. v. Sire*, 41 Fed. Rep. 662; and where the completion of a contract to remove a building was prevented by the failure of the employer to secure a permit, the contractor recovered the value of his services. *Theobald v. Burleigh* (N. H. 1891), 23 Atl. Rep. 367.

Where a party abandons his contract in pursuance of notice from his employer, and seeks other employment, he cannot be forced to abandon such employment by a subsequent notice from his employer to proceed to perform the first contract. *Rayburn v. Comstock*, 80 Mich. 448.

In *Gastlin v. Weeks*, 2 Ind. App. 222, the plaintiff contracted to clear and grade a certain tract at so much per acre. After part performance, the parties disagreed as to the contract, and defendants refused to pay for the work, unless plaintiff would perform it according to their interpretation. It was held that when the work had been accepted plaintiff was entitled to prove under a *quantum meruit* that it was worth more than the contract price.

In *Curlee v. Reiger*, 45 Ill. App. 544, the plaintiff contracted to work for defendant for a certain time for a certain price. He left work with defendant's consent, and when he returned was told to go home, and when wanted he would be notified. He held himself in readiness to return to work, but received no notice from defendant, and it was held that full performance was waived.

Where, in an action on building con-

tracts, it appeared that defendants had refused to permit plaintiff to complete the work, it was held that questions as to the time defendant expended in supervising the completion of the work, or its value, introduced with the view of sustaining a counterclaim for the same, were inadmissible. *Stone v. Assip* (Brooklyn City Ct.), 18 N. Y. Supp. 441.

A charge that if there were a specific contract to perform certain labor, and defendants failed to perform their part of it, plaintiff would be entitled to the contract price for the work done; that, if plaintiff failed of his own fault, he would still be entitled in the same way, but would also be liable for any sum defendants would have to pay in excess thereof to have it completed; and that, if there were no contract, plaintiff would be entitled upon a *quantum meruit*, was held correct in *Gastlin v. Weeks*, 2 Ind. App. 222. See *Yarborough v. Davis* (Tex. App. 1891), 15 S. W. Rep. 713, where the evidence was held insufficient to sustain a verdict for the contractor.

1. *Derby v. Johnson*, 21 Vt. 17; *Black v. Woodrow*, 39 Md. 194; *Roberts v. Bury Imp. Com'rs*, L. R., 5 C. P. 311.

See *Dunn v. Barton*, 40 Minn. 415, where the findings as to damages were held insufficient and a judgment based thereon not sustained.

But where the contract provides that a suspension of the contract by the employer shall give the contractor no claim for damages, a suspension, in good faith, will not relieve the contractor from his undertaking. *Snell v. Brown*, 71 Ill. 133.

Where an agreement between D and E stipulates that E is to do certain work on D's house, who is to furnish the materials, and the work is commenced, but suspended through failure of materials, and E leaves work promising to return and complete the job as soon as D shall notify him that he has materials ready, such notice is ineffectual to support an action for breach of contract, unless, in fact, D had the materials ready; but E would not be entitled to recover the whole contract price, on D's failing to supply materials, but only damages for loss of the job, loss of other work, etc.; and where the contract price has been paid in ad-

prove readiness and ability on his part to perform.¹ The fact that the employer afterwards gives the contractor notice to proceed with the work does not affect his right to recover.²

vance, he is not entitled to retain it after abandonment of the contract for such breach, but only so much as will indemnify him in damages. *Hood v. Raines*, 19 Tex. 400.

Plaintiffs contracted to cut and remove a quantity of wood from grounds to be used by defendants as a reservoir, agreeing to accept the wood in part payment for their undertaking. The whole of the work was to be completed on or before November 1, 1889. Plaintiffs sued to recover the value of cord-wood lost, and increased cost in clearing the land by reason of defendants prematurely flooding the same, and it was held that the defendants had no right to interfere with plaintiffs' performance of their contract by flooding the ground before the end of the prescribed time, and were liable to the plaintiffs for the damages caused them thereby. *Pennell v. New York* (Super. Ct.), 14 N. Y. Supp. 376.

Where a water company contracted for work to be done, and afterwards, because of a rise in the river and danger to some of its buildings, it desired to stop the work, it could do so only subject to liability for any injury thereby done to the other party. *Vicksburg Water Supply Co. v. Gorman* (Miss. 1892), 11 So. Rep. 680.

In an action for a breach of contract in refusing to permit the plaintiffs to complete a tunnel they had agreed to construct for the defendant, it appeared that, with the plaintiffs' consent, work thereon was suspended for a period as to the proposed length of which the evidence was conflicting; but, on February 11th following, the plaintiffs wrote to the defendant, asking whether they were to be allowed to complete the work. The defendant's notification in reply thereto, that the plaintiffs might begin work, was not given until the 19th of the same month, and the plaintiffs refused to do so, unless compensated for the unreasonable suspension of the work, having in the meantime secured other employment. It was held that the plaintiffs' letter was a waiver of the defendant's acts or omissions prior thereto, and it is a question for the jury whether the defendant's delay in answering it was unreasonable. *Sullivan*

v. New York, etc., Cement Co., 119 N. Y. 348.

Evidence.—In an action by a contractor for the balance due on a contract to build a house, which he was not allowed to complete, evidence that he had bought material which, by reason of its design, could not be used anywhere else, and had therefore been compelled to sell it at a loss, is admissible. *Wells v. Board of Education*, 78 Mich. 260.

Measure of Damages.—The contract price for the whole work—a job of hay pressing—was held to be the true measure of damages, where, through defendant's fault, the plaintiff had been prevented from full performance, and put to the same expense in time and money as if he had fully performed. *Wood v. Schettler*, 23 Wis. 501.

In *Meyer v. Hallock*, 2 Robt. (N. Y.) 284, it was held that the measure of damages should be determined by the price fixed in the original contract.

Prospective Profits.—The contractor cannot recover for prospective profits, unless he is absolutely prohibited by some act or omission of the employer from completing his part of the contract. *Christian County v. Overholt*, 18 Ill. 223.

In *Nourse v. U. S.*, 25 Ct. of Cl. 7, the plaintiff contracted with the government for the conversion of smooth-bore into rifled cannon. Work on the contract was suspended by order of the government, and a supplementary contract was entered into, compensating the contractor for the work already done, and allowing him to have the completion of the contract, if the government should decide to have it done. Several years after, the plaintiff brought suit to recover for damages sustained by not being permitted to complete the work, and it was held that such supplementary contract did not supersede the original, but kept it alive, and that he was entitled to the profits he would have realized under the original agreement.

1. *Howell v. Gould*, 2 Abb. App. Dec. (N. Y.) 418.

2. *Rayburn v. Comstock*, 80 Mich. 448. In this case the contractor had in the meantime employed all his means and teams under another contract.

Where the employer, prior to the commencement of the work, refuses to carry out the contract, the contractor cannot proceed with the work and recover the contract price, but must leave matters as they stand and sue for a breach of contract.¹

c. *DESTRUCTION OF WORK.*—One contracting to furnish the materials and labor, and construct an entire work, is not excused from the performance of the contract by the destruction of the work, whether from his own negligence or unavoidable accident, and not only can he recover nothing for the value of his labor and materials,² but is liable to an action by the employer for money

The suspension of work by the party for whom it was to be done, until after the time when the work was to be completed, releases the other parties from obligation to complete the work under the contract, and puts an end thereto; but the party thus suspending the contract is liable for a breach of it. *Kugler v. Wiseman*, 20 Ohio 361.

1. In *McGregor v. Ross*, 96 Mich. 103, it was held, where the employer first broke the contract, that the contractor could not perform so much of it as he saw fit, and recover the value of the work he did, but must either abandon the contract altogether, and sue for the work already done, and damages for the breach, or continue, under the contract, to do as much work as he was permitted to do, and recover damages for the interruption.

Where a person contracts to do a certain amount of work, at a stipulated price, upon materials to be furnished by his employer within a specified time, and is ready and willing to perform, but is prevented by the failure of the employer to furnish materials as promised, he is entitled to only compensatory damages. And if, during such time, he was offered other employment of the same kind, he cannot claim the amount of profits he would have had if the contract had been fully performed by both parties. *Heavilon v. Kramer*, 31 Ind. 241.

2. *Eaton v. Joint School Dist.* No. 3, 23 Wis. 374; *Partridge v. Forsyth*, 29 Ala. 200; *Drake v. Goree*, 22 Ala. 409; *Brumby v. Smith*, 3 Ala. 123; *Clark v. Busse*, 82 Ill. 515; *Fildew v. Besley*, 42 Mich. 100; 36 Am. Rep. 433; *Weis v. Devlin*, 67 Tex. 507; *Stover v. Allen*, 1 Heisk. (Tenn.) 486; *Galyon v. Ketchen*, 85 Tenn. 55; *Parker v. Scott*, 82 Iowa 266; *Newman Lumber Co. v. Purdum*, 41 Ohio St. 373; *Lawing v. Rintles*, 97 N. Car. 350; *Appleby v. Myers*, L.

R., 2 C. P. 651. And see *Anglo-Egyptian Nav. Co. v. Rennie*, L. R., 10 C. P. 271; 44 L. J. C. P. 130.

Where one contracts to build an addition to a house, and both the house and addition are destroyed by fire before the work is completed, the contractor cannot recover for the work done and materials furnished. *Fildew v. Besley*, 42 Mich. 100; 36 Am. Rep. 433. And if one contracts to erect a building upon a certain lot, and by reason of a latent defect in the soil the building falls down before it is completed, the loss falls upon the contractor. *School Trustees v. Bennett*, 27 N. J. L. 513; *Ingle v. Jones*, 2 Wall. (U. S.) 1; *Stees v. Leonard*, 20 Minn. 494.

The loss falls on the contractor if the building is destroyed before completion and delivery to the owner, unless the latter accepts the house when nearly but not entirely completed. *Galyon v. Ketchen*, 85 Tenn. 55.

Where there is no provision in a building contract against accident or inevitable necessity, the contractor cannot recover a sum retained by the owner as security for the faithful completion of the work, though the house, when nearly completed, was destroyed by fire without the contractor's fault. *Cutcliff v. McAnally*, 88 Ala. 507.

One who contracts to build a house, the last installment of the cost to be paid him "on completion of the work," cannot claim such installment if the house was destroyed by fire before the second coat of paint was on the house, all the doors hung, the fastenings put on the front doors and windows, or the building delivered to the owner. *Clark v. Collier*, 100 Cal. 256.

The plaintiffs contracted with the defendant to erect machinery upon his buildings and premises, and in his occupation, for a specified sum, and to keep the whole in order under fair wear

advanced upon the contract,¹ and for damages for its non-performance.² But this rule can have no application to a subcontractor, who has simply undertaken to do a distinct portion of the work, and, where he has substantially performed all the work his contract calls for, he can recover therefor from the principal contractor, notwithstanding the destruction of the building before the entire work is completed.³ So, also, where one contracts to do a specific portion of the work, such as the carpenter work in the

and tear for two years. When the machinery was only partly erected, a fire accidentally broke out in the buildings, and, without any fault by either party, destroyed both the buildings and machinery then erect thereon. It was held that the plaintiffs were not entitled to recover anything in respect of any portion of the machinery which had been erected and destroyed, as the whole work contracted to be done by them had not been completed. *Hughes v. Lenny*, 5 M. & W. 183; 2 H. & H. 13.

Where a contract for erecting a building provides that payment shall be made in installments, as successive portions of the work are completed, if the building is destroyed by inevitable accident before finished, the builder is entitled to be paid such installments as have been fully earned; but he cannot claim any portion of the next installment not fully earned. *Richardson v. Shaw*, 1 Mo. App. 234.

In *Appleby v. Myers*, L. R., 2 C. P. 651, the plaintiffs had contracted to erect certain machinery on the defendant's premises, at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by fire, and it was held that both parties were excused from further performance, but that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not.

E. agreed with M. to do all the carpenter's work upon his dwelling at a stipulated rate; the lumber was furnished by M., sent to the workshop of E., and there prepared to be put into the house, when it was destroyed by fire. The lumber destroyed was insured in the name of M. Other lum-

ber was furnished by M. and prepared and placed in the building, which was duly completed and paid for. Upon an action being afterwards brought by E. for the value of his work and labor upon the lumber destroyed, it was held that he was not entitled to demand payment for any carpenter work until the same was put into the dwelling; that the fact that M. had received the amount of the insurance upon the lumber did not render him liable to E. on account for money had and received; and that E. had also an insurable interest in the lumber as bailee, to the value of his work done upon it, and, having failed to effect an insurance thereon, must bear the loss. *Eichelberger v. Miller*, 20 Md. 332.

1. *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349; *Trenton v. Bennett*, 27 N. J. L. 513; *Butterfield v. Byron*, 153 Mass. 517.

It is immaterial that, by the terms of the contract, payment is to be made in installments as the work progresses. *School Trustees v. Bennett*, 27 N. J. L. 513.

The payments are mere advances on account of the entire sum. *Butterfield v. Byron*, 153 Mass. 517.

2. *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349; *Stees v. Leonard*, 20 Minn. 494; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530; *Adams v. Nichols*, 19 Pick. (Mass.) 275; 31 Am. Dec. 137. This last case was an action upon a penal bond conditioned to perform the contract.

In *School Trustees v. Bennett*, 27 N. J. L. 513, *Whelpley, J.*, said: "No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

3. *Clark v. Busse*, 82 Ill. 515; *Schwartz v. Saunders*, 46 Ill. 18.

erection of a building, which he completes before the work is entirely completed by the other contractors, and it is destroyed, he may recover.¹

Where work is to be done upon a building which is not wholly the property of, or in the control of, the contractor, or for which he is not solely accountable, as where repairs are to be made, or he is to do only certain portions of the work, the agreement upon both sides is upon the implied condition that the building shall continue in existence, and its destruction without the fault of either party will excuse performance, leaving to neither party the right of recovery of damages against the other,² and the contractor may recover for the work and labor performed under the contract.³ So, also, if the work is destroyed through the

1. In *Garretty v. Brazell*, 34 Iowa 100, the plaintiff contracted to do the carpenter work in the erection of a building and furnish the materials therefor. Having performed all the work except a minor part which was to be done after the plastering, the building was turned over to the employer for that purpose, and while thus in his possession was blown down, and it was held that as he had performed his work in a workmanlike manner, he was entitled to recover therefor, and that the loss resulting from the accident fell upon the owner.

But the contractor cannot recover for carpenter's work until it is put into the building, and hence, where lumber was destroyed while being prepared for the building at the shop of the contractor, it was held that he could not demand payment therefor. *Eichelberger v. Miller*, 20 Md. 332.

2. *Butterfield v. Byron*, 153 Mass. 517; *Lord v. Wheeler*, 1 Gray (Mass.) 282; *Gilbert, etc., Mfg. Co. v. Butler*, 146 Mass. 82; *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415; *Taylor v. Caldwell*, 3 B. & S. 826; *Menetone v. Athawes*, 3 Burr. 1592. And see *CONTRACT*, vol. 3, p. 901.

Where one contracted to build a bridge and bound himself to keep it in repair for a term of three years, he is not liable to rebuild if the bridge is destroyed by fire. *Livingston County v. Graves*, 32 Mo. 479. But see, *contra*, *Brecknock, etc., Canal Nav. Co. v. Pritchard*, 6 T. R. 950.

And see, as to the lessee of a house covenanting to repair, *Bullock v. Dommitt*, 6 T. R. 650; *LEASE*, vol. 12, p. 1018.

3. *Lord v. Wheeler*, 1 Gray (Mass.)

282; *Wells v. Calnan*, 107 Mass. 517; *Haynes v. Second Baptist Church*, 88 Mo. 285; 57 Am. Rep. 413. And see *Appleby v. Myers, L. R.*, 2 C. P. 651; *Gilbert, etc., Mfg. Co. v. Butler*, 146 Mass. 82; *Schwartz v. Daegling*, 55 Ill. 342; *Whelan v. Ansonia Clock Co.*, 27 Hun (N. Y.) 557; *Wilson v. Knott*, 3 Humph. (Tenn.) 473.

In *Schwartz v. Saunders*, 46 Ill. 18, a distinction is drawn between a case where one contracts to erect an entire building and where he merely contracts to do a certain portion of the work, and hence, where one contracted to do the carpenter work upon a brick building, the masonry to be done by another, and after the brickwork was nearly completed and the carpentry partly done, the brick walls were blown down, it was held that the loss as to the carpenter work fell upon the employer. And see, to the same effect, *Hollis v. Chapman*, 36 Tex. 1.

Where there is not an absolute and indivisible contract to build a complete house for a specified sum, but only a contract to do a portion of the work and furnish a portion of the materials, the remainder to be otherwise provided for from time to time by the employer, although the price is a fixed aggregate sum and no payment is to be made until after the house is complete, and the building is destroyed by fire before the completion of the whole, the contractor may recover for the work and materials actually done and furnished by him. *Cook v. McCabe*, 53 Wis. 250; 40 Am. Rep. 765.

In *Niblo v. Binsse*, 1 Keyes (N. Y.) 476, it was held that if the owner of the building contracted for labor upon it, and before the work was completed

negligence of the employer.¹ If, by the terms of the contract, the risk of destruction is to be upon the employer, of course the contractor may recover.²

d. IMPOSSIBILITY OF PERFORMANCE.³—See the titles CONTRACT, vol. 3, p. 897 *et seq.*; IMPOSSIBLE CONTRACTS, vol. 10, p. 176.

the building was destroyed by fire, without fault of the contractor, the owner was in default and the contractor could recover for all that was done up to the time of the fire.

In *Rawson v. Clark*, 70 Ill. 656, the contractors agreed to manufacture, and put into a building then in process of construction, certain ironwork, but were prevented from completing their contract by the building being destroyed by fire without their fault. The court held that they could recover *pro tanto*, and without performing the balance of the contract.

In *Cleary v. Sohler*, 120 Mass. 210, a workman who had contracted to lath and plaster a building for a certain sum, had lathed the building and put on the first coat of plaster, when, without his fault, it was destroyed by fire. It was held that he could recover for his work under a count for work done and materials furnished. And in *Hollis v. Chapman*, 36 Tex. 1, the plaintiff, a carpenter, undertook to furnish materials and do the woodwork necessary to finish defendant's brick building, and to turn the building over to him complete by a given day for a specified gross sum; when the work was nearly completed the building was destroyed by fire without his fault, and it was held that the contract was apportionable, and that he was entitled to recover for the materials furnished and the work done.

In *Butterfield v. Byron*, 153 Mass. 517, a builder and a landowner entered into a contract by which the former was to make, erect, build, and finish a hotel upon the land, and the latter was to do the grading, excavating, stonework, brickwork, painting, and plumbing, and to pay each month seventy-five per cent. of the value of the work of the preceding month, the balance in thirty days after completion. Upon the building being destroyed by lightning shortly before completion, it was held that the contract was upon the implied condition that the building, when begun, should continue in existence until completed, and that neither party

could recover damages for nonperformance, but that each might recover from the other, the landowner for what he had paid on account, the builder for what he had done and furnished under the contract.

An action lies by a shipwright for work and labor done and materials delivered in repairing a ship, though burnt in dock before the repairs are completed. *Menetone v. Athawes*, 3 Burr. 1592.

Where a carpenter contracted to do the carpenter's work upon a wooden house, at certain specified prices per piece, the materials to be furnished by the employer as they should be wanted, and the building was destroyed before completion, it was held that the contractor could recover the price of the work actually done. *Clark v. Franklin*, 7 Leigh (Va.) 1.

Where the contract is for the builder to furnish material and perform labor in altering a structure already erected, according to specifications already agreed on, there being no agreement as to when payment should be made, and, without fault of either contracting party, the structure itself is destroyed by fire when the work of altering has been but partially performed, the owner must pay the builder a full compensation for the work done and materials furnished before the fire. *Weis v. Devlin*, 67 Tex. 507.

1. In an action to recover for labor and materials furnished under a contract to build four houses, which were destroyed before completion by the falling of a stone wall on another part of the defendant's lot, it was held that the contract itself implied an undertaking, on his part, that the place chosen was free from danger, unless the plaintiff had assumed the risk of danger from the condition of the property. If the loss was occasioned by an accident that could have been prevented by reasonable care, skill and expense, it should be borne by defendant. *Sinnott v. Mullin*, 82 Pa. St. 333.

2. *Sontag v. Brennan*, 75 Ill. 279.

3. Where a person contracts to put in

e. ENTIRE CONTRACT—ABANDONMENT.—Where the contract is an entire one and the work is voluntarily abandoned by the contractor without fault on the part of the employer, it is well settled that he cannot recover a *pro rata* compensation for the amount of labor actually performed,¹ but if the employer completes the work, and in doing so makes use of the materials of the

a pump, and drain certain grounds for a certain sum, he cannot recover if he only drains part of the grounds, though it may turn out to be impossible to drain the rest. *Brinkerhoff v. Elliott*, 43 Mo. App. 185.

A contractor agreed to bore a well, "barring bad weather or other unavoidable hindrances," till a certain depth was reached or impenetrable rock was encountered. When about half the agreed depth was reached, his auger broke near the lower end, and became fastened in the well. It was held that he was not entitled to recover for the number of feet bored, at the contract price, since he was not prevented by the employer, nor by encountering impenetrable rock, from performing his contract. *Barrett v. Austin* (Cal. 1892), 31 Pac. Rep. 3.

1. *Malbon v. Birney*, 11 Wis. 107; *Swift v. Williams*, 2 Ind. 365; *Kettle v. Harvey*, 21 Vt. 301; *Rogers v. Steele*, 24 Vt. 515; *Brown v. Kimball*, 12 Vt. 617; *Wooten v. Read*, 2 Smed. & M. (Miss.) 585; *Faxon v. Mansfield*, 2 Mass. 147; *Phelps v. Sheldon*, 13 Pick. (Mass.) 50; 23 Am. Dec. 659; *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Sickel v. Pattison*, 14 Wend. (N. Y.) 257; 28 Am. Dec. 527; *Cronin v. Tebo*, 71 Hun (N. Y.) 59; *Jennings v. Camp*, 13 Johns. (N. Y.) 94; 7 Am. Dec. 673; *Walden v. Eldred*, 58 Hun (N. Y.) 605; *Lantry v. Parks*, 8 Cow. (N. Y.) 63; *Allen v. Curless*, 6 Ohio St. 505; *Stewart v. Weaver*, 12 Ala. 538; *Walling v. Warren*, 2 Colo. 434; *Wade v. Haycock*, 25 Pa. St. 382; *Ingle v. Jones*, 2 Wall. (U. S.) 1; *Sinclair v. Bowles*, 9 B. & C. 92; 17 E. C. L. 340. And see *Bassett v. Child*, 11 Ill. 569; *Strauss v. Chesapeake, etc., R. Co.*, 7 W. Va. 368. But see *Sherman v. Conner* (Tex. Civ. App. 1894), 25 S. W. Rep. 321.

Where a building contract is entire, the work cannot be considered done nor the materials furnished until the contract is executed. *Edwards v. Derickson*, 28 N. J. L. 39; *Derrickson v. Edwards*, 29 N. J. L. 468; 80 Am. Dec. 220.

A contract to bore a well at the rate of one dollar a foot for the first five hundred feet, two dollars and seventy-five cents for the next one hundred feet, five dollars per foot for the next one hundred feet, and eight dollars per foot for the remaining distance necessary to obtain water, the well to be put in the same finished order as the contractor's best finished wells, does not authorize the contractor to abandon the work so long as it is practicable for him to continue boring, and the other party is willing that he should continue; and if the contractor abandons it before completion, he cannot recover for the work performed. *Stewart v. Weaver*, 12 Ala. 538.

If a builder abandons his contract in November, without justification, and does not offer to complete the same until the following spring, the delay in making such offer is too great to entitle him to recover anything on the contract. *Scheible v. Klein*, 89 Mich. 376.

Nothing is due upon an entire contract until the work is fully performed, and hence, until then, the creditors of the contractor cannot enforce an attachment against his demand for compensation. *Coburn v. Hartford*, 38 Conn. 290.

Where the duty consists of parts which are severable in their nature, a partial performance will sustain an action *pro tanto*, or constitute a good defense *pro tanto*. *Morgan v. Ward*, *Wright* (Ohio) 474.

Where the contractor, failing, leaves the building incomplete, the owner, to exercise the right of applying any unpaid installment to its completion, need not have the remaining work estimated by disinterested parties. Nothing in the *Louisiana Act of March 18, 1844*, No. 66, requires it. *Hall v. Wills*, 3 La. Ann. 504; *St. Louis Church v. Kirwan*, 9 La. Ann. 31.

Under a construction contract, providing that the company might reserve a percentage of pay, as security for complete performance, it was held that, by an abandonment of the work, the contractors forfeited only the reserved

contractor, it seems that the latter may recover their value.¹

percentage, and that the residue of the value of their work was due to them. *Miller v. Hubbard*, 4 Cranch C. C. 451.

The plaintiff contracted to fit up for the defendant a brewery at the house of a third person, the whole to be fixed complete for a certain sum, nothing being said about the time or mode of payment. When a portion of the work was done, the plaintiff refused to complete it without security, which the defendant refused to give. In an action against the defendant for not permitting the plaintiff to proceed with or complete the work, or paying for what was done, it was left to the jury to say by whose default the work was stopped. The jury having found a verdict for the defendant, the court declined to interfere. *Pontifex v. Wilkinson*, 2 C. B. 349.

Where a building contract provided that the contractors should furnish all materials, and complete the building by a specified day, or forfeit ten dollars for each day's delay, and that during the construction the owner might require alterations, for which a reasonable valuation should be added to or deducted from the contract price, it was held that the contractors were not justified in abandoning the contract after the date fixed for completing the building, on account of disputes respecting the kind of work being done, and materials used, and the alterations required, and because the owner refused to release them from liability on the forfeiture clause, though the latter was in error as to her claims. *Hutton v. Gordon* (Rockland County Ct.), 23 N. Y. Supp. 770; 2 Misc. Rep. (N. Y.) 267.

Where a subcontractor proposes to contractors to excavate a trench of certain dimensions under water for a specified sum, "the material so dredged to be deposited inshore, so as not to interfere with said trench," and the latter simply accept the offer, it is not the duty of such contractors to furnish such shore as a place of deposit for such dredged material, and the subcontractor is not justified in abandoning the contract because the shore inspector prevented him from depositing such material thereon. *Cronin v. Tebo* (Supreme Ct.), 24 N. Y. Supp. 644; 71 Hun (N. Y.) 59; *Barnard, P. J., dissenting*.

If the employer has accepted the part performance and derived benefit therefrom, he will be compelled to pay the

value of the work, not exceeding the contract price, to the extent which that value exceeds the damage he has sustained by reason of the failure to complete the work. *Yeats v. Ballentine*, 56 Mo. 530; *Lee v. Ashbrook*, 14 Mo. 379; 55 Am. Dec. 110; *Eyeraman v. Mt. Sinai Cemetery Assoc.*, 61 Mo. 489; *Kelly v. Rowane*, 33 Mo. App. 440.

But see *Munroe v. Butt*, 8 El. & Bl. 738; 4 Jur. N. S. 1231. In this case, by a building contract between A and B, it was stipulated that A should complete, for a specified price, certain works on certain houses of B, the whole to be completed on a specified day, and to be done to the satisfaction of a surveyor named, upon whose approval payment was to be made. A failed to complete the work. He sued B on the agreement for the agreed price, and for a reasonable price according to measure and value. There was evidence, on the trial, that B had resumed possession of the houses, and was so far enjoying the fruits of A's labor. It was held that there was no evidence in support of the claim, that he could not recover on the special count, not having fulfilled it; and that the mere fact of B's taking possession of his own land, on which buildings had been erected, or where repairs had been done, or alterations made to a building thereon, did not afford an inference that he had dispensed with the conditions of the special agreement under which the works were done, or of a contract to pay for the work actually done according to measure and value.

Where the contractor voluntarily and without cause abandoned a contract to build a house, before the completion thereof, and sued to recover the contract price, and the employer presented in offset a claim for work done and expense incurred by himself on said job, and for work necessary to be done thereon to complete the same, and for damage for the non-completion thereof by the plaintiff, which was allowed by the referee, the employer was held to have thereby received the equivalent for the performance of the contract, and the plaintiff was therefore entitled to recover the contract price. *Austin v. Austin*, 47 Vt. 311.

1. *Wooten v. Read*, 2 Smed. & M. (Miss.) 589; *Bayley v. Anderson*, 71 Wis. 417.

Where the employer fails to perform his portion of the contract, the contractor may abandon the work and sue for the value of that already performed,¹ and whenever he abandons the work for just cause he may recover.²

1. *Western Union R. Co. v. Smith*, 75 Ill. 496.

A person performing a building contract may, on the refusal of the other party to comply with his stipulation to pay an installment of money when due, abandon the further performance of the contract, and sustain an action to recover for the work already performed. *Geary v. Bangs*, 138 Ill. 77, *affirming* 37 Ill. App. 301; *Schwartz v. Saunders*, 46 Ill. 18; *Scheible v. Klein*, 89 Mich. 376; *Grand Rapids, etc., R. Co. v. Van Deusen*, 29 Mich. 431. And see *Shaw v. Lewiston, etc., Turnpike Co.*, 3 P. & W. (Pa.) 445; *Dobbins v. Higgins*, 78 Ill. 440; *Mugan v. Regan*, 48 Mo. App. 461; *Pigeon v. U. S.*, 27 Ct. of Cl. 167; *Wharton v. Winch*, 140 N. Y. 287.

In *Bennett v. Shaughnessy*, 6 Utah 273, the plaintiff contracted to excavate a tunnel twelve hundred feet in length for a certain sum, the defendants agreeing "to receive said tunnel one hundred feet at a time, and pay" the plaintiff "one thousand dollars upon the completion of each one hundred feet." The defendants paid on the completion of the first hundred feet, but failed to pay for the second hundred feet, and the plaintiff discontinued the work. It was held that he could recover for the work already done and materials furnished, the payment of the one thousand dollars being a condition precedent to the further prosecution of the work.

A party contracting with a corporation is justified in abandoning the work under the contract provided to be done, where he is informed upon the part of the corporation that there is no money to meet the payments due him. *Cunningham v. Massena Springs, etc., R. Co.*, 63 Hun (N. Y.) 439. But the mere failure to pay an installment as it becomes due does not amount to prevention, and will not authorize the contractor to abandon the work. *Cox v. McLaughlin*, 52 Cal. 590.

Where a contract for building a sewer stipulated that the rock taken from the necessary excavation should become the property of the contractor, except such part as should be necessary for the support and protection of the work, it was held that the

fact that a private owner, through whose property a portion of the sewer ran, would not permit the contractor to sell stone removed from such portion, did not entitle the contractor to rescind the contract, as the right to sell the stone did not accrue until the contract was completed. *Becker v. Philadelphia* (Pa. 1889), 16 Atl. Rep. 625.

When an entire contract to lumber several tracts of land is broken by the owner's sale of the one tract out of which the contractors expected to make their profit, these are not obliged to finish the other tracts in order to a suit on the contract, or else recover merely for money expended and the value of work done, but may abandon, and recover, as damages for the breach, the profits they would have made on the whole job. *Lee v. Briggs*, 99 Mich. 487.

Materials—Failure to Pay.—Where, by the terms of an agreement to furnish materials, payments are to be made from time to time, at time specified, if, upon specific demand of payment, with notice that it will be insisted on as a condition of further delivery of materials, payment is refused, the other party may properly refuse to continue to furnish materials. *Palmer v. Breen*, 34 Minn. 39.

2. Where an entire contract with master carpenters, for building an addition to a house within a stipulated time and for a gross sum, provides that the materials for the work shall be furnished by the owner, but not where they are to be delivered, and the owner delivers the finishing stuff upon the premises, notwithstanding the request of the builder to deliver it at their workshop in another part of the city, to be worked, and refuses to permit them to take it at their own expense to their workshop, where it can be worked more advantageously for both parties, the carpenters, having framed and raised the addition, are entitled to recover for the work by them done, although they abandoned the contract, after due notice to the owner that they should do so unless permitted to work the finishing stuff at their own workshop. *Greene v. Haley*, 5 R. I. 260.

f. WAIVER OF ENTIRE PERFORMANCE.—Where the employer dispenses with performance of portions of the work, the contractor may recover for the part actually done.¹

5. Specific Performance.—It is now very generally settled that courts of equity will not enforce the specific performance of working contracts, since there is usually an adequate remedy at law by means of damages, and it would be impracticable, if not impossible, for the officers of the court to enforce the decree.² Some earlier cases have held, it is true, that specific performance of

And see *Hollister v. Mott*, 132 N. Y. 18.

A party agreeing to do work according to a certain plan cannot abandon the contract merely because the plan is an improper one. *Hooper v. Webb*, 27 Minn. 485.

See *Lambert v. Fuller*, 88 Ill. 260, where it was provided that the contract might be abandoned on certain conditions.

Where the plaintiff entered into a contract with the owner of a building to take it down, and, while at work within the building, it was stripped of sheathing, rafters, purlines, and braces, by the owner, so that the trusses and spars fell, killing two of the plaintiff's employees, and wounding another, it was held that he was justified in abandoning the contract. *Lynch v. Sellers*, 41 La. Ann. 375.

1. *Wilhelm v. Caul*, 2 W. & S. (Pa.) 26.

If part is accepted without the whole, the builder may recover such proportion of the price as the matter accomplished bears to the whole job, and any evidence showing the real value of the work in its incomplete state is admissible. *Freeman v. Campbell*, 22 Ga. 184.

2. *Justices v. Corft*, 18 Ga. 473; *Cobb v. Cromwell*, Phill. Eq. (N. Car.) 18; *Garrett v. Banstead, etc.*, R. Co., 4 De G. J. & S. 462; *Paxton v. Newton*, 2 S. & G. 437; *Kay v. Johnson*, 2 H. & M. 118; *Clark v. Glasgow Assur. Co.*, 1 Macq. H. L. Cas. 668; *South Wales R. Co. v. Wythes*, 24 L. J. Ch. 87; 3 W. R. 133; 3 Eq. Rep. 153, *affirming* 1 Kay & J. 186; 24 L. J. Ch. 1; 3 W. R. 3; 3 Eq. Rep. 70.

The court will not decree specific performance of a working contract which it is unable to superintend. *Greenhill v. Isle of Wight R. Co.*, 23 L. T. N. S. 885; 19 W. R. 345; *Peto v. Brighton, etc.*, R. Co., 1 H. & M. 468; 11 W. R. 874; 9 L. T. N. S. 227.

Romilly, M. R., in *Brace v. Wehnert*.

29 C. of L.—58

25 Beav. 351, said: "An agreement for building a house of a certain value is not one which this court will direct to be specifically performed. The court would have great difficulty in determining whether its decree had or not been performed, and it might lead to much litigation."

The court will not decree a specific performance of a preliminary building agreement, nor give damages for the breach of such agreement. *Wood v. Silcock*, 50 L. T. N. S. 251; 32 W. R. 845.

Where there is an agreement to do certain works, such works to be done to the satisfaction of a referee named, without specifying the nature, materials, or extent of such works, no decree for specific performance can be made upon such agreement. *London, etc., R. Co. v. Humphrey*, 6 W. R. 784.

The court has no jurisdiction to decree the specific performance of a contract, for which the consideration on the part of the plaintiff is the execution of certain works which the court is unable to superintend, and therefore, where a bill stated an agreement to employ the plaintiffs as contractors for making a railway and to pay for the works in debentures and shares of the company, a motion for an injunction to restrain the company from dealing with the debentures, and transferring the share to others in derogation of the plaintiff's rights, was refused. *Peto v. Brighton, etc., R. Co.*, 1 H. & M. 468; 11 W. R. 874; 9 L. T. N. S. 227.

Where the directors of a railway company entered into a written agreement to give G. "a contract for the construction of the line for £55,000, subject to a specification of the works on the line included in the sum to be agreed upon between G. and the engineer of the company, in case of a dispute the matter to be referred" to an arbitrator, and a bill was filed for spe-

an agreement to build may be decreed if sufficiently certain;¹ but this jurisdiction has been expressly denied in the later decisions.²

It is completely settled that there is no jurisdiction to compel repairs.³

6. Time of Performance—*a. GENERALLY.*—Provision is frequently made in working contracts for the completion of the work by a stipulated time, under penalties for delay,⁴ and this stipulation is a most important one, and should always be inserted.⁵ The failure of the contractor to complete the performance of the contract

cific performance, it was held that the terms of this agreement were too indefinite to be specifically enforced, but that even had the terms been sufficiently definite, the agreement was of such a nature that specific performance could not have been decreed. *Greenhill v. Isle of Wight R. Co.*, 23 L. T. N. S. 885; 19 W. R. 345.

1. *Mosley v. Virgin*, 3 Ves. Jr. 184; *Hepburn v. Leather*, 50 L. T. N. S. 660 (an agreement by the purchaser in a conveyance to build a wall on the land of the vendor other than that comprised in the conveyance).

In *Stuyvesant v. New York*, 11 Paige (N. Y.) 414, it was held that equity had jurisdiction to decree specific performance by the defendant of a covenant to make erections or improvements upon his own land for the benefit of the complainant, as the owner of adjoining property, and who had an interest in having such erections and improvements made, where the injury to him from the breach was of such a nature as not to be capable of being adequately compensated in damages.

A court of equity has jurisdiction to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. *Storer v. Great Western R. Co.*, 2 Y. & Coll. C. C. 48; 3 Railw. Cas. 106; 12 L. J. N. S. Ch. 65.

Some old cases have arisen where specific performance has been decreed against one covenanting to build upon land, *Allen v. Harding*, 2 Eq. Abr. 17; especially where a tenant has covenanted in his lease to build or rebuild. *London v. Nash*, 1 Ves. 12; 3 Atk. 512; *Pembroke v. Thorpe*, 3 Swanst. 437; *Cubitt v. Smith*, 10 Jur. N. S. 1123.

Specific performance of an agreement

by a railway to make such "roads, ways and slips for cattle as may be necessary," has been decreed. *Sanderson v. Cockermouth, etc.*, R. Co., 11 Beav. 497. Also one to construct a siding. *Green v. West Cheshire R. Co.*, L. R., 13 Eq. 44. And see *Wilson v. Furness R. Co.*, L. R., 9 Eq. 28; *Firth v. Midland R. Co.*, L. R., 20 Eq. 100; *Wells v. Maxwell*, 32 Beav. 408.

2. See SPECIFIC PERFORMANCE, vol. 22, p. 996.

In *Blanchard v. Detroit, etc.*, R. Co., 31 Mich. 43; 18 Am. Rep. 142, specific performance of a contract to erect a station at a certain place and run daily trains was refused.

And specific performance of an agreement to erect a public building upon the plaintiff's land was refused. *Kendall v. Frey*, 74 Wis. 26; 17 Am. St. Rep. 118.

3. *Beck v. Allison*, 56 N. Y. 366; 15 Am. Rep. 430; *Rayner v. Stone*, 2 Eden 128; *Hill v. Barclay*, 16 Ves. Jr. 405; 2 Story's Equity Jurisprudence 727. And see *Birchett v. Bolling*, 5 Munf. (Va.) 442.

4. See *infra*, this section, *Penalties and Liquidated Damages; Forfeitures.*

A provision of a contract that the contractors shall "proceed, with such diligence, and with such force of laborers, as the executive committee of the said company may direct, to perform the work," etc., is subordinate to, and qualified by, a provision requiring the work to be completed by a day named, and is intended to enable the company to compel completion by the day specified. *Grand Rapids, etc.*, R. Co. v. *Van Deusen*, 29 Mich. 431.

5. See Lloyd's Law of Buildings (2d ed.), § 34, where the author says: "In drawing a building contract it is generally advisable not only to bind the builder to complete his work within a certain time, but also to provide

by the time agreed upon, would, at common law, allow the employer to rescind,¹ but in equity time is not generally considered the essence of the contract, and the contractor is allowed to sue upon it, subject to the employer's right to show the damage, if any, which he may have sustained by reason of the delay.² The parties may stipulate, however, if they so desire, that time is to be made the essence of the contract, and that payment shall not be made unless the work is completed within the specified time, and such provision will be enforced.³ The employer must perform all things necessary on his part, and have the work in readiness for the contractor to begin within a reasonable time, and if

against all contingencies which may arise, making due allowances for extras which may be ordered, strikes of mechanics, bad weather, and other causes not under the builder's control."

1. *Morrison v. Wells*, 48 Kan. 494; *Parkin v. Thorold*, 16 Beav. 59.

2. *Smith v. Gugerty*, 4 Barb. (N. Y.) 614; *Homan v. Steele*, 18 Neb. 652; *Manville v. McCoy*, 3 Ind. 148; *Fruin v. Crystal R. Co.*, 89 Mo. 397; *Parkin v. Thorold*, 16 Beav. 59; *Littler v. Holland*, 3 T. R. 590; *Kingdom v. Cox*, 2 C. B. 661; 15 L. J. C. P. 95; *Wilson v. General Iron Screw Collier Co.*, 47 L. J. Q. B. 239; 37 L. T. 789.

In *Lucas v. Godwin*, 3 Bing. N. Cas. 737; 32 E. C. L. 309, *Tindal, C. J.*, said: "It (the completion of the work by the time specified) is not a condition, but a stipulation, for non-observance of which the defendant may be entitled to recover damages; but even if it be a condition, it does not go to the essence of the contract, and is no answer to the plaintiff's claim for the work actually done. It never could have been the understanding of the parties that if the house were not done by the precise day the plaintiff would have no remuneration. At all events, if so unreasonable an engagement had been entered into, the parties should have expressed their meaning with a precision which could not be mistaken."

The right of recovery for work under a written contract will not be construed to be conditional upon the compliance with a stipulation for the completion of the work by a fixed time, unless there is an express agreement to that effect, or unless, from a fair construction of the language employed, the nature of the contract and the attendant circumstances, it is apparent that the parties so intended. *St. Louis Steam Heating, etc., Co. v. Bissell*, 41 Mo. App. 426.

Here it was held that a stipulation to furnish a house with steam heating apparatus with all possible speed, was not a condition precedent.

In *Morrison v. Wells*, 48 Kan. 494, where payment was to be made upon the completion of the work by a given time, it was held of the essence of the contract.

Where the specifications and the contract differ as to the time of performance, the contract governs, as where the contract provided for the completion "without unnecessary delay as soon as ordered," and the specifications for the completion "within three months from the date of the contract." *Boteler v. Roy*, 40 Mo. App. 234.

Where the plaintiff made every reasonable effort to perform a building contract in the required time but failed to do so in some minor particulars, and the defendant took possession of the building when completed, and used it for the intended purpose, for which it was adequate, it was held that the plaintiff could recover the contract price less compensation to the defendant for the minor imperfections and omissions. *White v. Braddock Borough School Dist.*, 159 Pa. St. 201.

Measure of Damages.—Where a contractor fails to complete a building within the time specified, the measure of damages is the fair rental of the property for the time the owner is deprived of its use. Speculative profits are too remote to be allowed as damages. *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635.

Flooding.—It is not necessary for the plaintiff to allege or prove an offer to pay the amount which he had agreed to pay at the time when the work was to have been completed. *Lucas v. Snyder*, 2 Greene (Iowa) 490.

3. *Smith v. Gugerty*, 4 Barb. (N. Y.)

he fails to do so, the contractor may recover any damage resulting by reason of the delay.¹

614; *Morrison v. Wells*, 48 Kan. 497; *Warren v. Bean*, 6 Wis. 120; *Allen v. Cooper*, 22 Me. 135; *Fitzgerald v. Hayward*, 50 Mo. 516; *Tilley v. Thomas*, L. R., 3 Ch. 67; *Hudson v. Temple*, 29 Beav. 536; 30 L. J. C. 251; *Parkin v. Thorold*, 16 Beav. 59; *Maryan v. Carter*, 4 C. & P. 295; 19 E. C. L. 392; *Jones v. St. John's College*, 40 L. J. Q. B. 80; L. R., 6 Q. B. 115.

Parties have a right to make their own contracts, making the time of their performance material, so that failure to perform at the time will avoid the agreement. *Kemp v. Humphreys*, 13 Ill. 573.

Where parties entered into a contract to perform certain labor on a ditch of the company, one of the stipulations providing that if the work was not completed by a certain time they should forfeit the contract and all money due on the same, it was held that if the clause was inserted under a mistake as to the amount and difficulty of the labor to be performed, it was void. *Verzan v. McGregor*, 23 Cal. 339.

1. *Mansfield v. New York Cent., etc., R. Co.*, 102 N. Y. 205; *Lawson v. Wallace Local Board*, 52 L. J. Q. B. 302.

Where one contracts to do the carpenter work on a building, and to proceed forthwith without delay, the employer is bound to have the building in readiness to commence work within a reasonable time, and, if he fails to do so, the contractor may recover his damage by reason of the delay. *Allamon v. Albany*, 43 Barb. (N. Y.) 33; *Thorp v. Ross*, 4 Keyes (N. Y.) 546. So, where the employer is to furnish plans or do any other act before the contractor is to commence. *Roberts v. Bury Imp. Com'rs*, L. R., 5 C. P. 325.

He may recover the increased expense of doing the work in consequence of the delay on a *quantum meruit*, and does not waive the employer's breach of the contract by going on without complaint or objection, and completing the work. *Allamon v. Albany*, 43 Barb. (N. Y.) 33. And see *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285. But see *Geiger v. Western Maryland R. Co.*, 41 Md. 4.

But the contractor cannot himself incur the expense of removing the obstacle to his performance, and charge the employer therewith, without an agreement

by the latter to do the same. *Thorp v. Ross*, 4 Keyes (N. Y.) 546.

In *Haydnville Min., etc., Co. v. Art Institute*, 39 Fed. Rep. 484, it was held that where the contract provided for an extension of time in case delay was caused by other contractors, such a stipulation implied that there was to be no pecuniary compensation for such delay to the contractor. But see, *contra*, *Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333.

Where the plaintiff and the defendant were separate contractors in the construction of parts of a county jail, and the former agreed with the county to look solely to the other contractors for any damages caused by their delaying him, and the latter agreed to be liable for whatever damages were caused the others by delay, both contracts should be taken as one, and the defendant held directly liable to the plaintiff as upon a contract between them. *Grant v. Diebold Safe, etc., Co.*, 77 Wis. 72.

One who has contracted with a town for the erection of a building within a certain time may recover damages for its unreasonable omission to fix the site of the building, under a declaration alleging that it hindered him in the performance of the contract. *Blanchard v. Blackstone*, 102 Mass. 343.

One who agrees to furnish stone for a public building, and to cut it and dress it as "required," is entitled to damages for delays consequent upon doubts on the part of the public officials as to whether it was best to complete the building with that stone and on that site. *U. S. v. Mueller*, 113 U. S. 153.

Where a person employed to furnish all necessary labor and materials, and do everything specified under the head of mason's work, etc., in the erection of a building, the ironwork and stonemasons' work to be furnished by the employer, is delayed in the completion of his contract by the delay of his employer in furnishing the ironwork and cut stone, he will be entitled to recover damages occasioned by the delay, and such damages will not be waived by continuing the work until the completion of his contract. *Tobey v. Price*, 75 Ill. 645.

In *Swift v. U. S.*, 14 Ct. of Cl. 208,

b. REASONABLE TIME.—Where the time of performance is not specified the law will imply that it is to be within a reasonable time.¹

c. PARTICULAR WORDS.—The meaning of particular words

the contractor's acquiescence in the delay was deemed voluntary.

Where the parties to a building contract have waived performance within the time specified, the builder cannot abandon the contract and recover on a *quantum meruit* for the work done, until he has first demanded a performance upon the part of the owner and the latter has failed to perform within a reasonable time thereafter. *Lawson v. Hogan*, 93 N. Y. 39.

A provision of a contract that, at the completion of the work, the balance due shall be paid the contractor on his receipting for the same in full, and rendering clear receipts to the defendant company from all subcontractors, employees, and material men from all liability to them, exempts the company from liability to the contractor for damages recoverable against him, by a subcontractor, for breach of the subcontract, consisting in the delay of the company to have the road surveyed. *O'Connor v. Smith*, 84 Tex. 232.

Where a contract for the construction of a sewer by the plaintiffs for the defendant city, provided that the materials used should be strictly in accordance with the plans and specifications, and authorized the defendant city to appoint such person or persons to inspect the materials as might be deemed proper, it was held that a difference of opinion between the plaintiffs and the inspector as to whether the materials provided for the work conformed to the specifications, was an incident contemplated by the terms of the contract, and, therefore, the plaintiffs could not recover damages for delay in performing the work occasioned by the rejection by the inspector, in good faith, of materials which conformed with the specifications. *Montgomery v. New York* (Super. Ct.), 29 N. Y. Supp. 687; 9 Misc. Rep. (N. Y.) 331.

1. *Lehman v. Clark*, 33 Ill. App. 33; *Wilderman v. Pitts*, 29 Ill. App. 528; *Driver v. Ford*, 90 Ill. 595; *Fowler v. Deakman*, 84 Ill. 130; *Atwood v. Cobb*, 16 Pick. (Mass.) 227; 26 Am. Dec. 657; *Davis v. Tallcot*, 12 N. Y. 184; *McCartney v. Glassford*, 1 Wash. 579; *Liljengren Furniture, etc., Co. v.*

Mead, 42 Minn. 420; *Minneapolis Gas-light Co. v. Kerr Murray Mfg. Co.*, 122 U. S. 300; *Walling v. Warren*, 2 Colo. 434; *Ellis v. Thompson*, 3 M. & W. 445. And see REASONABLE TIME, vol. 19, p. 1089.

Where a person contracts to raft timber "as fast as same is put to the mouth of creek, and run timber as fast as water will permit," he can be required to do no more than perform his contract within a reasonable time. *Bonifay v. Hassell* (Ala. 1893), 14 So. Rep. 46.

Under an agreement by which the plaintiff was to put up a gas producer and furnace for the defendant, ready for use, for a specified sum on thirty days' trial, the time for completion not being expressed, it was the plaintiff's duty to perform the contract in a reasonable time, and the defendant's duty to make the trial within the time contemplated by the parties after the appliances were completed. *Turner v. Muskegon Mach., etc., Co.*, 97 Mich. 166.

A schooner having been carried a quarter of a mile up the beach by a storm, the master, on September first, entered into a contract with a landman experienced in moving houses, to launch her for one thousand dollars, to be paid when the launching was completed. The contractor, in several weeks, only moved the schooner twice her length, and then, abandoning this plan, hired a dredge to dig a canal; the dredge worked at intervals for some time, and then quit. On December fifth the dredge was again hired, and by December twenty-second had finished the canal up to the schooner's stern. After an unsuccessful effort at launching her, nothing more was done until January fourth, when the master notified the contractor that, unless the work was completed in one week, he would terminate the contract. On the expiration of the week, notice was given that other persons had been engaged to finish the job. With the new employees the master succeeded in launching the schooner by March ninth, and it was held that, in view of the time consumed by the latter, the delay of the original contractor was not unreasonable, and he

used in working contracts is much the same as when used in contracts generally, and have been elsewhere treated.¹

d. **PENALTIES AND FORFEITURES.**—As a general rule, the work is required to be completed within the time named, under penalty of the forfeiture of the contract, or the payment of a specified sum in damages.² Whether the sum specified shall be considered as a penalty or as liquidated damages, is a question of

was entitled to recover the reasonable value of his services. *Frame v. The Ella*, 48 Fed. Rep. 569.

1. After—See AFTER, vol. 1, p. 321. At—See AT, vol. 1, p. 890. Directly—See DIRECTLY, vol. 5, p. 670. Forthwith—See FORTHWITH, vol. 8, p. 571. From—See FROM, vol. 8, p. 981. Month—See MONTH, vol. 15, p. 712. On or upon—See ON, vol. 17, p. 183; UPON, vol. 27, p. 699. By a particular time, means before that time. *Rankin v. Woodworth*, 3 P. & W. (Pa.) 48. And see BY, vol. 2, p. 703.

As Soon as Practicable.—A contract to do a thing "as soon as practicable" implies that circumstances may occur which will delay the completion of it. The word "practicable" cannot be understood with regard to the means at the command of the contractors, for they may be entirely inadequate; but in ascertaining what was intended, the nature of the contract, the difficulties to be overcome, and the importance to the other party of the early completion of it, are to be considered. *Reedy v. Smith*, 42 Cal. 245.

As Soon as Possible.—A stipulation for the completion of work "as soon as possible" requires its completion within a reasonable time, or within such time as is reasonably necessary under the circumstances. *Florence Gas, etc., Power Co. v. Hanby* (Ala. 1893), 13 So. Rep. 343. And see AS, vol. 1, p. 777.

2. See *infra*, this title, *Penalties and Liquidated Damages; Forfeitures.*

Where one contracted to complete a piece of work by a certain date, the work to be begun within thirty days, it was held that the time stipulations were not conditions precedent, not being so made in terms, but only agreements for breach of which damages could be recovered if shown to result; and his failure to begin the work in the time fixed was no ground for interception, so long as he was continuing in good faith, and indicating no intent to abandon it. *Hambly v.*

Delaware, etc., R. Co., 21 Fed. Rep. 541.

Where the time has been extended, the employer cannot avail himself of a power to take the work out of the contractor's hands on grounds of delay till, or up to, a time within the extended period. *Mohan v. Dundalk, etc., R. Co.*, L. R., 6 Ir. 477.

Where the employer terminated the contract because not completed within the required time, and afterward had it completed by other parties at much lower terms, it was held that, as the employer had sustained no loss by the failure of the first contractor, the latter could recover the ten per cent. reserved out of the payments which had been made him. *Quinn v. U. S.*, 99 U. S. 30.

Under a contract for the erection of eight houses for twenty-one thousand two hundred dollars, to be completed in a certain time, providing that if the contractor "fail to complete the work upon any of the said houses . . . he shall pay . . . the full sum of five dollars per day for each and every day thereafter that the work upon either of the said houses shall so remain unfinished, . . . as liquidated damages," the payment is not five dollars per day for each house. *Denver Land, etc., Co. v. Rosenfeld Constr. Co.*, 19 Colo. 539.

Non-joinder of Co-defendant.—In *Lincoln v. Little Rock Granite Co.*, 56 Ark. 405, the plaintiff, being about to build a foundation for the defendant and another, agreed with them that if the foundation were not completed by a time named, he should forfeit a certain sum for each day of delay. The plaintiff completed the work, but after the time named, and sued the defendant for part of the cost. There was evidence that the other party to the contract had paid the plaintiff his portion, and it was held that the non-joinder of the other party to the contract as a defendant did not deprive the defendant of the right to claim the allowance for delay provided for by the contract.

construction.¹ The employer may set off such sums, where they are in the nature of liquidated damages, in an action by the contractor,² but if the delay has been caused by the default of the employer, the latter cannot recover therefor.³

c. *WAIVER OR EXTENSION OF TIME.*—The employer, of course, may waive performance within the stipulated time, or extend the time of performance,⁴ and such agreement requires no new

1. *Foley v. McKeegan*, 4 Iowa 1; 66 Am. Dec. 107.

In a building contract containing the usual clauses fixing the days for completing various parts of the work, a stipulation to the effect that any neglect to comply with the conditions of the contract, and finish the work as provided, shall be sufficient cause for the employer to claim damages at the rate of ten dollars for each and every day's detention so caused, may be regarded as covenanting for stipulated damages; and the owner is entitled to retain at that rate, for delay occurring without his contributory negligence or consent. *O'Donnell v. Rosenberg*, 14 Abb. Pr. N. S. (N. Y. C. Pl.) 59.

2. *Marshall v. Hann*, 17 N. J. L. 425; *Huckestein v. Kelly*, 139 Pa. St. 201; *Johnson v. White* (Tex. Civ. App. 1894), 27 S. W. Rep. 174; *Keogh Mfg. Co. v. Eisenberg* (C. Pl.), 7 Misc. Rep. (N. Y.) 79; 27 N. Y. Supp. 356; *Legge v. Harlock*, 12 Q. B. 1015; 18 L. J. Q. B. 45. And see *SET-OFF, RECOURTMENT, AND COUNTERCLAIM*, vol. 22, p. 209.

In an action on a building contract, where the defendant sets off a penalty stipulated for the plaintiffs' failure to complete the building by a certain time, and there is evidence that it was contemplated when the contract was made that the defendant should put in a siding to enable the plaintiffs to unload materials on the spot, it is misleading to charge that this siding could have been put in by the defendant in a day or two, where there was evidence that in order to do so, the lot would have to be graded. *Huckestein v. Kelly*, 139 Pa. St. 201.

3. *Russell v. Sa Da Bandeira*, 13 C. B. N. S. 149; 32 L. J. C. P. 68. In *Welch v. McDonald*, 85 Va. 500, the defendants contracted to furnish building stone for the plaintiffs according to the latter's plans and specifications, and agreed to pay five dollars per day for delay beyond a certain date, unless the delay was occasioned by circumstances beyond

their control, and it was held that the plaintiffs could recover nothing for the delay caused by their failure and refusal to furnish the defendants with a copy of the plans and specifications.

Where the answer in an action for the price of building materials sets up, as a counterclaim, damages stipulated in the contract between the parties for a failure to complete the delivery on a certain day, and it appears that the contract further provided that in case a delay should be caused by the defendant, then the time should be extended for a period equal to such delay, the plaintiff may show that the delay in delivery was caused by the defendant, though the complaint does not allege any excuse. *Keogh Mfg. Co. v. Eisenberg* (C. Pl.), 27 N. Y. Supp. 356; 7 Misc. Rep. (N. Y.) 79.

4. *Mundy v. Stevens*, 61 Fed. Rep. 77; 9 C. C. A. 366; *Luckhart v. Ogden*, 30 Cal. 547; *Smith v. Smith*, 45 Vt. 433; *Hutchinson v. New Sharon*, etc., R. Co., 63 Iowa 727; *Thornhill v. Neats*, 8 C. B. N. S. 831; *Wood v. Bernal*, 19 Ves. Jr. 220.

If the delay is assented to, recovery can be had. *Smith v. Gugerty*, 4 Barb. (N. Y.) 614; *Gallagher v. Nichols*, 60 N. Y. 438.

Where a contract provided that the plaintiffs should erect a building for the defendants before a certain date, for a specified price, to be paid in four installments, each payment to be made when certain work had been performed, and that, if the plaintiffs failed at any time to furnish sufficient material or workmen, the defendants, after three days' notice, might proceed with the work, and deduct the expense from the contract price, it was held that the fact that the plaintiffs were dilatory in the work from the beginning, did not entitle the defendants to refuse to pay the second installment when the same was fully earned, and afterward terminate the contract as for a breach thereof by the plaintiff, where the defendants had acquiesced in such delay

extraneous consideration to support it.¹ The waiver may either be by express agreement,² or implied from the action of the employer.³

up to the time such installment became due. *Smith v. Corn* (C. Pl.), 23 N. Y. Supp. 326; 3 Misc. Rep. (N. Y.) 545.

1. It is promise for promise, and such new and further agreement may be declared upon, and a recovery had for, such damages as the breach of it has occasioned, though in excess of what would have arisen under the original contract. *Hill v. Smith*, 34 Vt. 535.

2. If the agreement for extension is silent as to the duration of the extension of the time, the law implies that it shall be for a reasonable time. *Luckhart v. Ogden*, 30 Cal. 547.

Where the employers entered into a contract for the erection of a hotel by a given day, and, after that day, entered into a new contract, by which, in consideration of the delivery to them of the unfinished building as it stood, they agreed to pay the contractors the original contract price less a stipulated sum, it was held that they could not go behind the new agreement, and claim damages for the failure of the contractors to finish the work within the time fixed by the first contract. *Towson v. Reese*, 1 Tenn. Ch. 245.

3. The employer by accepting the work waives his right to object to the time of performance. *Cummings v. Pence*, 1 Ind. App. 317; *Adams v. Hill*, 16 Me. 215. And where payment was to be made upon the completion of the work at a given time, payment at that time, though the work was not complete, was held a waiver. *Paddock v. Stout*, 121 Ill. 571; *Meehan v. Williams*, 2 Daly (N. Y.) 367. But see *Shute v. Hamilton*, 3 Daly (N. Y.) 462.

The fact that the employer permits the contractor to go on with the work after the time limit, without expressing disapproval or dissatisfaction, does not waive his right to damages for the delay. *Oberlies v. Bullinger*, 75 Hun (N. Y.) 248; *Barber v. Rose*, 5 Hill (N. Y.) 76; *Smith v. Smith*, 45 Vt. 433. Nor does the fact that the builder of a house did not terminate a contract with a subcontractor for the latter's failure to complete his work within the time specified, prevent the builder from recovering, by way of counterclaim, damages for the delay. *Grannis, etc., Lumber Co. v. Deeves* (Supreme Ct.), 25 N. Y. Supp. 375; 72 Hun (N. Y.) 171.

A request to go on with the work, together with partial payments, after the workman's failure to complete a building within the time stipulated in the contract, constitutes a waiver of the owner's right to insist on a forfeiture. *Eyster v. Parrott*, 83 Ill. 517.

A provision in a building contract that the work shall be completed by a certain date is waived if there are departures by mutual consent from the original plan, or if, after the time prescribed by the contract has expired, the builder is notified to go on and complete. *Close v. Clark* (C. Pl.), 9 N. Y. Supp. 538.

Where the plaintiff contracts to complete a house "ready for occupancy" within sixty days, according to plans which do not require the finishing of the second story and putting on the last coat of paint, the effect of a subsequent contract, made after the sixty days have expired, to do the additional work, for an extra payment, is to waive the original stipulation to complete the work at a certain time, and substitute a stipulation for completion within a reasonable time. *Cornish v. Suydam* (Ala. 1893), 13 So. Rep. 118.

Where a contractor for the construction of a mill had completed the work, except as to certain corn rolls which did not work satisfactorily to the owner, and the latter wrote him a letter stating that whenever the rolls should do satisfactory work he would be ready to pay for the entire work, it was held to amount to a waiver of the time fixed by the contract for the completion of the entire work, and that a completion within a reasonable time thereafter was sufficient. *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128.

Allowing the contractor to go on and complete the work after the time stipulated, has been held a waiver. *Dunn v. Steubing*, 120 N. Y. 232.

A contractor agreed to build a house for B. by a certain time, and to pay himself from a mortgage to be negotiated by him. The house was not completed at the time stipulated, but the contractor was allowed to continue work for two months, when B. took possession. It was held that B. could not defend his suit in assumpsit for the value of work done and materials fur-

The effect of the extension of time is merely to substitute a new time for the old,¹ and the waiver of the condition as to time does not operate as a waiver of the other features of the contract.²

f. EFFECT OF EXTRAS AND ALTERATIONS.—Where, after the contract is entered into, additions to, or alterations in, the work, are made at the request of the employer, increasing the labor and requiring additional time, the time originally limited for the completion of the contract will be deemed to have been extended by the parties, if an extension is necessary for the protection of the contractor.³

g. EXCUSES FOR DELAY.—Where the delay is caused by the

nished, having waived the stipulation as to time, and having prevented him from negotiating a mortgage, by taking possession of the unfinished house. *Foster v. Worthington*, 58 Vt. 65.

Evidence of Waiver.—In an action on a building contract which provides that the contractor shall forfeit a certain amount for each day after a day on which he agrees to complete the building, if he does not complete it by that time, parol evidence that the defendant's superintendent, in ordering extra work, stated that he would not exact the forfeiture, is admissible as tending to show a waiver of such provision, but not for the purpose of showing a waiver in respect to other matters. *O'Keefe v. St. Francis' Church*, 59 Conn. 551.

Where a builder brought an action to recover for work done under a contract whereof time was the essence, alleging full performance of the contract on his part, and the defense was that the contract was not completed in time, it was held that evidence of the modification of the contract or waiver offered by the plaintiff by way of excuse, was inadmissible under the pleadings. *Elting v. Dayton* (Supreme Ct.), 17 N. Y. Supp. 849.

1. *Barclay v. Messenger*, 43 L. J. Ch. 449.

2. *Jacksonville, etc., R. Co. v. Woodworth*, 26 Fla. 368.

It waives nothing more than the time of performance. *Paddock v. Stout*, 121 Ill. 571.

3. *Smith v. Gugerty*, 4 Barb. (N. Y.) 614; *Green v. Haines*, 1 Hilt. (N. Y.) 254; *Bigler v. New York, etc., Transp. Co.* (Supreme Ct.), 5 N. Y. Supp. 347; *Van Buskirk v. Stow*, 42 Barb. (N. Y.) 9; *Doyle v. Halpin*, 33 N. Y. Super. Ct. 352; *Huckestein v. Kelly*, 152 Pa. St. 631; *Westwood v. Secretary of State for India*, 7 L. T.

N. S. 736; 11 W. R. 261; *Legge v. Harlock*, 12 Q. B. 1015; 18 L. J. Q. B. 45; *Kemp v. Rose*, 4 Jur. N. S. 919.

Thereafter the obligation is to finish within a reasonable time. *Green v. Haines*, 1 Hilt. (N. Y.) 254.

A party to a written agreement for building a house, the plan of which is subsequently altered by oral consent at his suggestion, so as to postpone the work without fixing any new time for its completion, cannot afterward object to its not having been completed at the time originally agreed upon. *Palmer v. Stockwell*, 9 Gray (Mass.) 237.

The plaintiff was not liable for delay in the completion of the building, where it was due to the fact that the defendant's architect either changed the plans and specifications, or failed to furnish necessary lines and levels, but was liable where the delay resulted from the condemnation of materials which he furnished and on which the architect was required to pass under the contract. *White v. Braddock Borough School Dist.*, 159 Pa. St. 201.

If, after a contract is made for building a bridge by a given day, the owner directs the contractor to do additional work requiring longer time, this time must be added to the contract time for completion. *Texas, etc., R. Co. v. Rust*, 19 Fed. Rep. 239.

The original plans for the construction of the piers of a bridge having been rendered impracticable by an act of Congress regulating the construction of the bridge, a new contract was entered into before the expiration of the time for the performance of the old contract, for the construction of the piers according to the altered plan, containing a special reference to description of, and price to be paid for, each pier, it being expressly provided that the work was to be done according to the original

negligence¹ or failure of the employer to perform his portion of the contract the contractor will be excused.² The rule is well-settled that where the work to be performed by the contractor

specifications. It was held that, as the plaintiff went to work under, and recognized as binding, the old contract, and now sought to recover for its alleged breach, the waiver of the company's right to annul the old contract did not affect its right to terminate it whenever the plaintiff in fact failed or refused to progress with sufficient speed, or in a proper manner, to complete the work in a reasonable time, or within the time agreed on, if any, when the new contract was made. *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303.

A house not having been completed until fourteen days after the stipulated time, but extra work having been required, it cannot be said, without evidence, that the delay was longer than required for the extra work. *Sweney v. Davidson*, 68 Iowa 386.

If a contractor agrees to execute not only the work specified, but also all alterations, within the time prescribed in the contract, there is no implied condition that the alterations shall be such as can reasonably be completed within the time. *Jones v. St. John's College*, 40 L. J., Q. B. 80; L. R., 6 Q. B. 115; *Weeks v. Little*, 47 N. Y. Super. Ct. 1.

Where a contractor undertook to execute works, with enlargement, etc., within a specified time, the architect having power to extend the time for completion in proportion to the extra work so ordered, and additions were ordered and executed, and caused delay in completion of the works beyond the time specified, but the architect did not extend the time, it was held that the contractor was bound to complete the works within the time specified and was liable to pay damages for non-completion within the specified time. *Tew v. Newbold-on-Avon Dist. School Board*, 1 C. & E. 260.

1. In an action by a contractor for constructing a building, the defendant cannot set off damages for the plaintiff's failure to complete the building within the time prescribed by the contract, where such failure was due solely to his own negligence. *White v. Fresno Nat. Bank*, 98 Cal. 166.

In an action on a contract to construct a water-tight tank, and place it in the defendant's laboratory in thirty

days or before, there was evidence that the plaintiff made such a tank, but could not gain access to the laboratory on the last day, that the defendant delayed performance for three days before actual notice from the plaintiff of readiness to perform, and for seven days thereafter, and that a leakage in the tank when put in place was caused by its exposure to heat in the plaintiff's shop during the delay. It was held that it was a question for the jury whether the plaintiff performed the contract in every respect except as prevented by the defendant. *Sylvester v. Wheeler*, 26 N. Y. Supp. 411; 74 Hun (N. Y.) 382.

But the performance of a contract to build a house for another on the soil of such person, and that the work shall be executed, finished, and ready for use and occupation; and be delivered over, so finished and ready, to the owner of the soil at a day named, is not excused by the fact that there was a latent defect in the soil, in consequence of which the walls sank and cracked, and the house, having become uninhabitable and dangerous, had to be partially taken down and rebuilt on artificial foundations. *Ingle v. Jones*, 2 Wall. (U. S.) 1.

2. If the owner refuses to permit the builder to complete his contract, the owner cannot complain of the delay. *Homebank v. Drumgoole*, 109 N. Y. 63.

Where a building contract containing a damage clause required the completion of the building by a certain time, delays chargeable to the owner or the architect in charge are excusable. *Wright v. Meyer* (Tex. Civ. App. 1894), 25 S. W. Rep. 1122.

The failure of the contractor to complete the work within the prescribed time is no bar to his recovery, where it appears that he could not prosecute the work on account of an overflow of water caused by the employers' non-compliance with their contract. *Skelsey v. U. S.*, 23 Ct. of Cl. 61.

In *King Iron Bridge, etc., Co. v. St. Louis*, 43 Fed. Rep. 768, the plaintiff contracted with the defendant to build a bridge "on the present stone piers," and bound himself to complete the work within ten months and one week after receiving notice to begin. The

cannot be performed until the other work provided to be done by the owner or his employees is finished, the failure of the latter to complete their work in season to enable the contractor to end his within the time limited by the contract, is a sufficient excuse for his delay.¹ So, the failure of the employer to obtain a building

defendant failed to prepare the piers to receive the bridge until eleven months after it had given the plaintiff notice to begin. It was held that such failure released the plaintiff from the obligation to complete the bridge within the specified time.

The provisions of a contract that it should be performed on a day named, and as stipulated damages the payment of a certain sum per day for each day's delay thereafter, do not apply where the delay is caused by the failure of the other party to the contract to perform on his part. *Davis v. Crookston Waterworks Power, etc., Co.* (Minn. 1894), 59 N. W. Rep. 482.

In *Maier v. Davis, etc., Lumber Co.*, 86 Wis. 530, the defendant contracted in writing to pay the plaintiff a certain amount for drawing lumber to the defendant's lumber yard, to furnish a wagon for such purpose, and to pay twenty-five cents additional on every one thousand feet if all should be delivered in a specified time. It was held that the plaintiff was entitled to recover the additional pay, though he did not deliver the lumber in the required time, if the delay was caused by the defendant's refusal to furnish a wagon and his failure to furnish the requisite facilities for unloading the lumber in the yard.

The contractor cannot excuse his failure to complete the work in time, on the ground that the company, when he had purchased material and contracted debts for labor on its credit, failed to meet its obligations, and thereby so impaired its credit that he could not dispose of its stock and bonds at a price that would afford him means to carry on the work. *Wood v. Boney* (N. J. 1891), 21 Atl. Rep. 574.

1. *Stewart v. Keteltas*, 36 N. Y. 388; *Weeks v. Little*, 11 Abb. N. Cas. (N. Y. Ct. App.) 415; *Guttman v. Crouch*, 134 N. Y. 585; *Taylor v. Renn*, 79 Ill. 181.

The fact that some work was delayed by the builder which was not affected by the employer's delay, does not alter the result, unless it be proved that there would have been delay in such inde-

pendent work, if the contractor had not been hindered. *Weeks v. Little*, 11 Abb. N. Cas. (N. Y. Ct. App.) 415.

Delay Caused by Other Contractors.—Where a contract for mason work to be done on a building by the plaintiff, provided that a certain payment should be made when the mason work was completed, and the plaintiff was delayed in his work on account of the delay of the work of another independent contractor, which had to be done first, and the plaintiff used all diligence in going on with the work after it was possible for him to do so, and went prepared to finish the job, when he was ordered off by the owner, who had put other men on the work, it was a substantial compliance, and entitled the plaintiff to his payment. *Highton v. Dessau* (P. Cl.), 19 N. Y. Supp. 395.

Where the contract provides that the contractor is not to excuse delay on account of any neglect of other contractors unless written notice of such neglect is given, and no such notice is given, a refusal to find that the contractor has been delayed six weeks by other contractors is proper. *Shute v. Hamilton*, 3 Daly (N. Y.) 462.

Where a party contracts to do the stonecutter's work of a building so as not to delay any of the other work, and to complete the same by a day named, and he is prevented from commencing the work by other contractors not having done their work, until about the time for the completion of his work, and he then proceeds under the contract, he will be bound by its provisions, except as to the time of completing his work, and for any unnecessary delay on his part thereafter he will be liable to respond to his employer in damages. *Graveson v. Tobey*, 75 Ill. 540.

A provision in the contract that the contractor shall have no claim by reason of delay on the part of the manufacturer in delivering pipes, etc., has no application where the pipes, when received, are found to be defective, thus entailing delay. *Wood v. Ft. Wayne*, 119 U. S. 312.

permit,¹ or to secure a right of way,² or to supply necessary materials,³ or to designate a day for commencing work,⁴ or, in fact, to do anything which he is called upon by the contract to do before the work is to commence, will excuse the contractor for his delay beyond the agreed period of completion.⁵ But after

1. *Deeves v. New York* (Super. Ct.), 17 N. Y. Supp. 460.

2. Where no time is specified for securing the right of way, it must be secured within a reasonable time, and it is sufficient to aver that it was not secured at the time it ought to have been. *Smith v. Boston, etc., R. Co.*, 36 N. H. 458.

The provision in a contract for the construction of a railroad that, in case the company is delayed in acquiring title to lands, or for other reasons, the contractor shall not be entitled to damages therefor, but shall have extension of time, does not apply to a delay caused by the company in failing to have a survey made for the work. *O'Connor v. Smith*, 84 Tex. 232.

3. Where the employer is to find the iron for building a ship, his failure to supply it in time will excuse the contractor for not completing the vessel in the time required. *Bulkley v. Brainard*, 2 Root (Conn.) 5.

4. *Deeves v. New York* (Super. Ct.), 17 N. Y. Supp. 460.

But where a party contracted to do a given job of work by a stipulated time, and in the contract was contained a provision that a portion of the work should not be done until directions were given to the other party, it was held that the power to suspend the doing of the work did not continue so long as to prevent the completion of it within the time agreed upon. *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285.

Work on a government contract was suspended by order of the government, and a supplementary agreement was made that the contractor might complete the contract should the government decide to have it done. It was held that the unreasonable delay of the government in deciding whether work should be resumed under the original contract was equivalent to an affirmative decision, and entitled the plaintiff to a recovery upon that basis, and the government, having ordered a suspension of the work, was not entitled to recover upon a counterclaim for failure to complete the work within

the time originally specified. *Nourse v. U. S.*, 25 Ct. of Cl. 7.

5. *Weeks v. Little*, 89 N. Y. 566; 11 Abb. N. Cas. (N. Y.) 415; *Starr v. Gregory Consol. Min. Co.*, 6 Mont. 485.

Delay in furnishing pipe according to a contract with the defendant is excused if it is occasioned by the discovery of defects in the specifications furnished by defendants' engineer, which made new specifications necessary, or by the failure of defendants to unload the pipe. *Wood v. Malone*, 131 Pa. St. 554.

Where, under a contract with the defendant, the plaintiffs were to commence the work therein provided for on a special date and failed to do so, it was competent for them to show that, though the defendant notified them at that date that it had been arranged for them to commence, it failed to make arrangements; such evidence being offered, not to change the terms of the contract, but to show the reason of their non-compliance therewith. *Texas etc., R. Co. v. Saxton* (N. Mex. 1893), 34 Pac. Rep. 532.

In an action on a building contract, where the defendant sets off a penalty stipulated for the plaintiffs' failure to complete the building by a certain time, and there is evidence that it was contemplated when the contract was made that the defendant should put in a siding to enable the plaintiffs to unload materials on the spot, it is not error to charge that the plaintiffs should be allowed additional time on account of the defendant's delay to put in such siding. *Huckestein v. Kelly*, 139 Pa. St. 201.

The defendants, having contracted to build a railroad, gave the plaintiff an oral subcontract to grade certain sections. The defendants were unable to have the work ready for the plaintiff at the time specified, because the railroad company had not then established the grade. It was held, in an action for special damages for breach of the contract, that it was a question for the jury whether the contract was upon condition that the railroad company

the employer has removed the impediment, the contractor must complete the work within a reasonable time.¹

The wrongful withholding of the monthly estimates upon which payment is to be made, will excuse delay,² as will also an unavoidable accident,³ or the act of God.⁴

should establish the grade in time. *Hammond v. Beeson*, 112 Mo. 190.

1. *Inter-Ocean Transp. Co. v. Sheriffs*, 54 Wis. 202.

In *McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575, it was held that the time began to run from the date the impediment was removed.

2. Where a building contract, in which there is a damage clause for non-performance by a certain time, provides for payment by the owner on monthly estimates, any delays caused by the wrongful withholding of the same are excusable. *Wright v. Meyer* (Tex. Civ. App. 1894), 25 S. W. Rep. 1122.

A contractor claimed that his failure to complete a railroad by the time limited was due to the company's refusal to pay the balance due him, and the failure of individual members to comply with promises of assistance. The only compensation agreed on was delivery of stock and bonds, and they were given to him on his estimates until the month before the contract expired, when he declared his inability to proceed further with the work unless more stock were issued him, or more funds raised, which was refused on the ground that he had already been overpaid. He claimed a balance due him, but, instead of insisting on it, he importuned the company to raise funds for the work, and offered to mortgage his own land for the purpose. It was held that his excuse that his failure to complete the road was due to the company's failure to pay him a balance due him was not established. *Wood v. Boney* (N. J. 1891), 21 Atl. Rep. 574.

3. *Bailey v. Stetson*, 1 La. Ann. 332.

Where a building contract provides for the completion of the buildings by a specified date, "provided there be no interference from labor strikes," the fact that the mechanics quit work upon the building on account of the contractor failing to pay them their wages as agreed does not release the contractor from completing the building by the time agreed upon. *McLeod v. Genius*, 31 Neb. 1. Nor is it an ex-

cuse where the strike takes place after the time stipulated for completion. *Hexter v. Knox*, 39 N. Y. Super. Ct. 109.

Where, by the contract, unavoidable accident is only to be allowed for upon written claim made at the time, it will not excuse delay where no written claim is made. *Brown v. Strimple*, 21 Mo. App. 338.

Delay in Other Parties.—In an action for damages from delay in completing improvements in the plaintiff's place of business, under a contract that they should be completed by a specified day, the witnesses for the defendant testified that the completion of the work was prevented by delay in the making of a tiled flooring, for which the plaintiff had contracted with other parties, and that the work was completed within three or four days after the tiling was finished, while the testimony for the plaintiff was that the delay in putting down the tiling did not in any way hinder the defendant from proceeding. It was held that a verdict for the defendant could not be set aside on appeal, and that the defendant was not necessarily liable for delay, because the work on the improvements agreed to be made was not commenced until after the time specified for its completion. *Franchi v. Brunswick-Balke-Collender Co. (C. Pl.)*, 13 N. Y. Supp. 294.

4. See *Deeves v. New York* (Super. Ct.), 17 N. Y. Supp. 460.

But the act of God, if relied on as a defense, must be pleaded. *Pengra v. Wheeler*, 24 Oregon 532.

It is no defense, in an action against the contractor's executors, for failure to complete the contract within the specified time, that the contractor died before the expiration of the time. *McDaniel's Appeal* (Pa. 1888), 12 Atl. Rep. 154.

Where a person contracts to build a building of a certain kind of stone, and to complete the same within a specified time, the impossibility of procuring the stone, to be an excuse for delay, must have existed when the contract was made. *Wright v. Meyer* (Tex. Civ. App. 1894), 25 S. W. Rep. 1122.

These rules are equally applicable to contracts between a principal contractor and a subcontractor.¹

7. Performance Subject to Approval—*a.* APPROVAL OF SUPERINTENDENT.—It is usually provided in building and construction contracts that the work shall be completed to the satisfaction of the superintendent, who is usually the architect or engineer, and shall be paid for upon the production of his certificate approving the work and valuing the amount done. This condition is perfectly valid, and is necessary to secure the owner from imposition by dishonest contractors, and enables him to rest satisfied that the work has been done to the satisfaction of some one thoroughly qualified to pass upon it.² The approval of the superintendent must, in such case, be obtained before any compensation can be recovered,³ which fact must be averred and

1. A builder who has failed to complete in time work which was required to be done on his part before the work of a subcontractor could be commenced, cannot complain that the subcontractor failed to complete his work within the time specified in the contract. *Grannis, etc., Lumber Co. v. Deeves* (Supreme Ct.), 25 N. Y. Supp. 375; 72 Hun (N. Y.) 171. And see *Hammond v. Beeson*, 112 Mo. 190.

2. *Boettler v. Tendick*, 73 Tex. 488; *Grafton v. Eastern Counties R. Co.*, 8 Exch. 699; *Goodyear v. Weymouth*, 1 H. & R. 67.

The provision for acceptance is an additional safeguard against defects not discernible by an unskillful person. *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449.

In *Clarke v. Watson*, 18 C. B. N. S. 278; 114 E. C. L. 278, Erle, C. J., said: "It is important that the person for whom the work has been done should not be called upon to pay for it until some competent person shall have certified that the work has been properly done, according to the contract and specification." This is a perfectly lawful and proper condition. It is properly made for the protection of both, by interposing the science and judgment of an expert to secure fidelity in the performance of the work, and in the use of suitable materials. *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 257.

3. *Denver, etc., R. Co. v. Riley*, 7 Colo. 494; *Richardson v. Mahon, L. R.*, 4 Ir. C. P. 486.

But his approval is only necessary to the extent required by the contract. Thus, in an action for services rendered in rebuilding the foundation of a mausoleum, it appeared that, under the

contract between the parties, all payments were to be subject to the architect's approval, and that the defendant might make "any alteration, deviation, additions, or omissions from the said contract" which should not avoid the contract, but be duly allowed for in payment. The foundation was not mentioned in the contract, and there were no specifications. It was held that, in the absence of proof that the rebuilding of the foundation was, in contemplation of the parties, a part of the work provided for by the contract, payment therefor was not subject to the architect's approval. *St. John v. Potter* (C. Pl.), 19 N. Y. Supp. 230.

A contractor is not entitled to recover for the value of work done, as to which, while incomplete, the architect has expressed approval so far as then partially executed, but which is not subsequently completed to the architect's satisfaction. *Richardson v. Mahon, L. R.*, 4 Ir. C. P. 486.

Where a building contract provided that the architect should determine all questions as to materials or work omitted, but, a question arising as to certain rosin, which was not put under the floors as required by the contract, the architect merely credited the account "by amount retained until rosin filling is properly put under floors, or until ascertained by whose fault the rosin was not properly put under the same," without determining this latter question, it was held that the owner was not entitled to credit for the amount, unless the failure to put the rosin under the floors was the builders' fault, and that this question was properly left to the jury. *Huckestein v. Kelly*, 152 Pa. St. 631.

proved in an action for the price,¹ and his decision is, in the absence of fraud, conclusive upon the parties.² If the one

Implied Approval.—The approval of the architect may be as well implied as express. Thus, where the architect, who is sole arbiter between the parties as to the character of the materials used, is present, and has knowledge of the character of the materials being used, and does not object at the time, it will be an approval of the same, which cannot be reversed to the injury of the contractor. *Wright v. Meyer* (Tex. Civ. App. 1894), 25 S. W. Rep. 1122.

In an action by a contractor for building waterworks, the defendant set up the contract, alleging that the work was not done in accordance therewith, and that it had not been accepted, as provided by the defendant's engineer. The plaintiff replied performance under the engineer's directions, and acceptance by actual taking possession of the works by the defendant, and failure of formal acceptance by the engineer. It was held that where the plaintiff's testimony tended to show the presence and directions of the engineer while the work was progressing, and a subsequent acceptance of the works as a whole by the defendant's officers, the court properly refused to withdraw the case from the jury. *Coon v. Citizens Water Co.*, 152 Pa. St. 644.

1. Where a contractor agreed to perform work to the satisfaction of a third person, it was necessary for him to aver and prove, in an action to recover the price stipulated to be paid for the work, that it was done to the satisfaction of the party designated in the contract. *Butler v. Tucker*, 24 Wend. (N. Y.) 447; *Barton v. Hermann*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 378.

2. *Moore v. Kerr*, 65 Cal. 519; *Tetz v. Butterfield*, 54 Wis. 242; 41 Am. Rep. 29; *Chapman v. Kansas City, etc.*, R. Co., 114 Mo. 542; *Messner v. Lancaster County*, 23 Pa. St. 291; *Hostetter v. Pittsburgh*, 107 Pa. St. 419; *Keller v. McCauley* (Pa. 1889), 18 Atl. Rep. 607; *Vanderwerker v. Vermont Cent. R. Co.*, 27 Vt. 130; *Zimmerman v. German Luth. Church*, 11 Misc. (N. Y. Super. Ct.) 49; *Dorwin v. Westbrook*, 86 Hun (N. Y.) 363.

Where a contract for work to be done provides that "the decision of the engineer in charge as to the quality and

quantity shall be final, and he shall be the sole referee," a court will not disturb the decision of such officer in the absence of fraud or such gross error as would imply bad faith. *Ogden v. U. S.*, 60 Fed. Rep. 725; 9 C. C. A. 251.

The acceptance of contract work bi-weekly, as it progresses, by the superintendent of a corporation, as done to his satisfaction in compliance with the terms of the contract, and a final acceptance of the whole in writing, is conclusive on the company in the absence of fraud or mistake on the part of the superintendent. *Sheffield, etc., Coal, etc., Co. v. Gordon*, 151 U. S. 285.

But his decision is only conclusive of those matters referred to him by the contract, and where a clause in a building contract provided that the architect's decision should be binding on both parties "as to the interpretation of the drawings and specifications, and as to the quality and quantity of work or materials, or any other matter connected with the work, furnishing materials, or in settlement of this contract," it was held not to include a claim for damages for unreasonable delay in performing the contract. *Michigan Ave. M. E. Church v. Hearson*, 41 Ill. App. 89.

The appointment of a person to see whether certain work was done according to contract, does not confer the power of a referee; and his opinion would not be conclusive. *McKinney v. Page*, 32 Me. 513.

Where a building contract stipulates that the materials shall be of a certain quality, and that the work shall be performed in the best manner, subject to the acceptance or rejection of the architect, all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted, the acceptance by the architect of a different class of work or of different materials will not bind the owner, as the provision for the acceptance by the architect is merely an additional safeguard for the benefit of the owner. *Lewis v. Yagel* (Supreme Ct.), 28 N. Y. Supp. 833; 77 Hun (N. Y.) 337.

Fraud of Superintendent.—Evidence that the architect, in accepting the work, acted collusively and in bad

designated to approve the work declines to act, the contractor may show that it is according to the contract.¹

6. APPROVAL OF EMPLOYER.—Where the contract, as it frequently does, provides that the work shall be performed to the satisfaction of the employer, it does not mean merely according to his private taste or liking, but what reasonably ought to satisfy him, and where he has accepted the benefit of the work he will not be allowed to avoid payment.² But where the employer, acting *bona fide* and not from mere caprice, refuses to accept the work, he cannot be compelled to pay for it.³

faith, is admissible. Vermont St. M. E. Church v. Brose, 104 Ill. 206.

1. Where a contract for the building of an electric plant provides that on its completion it shall be inspected and passed upon by a certain person, and such person declines to act, the builder may show that the quality of the work is according to the specifications. A. J. Anderson Electric Co. v. Cleburne Water, etc., Co. (Tex. Civ. App. 1894), 27 S. W. Rep. 504.

Where the employer has, prior to the completion of the work, discharged his architect, the contractor may recover on showing a substantial compliance with the contract. Griffith v. Happersberger, 86 Cal. 605.

Stipulations, in a railroad construction contract, that the engineer shall be the sole judge of the performance, do not prevent the contractor from recovering upon other evidence of performance, if the engineer refuses to measure or estimate the work done; nor do they govern as to extra work, work not called for by the contract. Starkey v. DeGraff, 22 Minn. 431.

2. Hawkins v. Graham, 149 Mass. 284; Sloan v. Hayden, 110 Mass. 143; Logan v. Berkshire Apartment Assoc. (City Ct.), 18 N. Y. Supp. 164; Doll v. Noble, 116 N. Y. 230; 15 Am. St. Rep. 398; Braunstein v. Accidental Death Ins. Co., 1 B. & S. 782; 101 E. C. L. 782; Dallman v. King, 4 Bing. N. Cas. 105; 33 E. C. L. 293; Parsons v. Sexton, 4 C. B. 899; 56 E. C. L. 897.

In Hawkins v. Graham, 149 Mass. 284, Holmes, J., said: "When the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases,

courts have been inclined to construe agreements of this class as agreements to do the thing in such way as reasonably ought to satisfy the defendant" (employer).

Where the work was to be performed to the full satisfaction of the architect and the satisfaction of the owner, it was held that the last provision had no reference to the quality of the workmanship or materials, and that as to these, in the absence of proof of fraud, mistake, or unfair dealing on the part of the architect, his acceptance of the work as satisfactory bound the owner. Tetz v. Butterfield, 54 Wis. 242; 41 Am. Rep. 29.

When a party has substantially complied with the terms of a contract which he is to perform to the satisfaction or approval of the other party, whereby the property of the latter has been benefited materially, the improvements and benefits being of such a character that they must be necessarily appropriated and retained by the party by whom they are made, the contractor is entitled to recover on his contract. O'Dea v. Winona, 41 Minn. 424.

3. Singlerly v. Thayer, 108 Pa. St. 291; 54 Am. Rep. 715; McCarren v. McNulty, 7 Gray (Mass.) 139; Andrews v. Belfield, 2 C. B. N. S. 779; 89 E. C. L. 779. In the last two cases the contract was for the manufacture of a chattel to the satisfaction of the employer, who refused to receive it, and received no benefit therefrom. And see also Moffatt v. Dickson, 13 C. B. 543; 76 E. C. L. 543.

Where the materials are to be approved by the employer before being used, the contractor must apply to him to approve them, or use them at his peril. Higgins v. Lee, 16 Ill. 495.

An action for work and labor in making a bookcase, which the plaintiff had agreed in writing to construct for the

c. CERTIFICATES OF APPROVAL—(1) *Condition Precedent to Recovery.*—It may be laid down as a general rule that a certificate of approval, when called for by the contract, is a condition precedent to the right of the contractor to recover compensation;¹

defendants, of a certain kind and dimensions, "in a good, strong, and workmanlike manner, to the satisfaction of" one of the defendants, was not maintained by proof that it was constructed according to the terms of the agreement, without also proving that it was satisfactory to, or accepted by, that defendant. *McCarren v. McNulty*, 7 Gray (Mass.) 139.

1. *Coey v. Lehman*, 79 Ill. 173; *Packard v. Van Schoick*, 58 Ill. 79; *Michaelis v. Wolf*, 136 Ill. 68; *Barney v. Giles*, 120 Ill. 154; *Fowler v. Deakman*, 84 Ill. 130; *McNamara v. Harrison*, 81 Iowa 486; *U. S. v. Robeson*, 9 Pet. (U. S.) 319; *Sweeney v. U. S.*, 109 U. S. 618; *Hanley v. Walker*, 79 Mich. 607; *Roy v. Boteler*, 40 Mo. App. 213; *Neenan v. Donoghue*, 50 Mo. 495; *Yeats v. Ballentine*, 56 Mo. 539; *Smith v. Briggs*, 3 Den. (N. Y.) 73; *Byron v. Low*, 109 N. Y. 291; *Barton v. Hermann*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 378; *Adams v. New York*, 4 Duer (N. Y.) 295; *Haden v. Coleman*, 42 N. Y. Super. Ct. 256; *Smith v. Brady*, 17 N. Y. 173; *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255; *Stewart v. Keteltas*, 36 N. Y. 388; *Wangler v. Swift*, 90 N. Y. 38; *Kirtland v. Moore*, 40 N. J. Eq. 106; *Byrne v. Sisters of Charity*, 45 N. J. L. 213; *Bannister v. Patty*, 35 Wis. 215; *Hudson v. McCartney*, 33 Wis. 332; *Clarke v. Watson*, 18 C. B. N. S. 278; 114 E. C. L. 278; *Morgan v. Birnie*, 9 Bing. 672; 23 E. C. L. 414; 3 M. & S. 76; *Scott v. Liverpool Corp.*, 3 De G. & J. 334; 5 Jur. N. S. 104; 28 L. J. Ch. 230; *Glenn v. Leith*, 1 C. L. R. 569; *Richardson v. Mahon*, L. R., 4 Ir. C. P. 486; *Ferguson v. Galt*, 23 U. C. C. P. 66. And see *Reg. v. McGreevy*, 18 Can. Supreme Ct. 371; *Walsh v. Walsh*, 11 Ill. App. 199; *Hopper v. Cutting* (C. Pl.), 13 N. Y. Supp. 820; *Butler v. Tucker*, 24 Wend. (N. Y.) 447.

A formal approval and acceptance by the architect, without a certificate, are not enough. *Schencke v. Rowell*, 3 Abb. N. Cas. (N. Y. C. Pl.) 42.

Where, by a contract, an engineer is interposed between the parties to it, and made the absolute judge of the performance of the work, there is no right in the one party to demand pay-

ment, and no liability on the other to pay, throughout the contract, unless the condition of obtaining a valuation by the engineer and his certificate has been fulfilled. *Scott v. Liverpool Corp.*, 4 Jur. N. S. 402; 27 L. J. Ch. 641.

Where a construction contract requires all work done on the road to be certified by the chief engineer, until he so certifies the contractors are not entitled to payment. *Jones v. Reg.*, 7 Can. Supreme Ct. 570; *McNamara v. Harrison*, 81 Iowa 486.

In *Reg. v. Starrs*, 17 Can. Supreme Ct. 118, the claimants made a contract for the construction of a bridge for a certain lump sum, and upon its completion the chief engineer made a final estimate, and payment was made. The claimants claimed for the value of work not included in the estimate, alleged to have been done in consequence of alterations ordered by the chief engineer, of such a nature as to create a new contract, but it was held that the claim came within the provisions of the original contract, making the certificate of the chief engineer a condition precedent to recovery, and such certificate not having been obtained, the claim could not be allowed.

In *Byron v. Low*, 109 N. Y. 291, no certificate of the engineer was produced, and no demand for one, or any refusal to give it, was proved, and it was held a condition precedent to the right to recover.

If an architect, subject to whose approval a building is erected, acting in good faith, fails and refuses to approve the work in any form, the general rule is that the contractor cannot recover. *Kane v. Wilson, etc.*, Stone Co., 39 Ohio St. 1; *Sweeney v. U. S.*, 109 U. S. 618.

But where a building contractor signed a writing by which the decision of the architect should be final as to any matter of difference between the parties, and making the contract price payable in installments on presentation of certificates of the architect, and the writing showed on its face that it was to be signed by the owner, but it was not in fact signed by him, it was held that the writing did not affect the

but the rule is otherwise where its production is waived¹ or fraud or collusion in withholding it is shown.² The rule is the same

contractor's right to sue for the value of his services, though the architect refused to give a certificate. *Keating v. Nelson*, 33 Ill. App. 357.

In *Davis v. Badders* (Ala. 1892), 10 So. Rep. 422, it was held that where the plaintiffs had contracted to build a house for the defendants, payments to be made only on the architects' certificates, and sued on the common counts, on an implied contract to pay for the labor and materials, they could recover although they had not obtained the architects' certificates.

And see *Willey v. Fractional School Dist.*, 25 Mich. 419, where it was held that provisions in a contract for the construction of a school building, requiring the certificate of the architect to the performance of the work, before payment, are not necessarily a condition precedent to the right of the contractor to recover for work which has been approved by the local superintendent of the work, employed by the district.

In *Packard v. Van Schoick*, 58 Ill. 79, it was said that the party applying for such estimate and certificate should give notice to the other of the time and place of a hearing in respect thereto. But see *Korf v. Lull*, 70 Ill. 420, and *Taylor v. Renn*, 79 Ill. 181.

Where the contractor claimed the right to maintain an action without regard to a certificate, an unreasonable time having expired without the filing of one, it was held that, since it appeared that on a certain day prior to the action a certificate was delivered to the commissioners, though the one offered in evidence by the defendant was not identified with it, a statement that a final certificate was filed on that day was not impeached by evidence that the certificate delivered to the commissioners was taken back and afterward a certificate was returned. *O'Brien v. New York*, 139 N. Y. 543.

A contractor sought to recover the price of certain ironwork, manufactured for a building which he was to put up, and be paid for upon the estimate of an architect; the building having been destroyed by fire before the same could be put up, and the plaintiff being in no default, it was held that the case contemplated for the architect's certificate never arose, and that a recovery could be had without it, accord-

ing to the contract price for the iron-work manufactured. *Rawson v. Clark*, 70 Ill. 656.

Final Payment.—But a provision in a contract for payment upon the architect's certificates as the work progresses, does not make a certificate by the architect a condition precedent to the final payment. *Braun v. Winans*, 37 Ill. App. 248; *Oberlies v. Bullinger*, 75 Hun (N. Y.) 248. Though where the contract provided for payment in six installments, the first three at various stages of the work, the fourth when the building was completed, the fifth, thirty days thereafter, and the last, six months thereafter, and that in each case a certificate should be obtained from the architect that the work was done in strict accordance with the plans and specifications, it was held that the certificate of the architect was necessary as to each of the payments, and that the fourth certificate, given after the completion of the building, was not conclusive as to the character of the work. *Michaelis v. Wolf*, 136 Ill. 68.

Absence No Bar to Damages for Breach.—A provision in a building contract requiring the production of the architect's certificate as a prerequisite to collecting compensation for performance, cannot defeat the contractor's right to damages for breach of the contract by the employer. *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23.

1. *Byrne v. Sisters of Charity*, 45 N. J. L. 213; *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255; *Barton v. Hermann*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 382; *Botterbury v. Vyse*, 2 H. & C. 42. And see *infra*, this title, *Waiver of Certificate*.

2. *Michaelis v. Wolf*, 136 Ill. 68; *Sweeney v. U. S.*, 109 U. S. 618; *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255; *Barton v. Hermann*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 382; *Schencke v. Rowell*, 3 Abb. N. Cas. (N. Y. C. Pl.) 42; 7 Daly (N. Y.) 286; *Hanley v. Walker*, 79 Mich. 607; *Bannister v. Patty*, 35 Wis. 215; *Hudson v. McCartney*, 33 Wis. 331; *Clark v. Watson*, 18 C. B. N. S. 278; 114 E. C. L. 277; *Botterbury v. Vyse*, 2 H. & C. 42. And see *infra*, this title, *Withholding Certificate*.

where a certificate as to extra work¹ or alterations is required.² But where it is the employer's duty to procure the certificate, its absence is no bar to a recovery where it is shown that the work has been completed to the satisfaction of the architect,³ and if the contractor has been compelled to abandon the work by the employer, he may recover the value of the work done without the certificate.⁴

The absence of the certificate is always a good defense to an action by the contractor upon the contract,⁵ who must either aver in the pleadings and establish by the evidence that he has complied with the condition and obtained the certificate, or offer a sufficient excuse for not doing so.⁶

Notwithstanding a building contract makes the certificate of an architect conclusive between the parties, evidence is competent that it has been given by collusion and fraud. *Smith v. White*, 5 Neb. 408.

If the contractor can show that the certificate was fraudulently withheld, or refused by the architect through collusion with the owner, or that the owner has waived it, it is said that he might be entitled to recover on showing, *prima facie*, that the agreement was, in other respects, performed. *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255.

Where a building contract makes the architect's certificate a condition of payment, payment is not due without such certificate, unless it be unreasonably withheld. *Beecher v. Schuback* (C. Pl.), 23 N. Y. Supp. 604.

If the contractors use all reasonable efforts to get the superintendent to make a certificate and are prevented by accident, fraud, or some unavoidable cause, they will be entitled to recover for their labor and materials such value as they prove themselves entitled to receive. *Mills v. Weeks*, 21 Ill. 561.

The contractor may prove a fraudulent purpose of the inspector in refusing a certificate; also his incompetency, he not having been named and agreed upon in the contract. *Sweeny v. U. S.*, 15 Ct. of Cl. 400.

1. *Fowler v. Deakman*, 84 Ill. 130; *Zimmerman v. German Luth. Church*, 11 Misc. (N. Y. Super. Ct.) 49.

If a contractor is to procure the certificate of the architect as to extra work done, before payment is to be made, he must do so or show a good reason for not doing it. *Mills v. Weeks*, 21 Ill. 561; *McNamara v. Harrison*, 81 Iowa 486.

Where the contract provided for the payment of a balance due within two months after receiving the architect's certificate that the whole of the building contracted for had been executed to his satisfaction, it was held to involve not only the original, but the additional, or extra, work, and that until the contractor obtained the architect's certificate of approval he could not recover. *Morgan v. Birnie*, 9 Bing. 672; 23 E. C. L. 414.

2. *Morgan v. Birnie*, 3 M. & S. 76; 9 Bing. 672, 23 E. C. L. 414. And see *infra*, this title, *Deviations and Alterations*.

3. *McKone v. Williams*, 37 Ill. App. 591.

4. *Byron v. New York*, 54 N. Y. Super. Ct. 411.

The plaintiff agreed to perform certain work and labor in shifting the track of a railroad, "under the directions, and to the satisfaction," of the city surveyor, whose certificate of such performance was to entitle him to payment. Before the work was completed it was stopped at a certain point by the surveyor, who drove a stake and directed that no work should be done beyond that point. It was held that the plaintiff might recover for the portion of the work performed. *Devlin v. Second Avenue R. Co.*, 44 Barb. (N. Y.) 81.

Where the contract has been forfeited, no certificate is necessary to recover for the work actually done. *Gillen v. Hubbard*, 2 Hilt. (N. Y.) 303.

5. The owner, in an action by the contractor for a larger sum than that certified by the architect, cannot obtain an injunction restraining the action, as the absence of the certificate can be as well pleaded in law as in equity. *Baron de Worms v. Meiller*, L. R., 16 Eq. 554.

6. *Michaelis v. Wolf*, 136 Ill. 68;

There is no difference between law and equity as to the construction or operation of such an agreement.¹

(2) *By Whom Given.*—The one filling the office of superintendent at the time the decision is called for is the proper one to give the certificate, and not one who held the office at the time the contract was made.² The certificate must be signed by the superintendent, and not by his assistant.³

Wangler v. Swift, 90 N. Y. 38; *Dinsmore v. Livingston County*, 60 Mo. 244; *Bayse v. Ambrose*, 32 Mo. 484; *Roy v. Boteler*, 40 Mo. App. 222.

The complaint in an action on such a contract must allege the making of the certificate, or else a legal reason dispensing with it. Nor is a mere allegation of the plaintiff's complete performance, or of the defendant's acceptance of the work sued for, enough. *Schencke v. Rowell*, 3 Abb. N. Cas. (N. Y. C. Pl.) 42.

Where the contractor sues without the certificate, alleging bad faith and collusion, such allegations must be proved before there can be any recovery, unless the common counts are also filed. *Fowler v. Deakman*, 84 Ill. 130.

In an action to recover the last payment on a building contract providing for such payment on the architect's certificate, where it appeared that the employer undertook the completion of the work himself, under a provision of the contract, thereby rendering the architect's certificate unnecessary, to enable the plaintiff to recover the difference between the last installment and the amount expended in completing the work, the court erred in dismissing the complaint for failure to aver that the architect's certificate was unreasonably withheld. *Weeks v. O'Brien*, 141 N. Y. 199.

In an action on a building contract which provided that no money should be due and payable unless certified to by the architect, a declaration by the builder which sets out the contract, and alleges that he "performed each and every requirement by him contracted, as set forth in the contract," is sufficient without alleging a certificate from the architect. *McClell. Dig.*, p. 826, § 59 (*Florida Rev. Stat.*, § 1045), provides that it shall be lawful to aver, generally, performance of conditions precedent, and that the opposite party shall not deny such averment generally, but must specify the conditions precedent,

the performance of which he intends to contest. *Wilcox v. Stephenson*, 30 Fla. 377.

1. *Scott v. Liverpool Corp.*, 3 De G. & J. 334; 5 Jur. N. S. 104; 28 L. J. Ch. 230.

The rule requiring compliance with such condition, or an excuse for non-compliance, applies as well to a proceeding in equity as a suit at law. *Michaells v. Wolf*, 136 Ill. 68; *Barney v. Giles*, 120 Ill. 154; *Downey v. O'Donnell*, 86 Ill. 49.

2. *North Lebanon R. Co. v. McGrann*, 33 Pa. St. 530; *Ranger v. Great Western R. Co.*, 27 Eng. L. & Eq. 35.

The certificate required must be had from the engineer who has charge of the work at the time it is done. *Wangler v. Swift*, 90 N. Y. 38.

Where, in a building contract, certain matters connected with the work were left to the decision of the chief engineer of the owner, it was held that after the work was finished, a person who had been such engineer, but had left the owner's employ, was not the person intended. *Wallis Iron Works v. Monmouth Park Assoc.* (N. J. 1893), 26 Atl. Rep. 140.

Where a building contract makes the architect's certificate a condition of payment, and on the death of the architect named another is substituted by the owner and accepted by the contractor, the certificate of the latter is necessary. *Beecher v. Schuback* (C. Pl.), 23 N. Y. Supp. 604, 4 Misc. Rep. (N. Y.) 54.

If the superintendent resigns and the employer fails to appoint a successor, the parties are at liberty to resort to the courts of law. *North Lebanon R. Co. v. McGrann*, 33 Pa. St. 530.

3. *McNamara v. Harrison*, 81 Iowa 486.

Payments on account of the work done, made on a certificate signed by the architect's assistant, are not a waiver of the right under the contract to a final certificate signed by the architect himself. *McEntyre v. Tucker*

(3) *Progress Certificates.*—Many working contracts involve the outlay of considerable sums of money, and it would be a great hardship upon the contractor to compel him to wait until the completion of the work before receiving any compensation; it would, in fact, make the business of contracting one requiring a much larger outlay of capital than the majority of contractors possess. In consequence, a provision is usually inserted that the superintendent shall issue certificates from time to time, sometimes called "progress certificates," certifying the value of the work performed, upon which the owner shall make advances to the contractor up to a certain per cent. of the value certified.¹

(4) *Waiver of Certificate.*—The provision requiring certificates of approval is placed in the contract for the benefit of the owner, merely to provide a method by which he may satisfy himself that the contract has been fully performed. He may waive it at his option and receive other proofs of the required fact, or pay without proof,² and such waiver may be implied as well as

(C. Pl.), 25 N. Y. Supp. 95; 23 Civ. Pro. Rep. (N. Y.) 171; 5 Misc. Rep. (N. Y.) 228.

1. See *Barton v. Hermann*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 378; *McNamara v. Harrison*, 81 Iowa 486.

In *Hanley v. Walker*, 79 Mich. 607, the contractors were to be paid from time to time, as the work progressed, upon the certificate of the architects, deducting ten per cent.

Such certificates simply state the amount of work done and the value of the same, and payments made under them are provisional only, and subject to adjustment or readjustment at the end of the contract. *Tharsis Sulphur, etc., Co. v. M'Elroy*, L. R., 3 App. Cas. 1040. And see *Hartup v. Pittsburgh*, 97 Pa. St. 107; *McNamara v. Harrison*, 81 Iowa 486; *Crumlish v. Wilmington, etc., R. Co.*, 5 Del. Ch. 270.

The final certificate may be withheld upon the subsequent discovery of unsound work. *Cooper v. Uttoxeter Burial Board*, 11 L. T. N. S. 565. No partial payment during the progress of the work can be claimed without the certificate. *Braun v. Winans*, 37 Ill. App. 248; *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255. But it is required for the benefit of the owner who may waive its production and pay without it. *Blethen v. Blake*, 44 Cal. 117; *Barton v. Hermann*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 378.

Where the board of supervisors of a county make a contract with the builder

to build a courthouse, for which he is to be paid eighty-five per cent. as the work progresses, on monthly estimates, upon the certificate of the superintendent of the building employed by the county, fifteen per cent. to be reserved until the completion of the work, the county is not bound by any arrangement made between such builder and superintendent and subcontractor, by which certificates are to be issued to the subcontractor, such agreement being at variance with the terms of the original contract. *Bouton v. McDonough County*, 84 Ill. 384.

The fact that some of the payments are to be made after the building is completed, does not avoid the necessity of obtaining a certificate for each payment. *Michaelis v. Wolf*, 136 Ill. 68.

Provisions in a building contract for payment for work and materials by installments, naming no dates for the same, but providing in each case for the architect's certificate "that all the work upon the performance of which the payment is to become due has been done to his satisfaction," shows an intention that they should become due at dates intermediate the date and the completion of the contract. *Wright v. Reusens* (Supreme Ct.), 15 N. Y. Supp. 590; *affirmed* 133 N. Y. 298.

2. *Blethen v. Blake*, 44 Cal. 117; *Clark v. Pope*, 70 Ill. 128; *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255; *Bannister v. Patty*, 35 Wis. 215.

If the owner intends to assert his right to a final certificate, he should

express,¹ but proof of the waiver should be of the clearest and most satisfactory kind.²

(5) *Withholding Certificate*.—Where the certificate is withheld by the superintendent through fraudulent collusion with the owner, its production will be excused;³ and, according to the

notify the contractor of such intention and place his refusal to pay the balance on the ground that no certificate has been furnished. *Bannister v. Patty*, 35 Wis. 215.

1. Waiver may be express or proved by acts and conduct of the party entitled to demand it. *Byrne v. Sisters of Charity*, 45 N. J. L. 213. But a waiver of the right to require a certificate of approval will not be implied from the fact that payments have been made from time to time without them. *Brown v. Winehill*, 3 Wash. 524. The architect's final certificate of approval may, notwithstanding, be required. *Barton v. Hermann*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 378.

But where it appears that the owner paid more than fifty per cent. of the contract price of the materials furnished up to a certain date, without requiring any certificate from the superintendent, and that he did not afterward demand one for the residue of the work, he was held to have waived its production. *Bannister v. Patty*, 35 Wis. 215.

And a promise to pay after the work is done, without requiring the certificate, amounts to a waiver. *Flaherty v. Miner*, 123 N. Y. 382.

A waiver of a right to require the certificate and estimate of the chief engineer will not be implied from the fact that monthly payments have been made upon the measurements and estimates of an assistant engineer. *McNamara v. Harrison*, 81 Iowa 486.

A mere allegation that the employer "duly accepted the work performed by the plaintiff under and by virtue of the said agreement" does not show that the work was accepted as a full compliance with the contract, and is insufficient as an allegation of waiver. *Schencke v. Rowell*, 7 Daly (N. Y.) 286.

A building contract stipulated for payment in installments as the work progressed, provided that in each case a certificate should be obtained, signed by a certain architect. But, in fact, he did not superintend the work, changes were made in the specifications, and the installments, except the last, were paid

without requiring the certificate, and without objection or reservation. After the work was finished, the owner expressed himself satisfied. When the claim for the balance was presented, he threatened that unless the builders would give up a claim which they had against him independent of the contract, he would throw the whole matter into the architect's hands. It was held that the facts constituted a waiver of the condition as to the certificate. *Overruling Bell v. Sun Printing, etc., Co.*, 42 N. Y. Super. Ct. 567. *Haden v. Coleman*, 73 N. Y. 567.

Taking Possession of Building.—The fact that the owner takes possession of the building after the contractor has left the premises cannot be construed as an unequivocal acceptance of the work, but the most that can be said is that such act, and all of the circumstances, may be taken into consideration in determining whether there is an implied waiver of a condition precedent to such acceptance, such as the architect's certificate of approval. *Hanley v. Walker*, 79 Mich. 607.

But see *Blethen v. Blake*, 44 Cal. 117, where it was said that the entrance of the owner into the possession and enjoyment of the building was sufficient evidence that he was satisfied, that it had been completed in accordance with the contract, and that the production of the certificate would accomplish nothing more.

Acceptance of Work.—An acceptance of a building as under a completed contract is a waiver of a stipulation that the final payment shall not be required until the architect's certificate shall have been obtained. *Smith v. Alker*, 102 N. Y. 87.

2. It will not be presumed where the evidence of the parties is conflicting in regard thereto. *Brown v. Winehill*, 3 Wash. 527.

But less evidence of the waiver is requisite when it clearly appears that the contract has been fully performed. *Byrne v. Sisters of Charity*, 45 N. J. L. 213.

3. *Michaelis v. Wolf*, 136 Ill. 68; *School District No. 27 v. Randall*, 5

English cases, only where there is such collusion.¹ Many of the American cases hold, however, that where the certificate is withheld through the fraud, malice, caprice, or mistake of the superintendent, even though there be no collusion between him and the owner, the contractor may recover without it.²

Neb. 408; *Dabbs v. Nugent*, 13 L. T. N. S. 396; *Batterbury v. Vyse*, 2 H. & C. 42; *McIntosh v. Great Western R. Co.*, 18 L. J. N. S. Ch. 94; 13 Jur. 92; 2 McN. & G. 74; 2 H. & T. 250.

If withheld by collusion between the owner and superintendent its absence is no bar to a recovery, under the contract, for materials furnished or work performed. *Bannister v. Patty*, 35 Wis. 215.

Although the giving of a certificate by the architect is a condition precedent to a builder's right of payment for work done, the builder may, nevertheless, recover for the work done if the withholding of the certificate is due to the improper interposition of the employer, who prevented the architect from giving his certificate. *Brunsdon v. Beresford*, 1 C. & E. 125.

The builder may sue upon the contract and impeach the decision of the party withholding the certificate, on the ground of fraud or mistake. *Fowler v. Deakman*, 84 Ill. 130; *Badger v. Kerber*, 61 Ill. 328.

In *Milner v. Field*, 5 Exch. 829; 20 L. J. Exch. 68, it was held that under the general issue the absence of the certificate was a good answer to an action upon the contract, and that even if it was withheld by fraud, it could only be the subject of a cross action.

Fraud in Withholding.—In *Cooper v. Uttoxeter Burial Board*, 11 L. T. N. S. 565, a contractor engaged to execute, in a "workmanlike manner," certain buildings for a burial board, to the entire satisfaction of the architect; the payments in respect of the work to be made to the contractor from time to time as the work proceeded, and the balance on the final certificate of the architect that the work had been executed according to the contract. Certificates from time to time had been given by the architect, and the contractor received payments on account. It appeared, subsequently, that parts of the work had not been done in a "sound and workmanlike manner," and the final certificate was withheld. On a bill by the contractor to have it

declared that the withholding of the final certificate was a fraud upon him, it was held that on proof of the "unsound and unworkmanlike manner of the buildings," the withholding of the final certificate was not a fraud upon the plaintiff, although the architect had given certificates from time to time to enable the builder to obtain money on account.

1. Where the plaintiff, in an action for the contract price of the work, averred that all things necessary had been duly and efficiently performed and completed to the satisfaction of the surveyor, but that the latter had not given the certificate but had wrongfully and improperly neglected and refused to do so, etc., it was held that, in the absence of collusion, the plaintiff could not recover without producing the certificate. *Clarke v. Watson*, 18 C. B. N. S. 278; 114 E. C. L. 278; 34 L. J. C. P. 148; 11 L. T. N. S. 679; 13 W. R. 345.

In *Scott v. Liverpool Corp.*, 3 De G. & J. 334, 5 Jur. N. S. 104; 28 L. J. Ch. 230, the contractor filed a bill against the employers and their engineer, complaining of undue delay on the part of the latter in awarding the amount earned and seeking payment of what was due upon the contract, but did not establish any case of fraud or collusion against the engineer, and it was held that the bill was properly dismissed with costs.

2. *Hudson v. McCartney*, 33 Wis. 331; *Bentley v. Davidson*, 74 Wis. 420; *Bannister v. Patty*, 35 Wis. 215; *Nolan v. Whitney*, 88 N. Y. 648; *Batchelor v. Kirkbride*, 26 Fed. Rep. 899; *Fletcher v. New Orleans, etc., R. Co.*, 19 Fed. Rep. 731; *Dinsmore v. Livingston County*, 60 Mo. 244; *Neenan v. Donoghue*, 50 Mo. 495; *Yeats v. Ballentine*, 56 Mo. 531; *Estel v. St. Louis, etc., R. Co.*, 56 Mo. 282; *Lowe v. Sinklear*, 27 Mo. 309; *Sullivan v. Byrne*, 10 S. Car. 122. And see *Sweeney v. U. S.*, 109 U. S. 618.

The production of the certificate is excused when the superintendent unconsciously and in bad faith withholds it. *Thomas v. Fleury*, 26 N. Y. 26;

Barton v. Hermann, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 382.

The unreasonable refusal to give the certificate dispenses with its production. *Flaherty v. Miner*, 123 N. Y. 382.

Where the approval is wrongfully or unavoidably withheld, the courts have never refused redress. *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463.

In *Hudson v. McCartney*, 33 Wis. 331, the court refused to decide whether the contractor could recover without showing that the certificate was corruptly withheld by the superintendent in collusion with the owner.

Where a building contract requires a certificate that the work has been well done, as a prerequisite to payment, and this certificate is withheld by order of the owner, and not because the work has not been well done, the builder may maintain an action against the owner without such certificate. *Whelen v. Boyd*, 114 Pa. St. 228.

A provision in a building contract for the payment of the builder only on certificates of the architects that payments are due, will not prevent recovery by the builder, when he has fully performed the contract and the architects refuse their certificates without sufficient cause. *Van Keuren v. Miller* (Supreme Ct.), 24 N. Y. Supp. 580; 71 Hun (N. Y.) 68.

The superintendent must exercise his power with reasonable discretion and not capriciously, and if he refuses to deliver a certificate in bad faith and fraudulently, then the contractor may recover upon performance. *Badger v. Kerber*, 61 Ill. 328. In this case a party contracted to furnish stone for the erection of a building, with reference to stone from a particular quarry to be used, which was recommended by the superintendent selected by the parties, upon whose certificate payment was to be made. The contractor used it and received certificates after using it on a part of the building, and it was held that the superintendent could not capriciously or fraudulently refuse to give him a certificate after he had completed the contract, on the pretext that the stone was not of the proper kind.

But a certificate can be properly demanded, and recovery had on refusal thereof, only where there has been a substantial compliance with all the terms of the contract, and there remains nothing further to be done in relation thereto which it is practicable and reasonable to require to make the

job a finished and complete one. *Craig v. Geddis*, 4 Wash. 390.

Though the production of the architect's certificate of the inspection of a building is a condition precedent to the recovery of the contract price from the owner, the fraudulent withholding of such certificate by the architect will dispense with its production. *Bradner v. Roffell* (N. J. 1894), 29 Atl. Rep. 317.

In an action for the contract price of a building, where the evidence shows that the architect, on an inspection, stated that the building was completed according to contract, and that he would give the requisite certificate to the builder, but that he afterward refused to do so, and that the building was in fact completed according to contract, the builder is entitled to recover, though the contract made the production of the architect's certificate of completion a condition precedent to such recovery. *Bradner v. Roffell* (N. J. 1894), 29 Atl. Rep. 317.

Under a contract providing that work shall be done to the satisfaction of the superintendent, that his decision as to the quality of the work or material shall be conclusive, and that payment shall be made only on his certificate, the mistake in refusing a certificate, which will authorize a recovery without it, is an unintentional misapprehension or ignorance of some material fact which must be shown clearly, and so palpable as to amount to dishonest or arbitrary action. *Wendt v. Vogel*, 87 Wis. 462.

A building contract provided that the work was to be done to the satisfaction of the architect, to be shown by his certificate. In an action for a balance due thereon, one of the plaintiffs testified that the work had been completed, and that when he applied to the architect for a certificate the latter made no complaint about the work, but referred to some damage from water, and said the defendant was "a little cranky," and that he did not like to give a certificate until the defendant was satisfied; that the defendant ought to settle, etc. It was held that it was proper to submit to the jury the question whether the certificate was unreasonably withheld. *Gibbons v. Russell* (Brooklyn City Ct.), 13 N. Y. Supp. 879.

The plaintiff contracted to macadamize a street, payment to be made when the same was accepted by the board of public works. The board was

The superintendent is entitled to a reasonable time in which to examine the work and satisfy himself that it has been completed according to the contract, before giving the final certificate,¹ but if he withholds it through fraud or collusion with the employer, the contractor may maintain an action against them, either jointly or severally, for damages,² though in the absence of collusion the employer is not responsible for the refusal of the superintendent to give a certificate.³

(6) *Sufficiency.*—No particular form of certificate is requisite; any words conveying the meaning of the superintendent that the work has been performed to his satisfaction and stating the amount due are sufficient.⁴ It is not, in fact, absolutely necessary that it should state, in terms, that the work has been done to his satisfaction where such fact can be reasonably implied,⁵

composed of three men, one of whom examined the work and accepted it, and the others refused and neglected to make any examination, and had nothing to do with its acceptance, and it was held that the non-action or default of some of the members would not have the effect of depriving the plaintiff of all compensation for his labor and materials. *Neenan v. Donoghue*, 50 Mo. 493.

In *Nolan v. Whitney*, 88 N. Y. 648, it was held that where the contractor has substantially performed the contract, he may recover without the architect's certificate of approval, upon showing a refusal of the architect to give it, the refusal in such case being unreasonable.

Evidence of Fraud or Mistake.—The plaintiff, in order to introduce evidence of fraud or mistake on the part of the superintendent in refusing to give his certificate of approval, must set up the facts in his complaint. *Hudson v. McCartney*, 33 Wis. 331.

Return of Certificate by Contractor.—If the contractor returns the final certificate to the architect, the amount not being satisfactory, and the architect afterwards refuses to give him any further certificate, he may recover without it. *Arnold v. Bournique*, 144 Ill. 132, *reversing* 44 Ill. App. 199.

1. A contract for the construction of an aqueduct provided that the engineer should give a certificate to the aqueduct commissioners when, in his opinion, the contractor had completely performed the contract, and that the commissioners should pay the amount therein stated within thirty days thereafter, the contractor not to be entitled to payment until the certificate had been

given. The engineer claimed that there were defects in the aqueduct requiring further work, and three months after it was done gave the certificate. It was held that there was no unreasonable delay in furnishing the certificate, the aqueduct being many miles in length, and involving an outlay of several millions of dollars, and there being a demand about the same time for a final estimate under several contracts, all of which involved a great amount of figuring. *O'Brien v. New York*, 139 N. Y. 543.

2. *Ludbrook v. Barrett*, 36 L. T. N. S. 616; 46 L. J. C. P. Div. 798; *Batterbury v. Vyse*, 2 H. & C. 42.

But no action will lie against the architect or superintendent in the absence of fraud or collusion, which must be alleged. *Stevenson v. Watson*, 4 C. P. Div. 148. Nor will he be subject to an action for errors in his estimates, or refusing to reconsider them, his duties involving the exercise of judgment and skill. *Stevenson v. Watson*, 4 C. P. Div. 148; 48 L. J. C. P. 318; 40 L. T. 485; 27 W. R. 682.

3. *Clarke v. Watson*, 18 C. B. N. S. 278; 114 E. C. L. 278; 34 L. J. C. P. 148; 11 L. T. N. S. 679; 13 W. R. 345.

4. See *Lloyd's Law of Building & Buildings* (2d ed.), § 21. The following form of certificate is given in the above work: "I hereby certify that the work of J. B. has been completed to my entire satisfaction, in conformity to the specifications and drawings, and in a substantial and efficient manner. I further certify that there is a balance of \$—— due to him under the contract. A. L., Architect."

5. In *Bannister v. Patty*, 35 Wis. 215, the superintendent certified to the

and a certificate by the architect that the last payment was "due as per contract" has been held sufficient.¹ A final certificate of the completion of the work to the satisfaction of the architect has even been held sufficient without stating the amount remaining due;² but the certificate must be substantially what the contract

amount and value of the work furnished, stating the value at the contract prices, but not stating in terms that it was to his satisfaction. It was held to be in effect a certificate that the work was done to his satisfaction. *Lyon, J.*, said: "The certificate does not state, in terms, that the work is to the satisfaction of the superintendent, but it fixes the value thereof at the contract price and states no objection thereto. This, we think, is equivalent to a statement that the work was done to his satisfaction."

1. In *Wyckoff v. Meyers*, 44 N. Y. 143, the building contract provided that the last installment should be paid when all the work was "completely finished and certified to that effect by the architect" under whose direction the work was to be done, and the production of the certificate of the architect that "the last payment is due as per contract" was held conclusive.

In *Bloodgood v. Ingoldsby*, 1 Hilt. (N. Y.) 388, the following certificate was held sufficient: "This is to certify that the ——— payment, amounting to ——— dollars, is now due to M. B., on account of his contract with you for doing the masons' and carpenters' work of your store, No. 46 Warren Street."

An architect's certificate that "there is now due to 'the contractor' the final payment of his contract," specifying the amount, sufficiently complies with a contract requiring final payment within thirty days after completion, provided that the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction. *Snaith v. Smith* (C. Pl.), 27 N. Y. Supp. 379; 7 Misc. Rep. 37.

Where the contract provided that the work should be done under the direction and supervision of the architect, "to be certified by a certificate or writing under his hand," a certificate stating "balance due in full of contract price" was held sufficient. *Mercer v. Harris*, 4 Neb. 77.

In *Stewart v. Keteltas*, 36 N. Y. 392,

the court said that "it was not necessary that the architect's certificate should contain a statement that the work was done agreeably to the drawing and specifications, within the time, in a good, workmanlike, and substantial manner, under his direction and to his satisfaction."

But where the contract called for an architect's certificate "that the contract has been well and duly performed and accepted by him, and that all damages or allowances which should be made have been deducted," a certificate that the contractors "are entitled to a payment of \$1,079.73 by the terms of the contract, work having been measured at the building," was held insufficient and not to entitle the contractors to their final payment. *Barney v. Giles*, 120 Ill. 154.

2. *Pashby v. Birmingham*, 18 C. B. 2; 86 E. C. L. 2. In this case the contract provided that "no payments should be made to the contractors, except on the production of the certificate of the architect that a certain amount of work had been done, and that the architect should deliver his certificate thereof at the end of every fourteen days," and "that the contractors should be entitled to receive, at the end of every fourteen days, the amount for which the architect should have given his certificate; the amount of such certificate to be less by certain varying proportions than the value of the work done, until 90 per cent. of the whole should be completed; and that no further payments should be made to the contractors until within three calendar months after the architect should have certified the completion of the whole work to his satisfaction," and a certificate of final completion was held sufficient without mentioning the amount remaining due. *Willes, J.*, in this case, said: "The certificate in question is for the balance remaining unpaid in respect of the work done under the contract, and the alterations and additions. It is said that the certificate must state the amount due. There is, however, no provision for that in that part of the contract which I have read. Here is a certifi-

calls for;¹ and a certificate that the building is finished in such a manner that the architect would accept it if it were his own, does not comply with a contract requiring a certificate that it has been "fully and completely finished according to the specifications,"² and merely checking the builder's charges,³ or giving the contractor an order on the owner for a certain sum, is insufficient.⁴ But where the owner has repeatedly made payments on certificates of a peculiar form without objection, he cannot raise such objection for the first time on the trial.⁵ If a certificate in writing is called for, a parol approval is insufficient,⁶ and it is always

cate of the architect that the whole of the work has been completed to his satisfaction. The other provision which has been referred to applies to the intermediate certificates only. It is clear that the final certificate need show no more than the completion of the whole work. That view of the matter is considerably fortified by a reference to that part of the conditions which requires the particulars and the amount of alterations and additions to be entered in a book."

Final payment of the sum due a subcontractor from a builder for work performed cannot be refused on the ground that the subcontractor had failed to procure an architect's certificate as to the proper performance of his work, as required by the contract, where the architect has certified that the subcontractor is entitled to a settlement, but without prejudice to any claim the builder might have for time lost, or work done, in carrying out the terms of the contract. *Grannis, etc., Lumber Co. v. Deeves* (Supreme Ct.), 25 N. Y. Supp. 375; 72 Hun (N. Y.) 171.

1. *Michaelis v. Wolf*, 136 Ill. 68.

2. In *Smith v. Briggs*, 3 Den. (N. Y.) 73, the architect certified that the house was finished in such a manner that he would accept it if he were the owner, and that he was satisfied as to the work and materials, and it was held insufficient as the contract called for a certificate that the work was "fully and completely finished according to the specification."

3. Where the defendant was to pay for a building upon receiving the architect's certificate that the work was done to his satisfaction, and the architect checked the builder's charges and sent them to the defendant, it was held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although

the defendant had not objected to pay on the ground that no sufficient certificate had been rendered. *Morgan v. Birnie*, 9 Bing. 672; 23 E. C. L. 414. In this case Tindal, C. J., said: "It appears to me that the effect of a certificate would be altogether different, applying to the manner in which the work has been done, while the checking the accounts applies only to the propriety of the charges."

4. Where the contract requires the contractor, before each payment, to procure a certificate signed by the architect therein named "to the effect that the work is done in strict accordance with drawings and specifications, and that he considers the payment properly due," a mere order, signed by the architect and addressed to the owner, requesting him to pay a given sum to the contractor, will not bind the owner. *Michaelis v. Wolf*, 136 Ill. 68.

In *Roy v. Boteler*, 40 Mo. App. 213, the contract required the certificate to be under the hand of the architects, and to show that the whole job had been completed and accepted by the architects, their final estimate of the amount due on the contract, and that the work had been performed agreeably to the drawings and specifications under the direction and to the satisfaction of the architects; and a certificate showing the balance due the contractor, but nothing more, was held insufficient.

5. *Bloodgood v. Ingoldsby*, 1 Hilt. (N. Y.) 388; *Barton v. Hermann*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 382.

6. *Hanley v. Walker*, 79 Mich. 605; *Lamprell v. Billericay Union*, 3 Exch. 283; *Russell v. Sa Da Bandeira*, 13 C. B. N. S. 149; 106 E. C. L. 149; *Goodyear v. Weymouth*, 1 H. & R. 67. And see *Roy v. Boteler*, 40 Mo. App. 224.

But if there is no stipulation on the subject in the contract, a parol approval will be sufficient. *Kirk v. Bromley*

advisable to provide for a written approval.¹ A conditional certificate will be sufficient where it is shown that the condition has been complied with.² The certificate must be given by the person named in the contract and not by his deputy or assistant,³ and if required to be signed by two or more, a certificate signed by one only is fatally defective.⁴

(7) *Conclusiveness.*—In the absence of fraud or palpable mistake, such a certificate properly given is conclusive alike upon the owner and the contractor,⁵ and entitles the latter to recover

Union, 2 Ph. 640. And where it appeared that the party subject to whose approval payment was to be made, knew of the contract and visited the building, where the work was going on, every day, it was held sufficient, in the absence of a denial of approval by the defendant, to show an approval by implication. *Union Stove Works v. Arnoux*, 7 Misc. Rep. (N. Y. C. Pl.) 700.

Where a building contract contained a clause for payment of the price of building by installments, with a proviso that, before each payment, the architect should certify that the works were carried out to his satisfaction, it was held that the certificate need not be in writing. *Roberts v. Watkins*, 14 C. B. N. S. 592; 108 E. C. L. 592; 32 L. J. C. P. 291; 9 Jur. N. S. 128; 8 L. T. N. S. 460; 11 W. R. 783.

1. *Pashby v. Birmingham*, 18 C. B. 2; 86 E. C. L. 2.

2. Where an architect certifies that when some slight additions should be made, the work would be acceptable, and it appears that these additions have been made and on notice thereof no further additions are made, it will be a sufficient acceptance. *Mills v. Weeks*, 21 Ill. 561.

3. In *McNamara v. Harrison*, 81 Iowa 486, the contract called for the certificate of the chief engineer and "his estimate of the quantity of work done," and it was held that the estimate and certificate of a subordinate engineer was insufficient.

The estimate of an assistant engineer is not conclusive upon the parties. *Snell v. Brown*, 71 Ill. 133.

A certificate which is not signed by the architect, but by his assistant for him, is not within a building contract which requires the contractor to do and finish the work under and to the satisfaction of the architect, and provides that payments shall be made on certificate of the architect that the work has been done to his satisfaction.

McEntyre v. Tucker (C. Pl.), 25 N. Y. Supp. 95; 23 Civ. Pro. Rep. (N. Y.) 171; 5 Misc. Rep. (N. Y.) 228.

4. *Adams v. New York*, 4 Duer (N. Y.) 295.

But where payments were to be made on the certificate of two architects, who were partners, it was held that a certificate signed by one in the firm name was sufficient. *Lull v. Korf*, 84 Ill. 225. And the recognition by the owner and contractor of the surviving member of a firm of architects, upon whose certificates payments were to be made, as superintendent and architect, is binding upon both. *Davidson v. Provost*, 35 Ill. App. 126.

5. *Dingley v. Greene*, 54 Cal. 333; *Barton v. Hermann*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 381; *Dorwin v. Westbrook*, 71 Hun (N. Y.) 405; *Stewart v. Keteltas*, 36 N. Y. 388; *Wilcox v. Stephenson*, 30 Fla. 377; *Korf v. Lull*, 70 Ill. 420; *Snell v. Brown*, 71 Ill. 133; *Coey v. Lehman*, 79 Ill. 173; *Taylor v. Rem*, 79 Ill. 181; *Bournique v. Arnold*, 33 Ill. App. 303; *Hudson v. McCartney*, 33 Wis. 331; *Boettler v. Tendick*, 73 Tex. 488; *Condon v. South Side R. Co.*, 14 Gratt. (Va.) 302; *Sweeney v. U. S.*, 109 U. S. 618; *Baron de Worms v. Mellier*, L. R., 16 Eq. 554; *Sharpe v. San Paulo R. Co.*, L. R., 8 Ch. 597; *Dunaberg, etc., R. Co. v. Hopkins*, 36 L. T. 733; *Arnold v. Walker*, 1 F. & F. 671; *Harvey v. Lawrence*, 15 L. T. N. S. 571. See *Downey v. O'Donnell*, 86 Ill. 49.

The owner cannot be allowed to urge defects in the work. *Lull v. Korf*, 84 Ill. 225.

A certificate is conclusive against the owner unless he can show fraud or collusion between the architect and contractor. *Mercer v. Harris*, 4 Neb. 77; *School Dist. No. 27 v. Randolph*, 5 Neb. 408. And the superintendent, after rejecting the work as deficient, cannot make any arrangement by which the work may be accepted and

the deficiency made good to the company. *Barcus v. Hannibal, etc., Plank Road Co.*, 26 Mo. 102.

Where the parties to a building contract agreed that the architect's certificate should be a prerequisite to payments, his certificate that the last payment was due was conclusive, in the absence of fraud or mistake, and its conclusiveness was not affected by a letter afterward written by the architect, in which he stated that the certificate was not intended to conclude any just rebate or offsets. *Weeks v. Little*, 47 N. Y. Super. Ct. 1.

But where a building contract merely authorizes an architect to certify that the contract is performed to his satisfaction, his certificate that it is not so performed because of certain defects in the work has no binding effect upon the contracting parties. *Mackinson v. Conlon*, 55 N. J. L. 564.

In an action on a building contract, on which payments were to be made in accordance with the certificates of the architect, reserving fifteen per cent. from each certificate until the whole was completed to the superintendent's satisfaction, the superintendent's certificate of dissatisfaction is admissible, though he has exceeded his powers in charging one or more items therein. These the jury should be directed to disregard. *Sanders v. Hutchinson*, 26 Ill. App. 633.

A building contract providing that final payment shall be made within thirty days after completion, "provided that . . . the architect shall certify in writing that all the work . . . has been done to his satisfaction," constitutes the architect the agent of the owner, and his decision as to completion of the work is final. *Snaith v. Smith (C. Pl.)*, 27 N. Y. Supp. 379; 7 Misc. Rep. (N. Y.) 37.

Where it is stipulated in a contract for the erection of a house that it shall be built according to the plans, and to the "satisfaction" of the architect, his certificate that he accepts the work as done in accordance with the plans and specifications is conclusive on the owners, and cannot be contradicted by them. *Kennedy v. Poor*, 151 Pa. St. 472.

Where the plaintiff agreed to construct a levee for the defendant, and to receive pay on the estimates of the engineer, who was made the sole judge as to the quality and quantity of the work performed, he cannot recover more than the estimates, in the absence of

fraud or mistake by the engineer in making them. *Edwards v. Louisa County (Iowa, 1893)*, 56 N. W. Rep. 656. But in order to bind a contractor to the certificate or decision of an architect or engineer appointed by the party for whom the work is done, there must be very conclusive language in the contract. *Lawson v. Wallasey Local Board*, 11 Q. B. Div. 229; 52 L. J. Q. B. 302; 47 L. T. 625; *aff'd* 52 L. J. Q. B. 309, note; 48 L. T. 507; 47 J. P. 437.

In an action on a building contract providing that the architect's certificates and decisions should be binding in all matters, an instruction that his certificate was conclusive on the defendant, in the absence of collusion with the plaintiff, is not erroneous, where the answer charges such collusion, and no instruction based on the theory of independent fraud or gross negligence on the part of the architect is requested. *Johnson v. White (Tex. Civ. App. 1894)*, 27 S. W. Rep. 174. But see *Davidson v. Provost*, 35 Ill. App. 126, where it was held error in the trial court to refuse to admit evidence on the part of the owner going to show that the contractor had not followed the plans and specifications. *Garnett, J.*, in delivering the opinion of the court in this case, said: "The effect of the certificate, however, is not as absolute as indicated by the rulings of the court on the hearing of the case.

. . . The court rejected the evidence, and defendant excepted to the ruling. The exception is well taken. If the evidence had been admitted it might have shown such gross dereliction of duty on the part of the architect as to raise a presumption of fraud or mistake in the issuing of the certificates." And see *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449.

The plaintiff covenanted with the defendant, a railway company, to do certain works within a given time, to the satisfaction of the engineer of the company, and that if the works should not be so done, the company might enter into possession of the plaintiffs' plant, and complete the works. The company covenanted to pay for the works from time to time during their progress, according to the certificate of the engineer. All disputes were to be referred to the latter. The works were not completed within the period originally limited, and some time afterward the company gave notice of its

without any other proof of actual performance,¹ but the evidence of the superintendent, in the absence of the certificate, is not conclusive.² Mere mistakes, incompetency, or negligence are not grounds for going behind the estimates,³ though errors made

intention to enter, under the agreement, and complete the works. The plaintiffs filed a bill stating that they had done all that they had contracted to do, except what the company had prevented them from doing, and that they had not been fully paid for the work done; alleging that the engineer, fraudulently and collusively with the company, certified a less amount than what was due to the plaintiffs, and praying for an injunction and account. A demurrer for want of equity was overruled, on the ground that the plaintiffs would be entitled to some relief at the hearing, and that the species of fraud alleged in the bill gave jurisdiction to the court, although the plaintiffs had not completed the whole of their work. *Waring v. Manchester, etc., R. Co.*, 7 Hare 482; 18 L. J. N. S. Ch. 450; 14 Jur. 613; *affirmed* 2 H. & Tw. 239.

A subcontract for railway grading provided for payment at different rates per yard for different classes of excavation, and that at the end of the work the engineer of the road should certify the quantity and character of the work done by the subcontractor, and that the latter should be paid according to such certificate. Soon after the work was commenced the engineer told the parties that he would classify the work to be done as "75 per cent. solid rock," to obviate any disputes as to measurement, with which arrangement the parties expressed themselves as satisfied. It did not appear that either party intended thereby to make or consent to any arrangement outside of, or inconsistent with, the contract, and it was held that the engineer's final certificate, made after the conclusion of the work, was binding on the parties, though he failed therein to adopt the promised classification. *Dorwin v. Westbrook* (Supreme Ct.), 24 N. Y. Supp. 955; 11 Hun (N. Y.) 405.

Certificate of Extra Work.—The final certificate of the engineer is binding upon contractors under a contract providing that the balance of the contract price is not payable until the final certificate by the engineer in charge is delivered, showing the amount of work done, materials fur-

nished, cost of extras, and reduction for alterations, and precludes any allowance for extras not included therein. *Reg. v. Cimon*, 23 Can. Supreme Ct. 62; *Sharpe v. San Paulo Brazilian R. Co.*, L. R., 8 Ch. 605, note; 27 L. T. N. S. 699.

Certificate Conclusive on One Party Only.—Where the contract makes the estimate conclusive upon one party only, the other is not precluded from showing the true amount of work done. *O'Brien v. New York*, 139 N. Y. 543.

Evidence of Fraud.—Though the engineer thought the contractor was entitled to an allowance for excavations outside the exterior line of the brickwork, and that he had the right to give the contractor credit therefor, on the final certificate, the fact that he did not do so does not show fraud in his certificate, where he allowed for all that the contract authorized. *O'Brien v. New York*, 139 N. Y. 543; 142 N. Y. 671.

1. *Adams v. New York*, 4 Duer (N. Y.) 295; *Wyckoff v. Meyers*, 44 N. Y. 143; *Tetz v. Butterfield*, 54 Wis. 242; 41 Am. Rep. 29; *Hot Springs R. Co. v. Maher*, 48 Ark. 522.

Certificate as Evidence.—The certificate is always admissible to prove the acceptance of the work. *Hamilton County v. Newlin*, 132 Ind. 27. But the certificate is admissible only in so far as it is connected with the matters referred to the superintendent, and no further. *Mills v. Weeks*, 21 Ill. 561.

2. But although the contract makes the certificate of the architect conclusive, his testimony, in the absence of such certificate, will not be conclusive but will be received on the same terms with any other witness of equal knowledge and opportunity. *Boteler v. Roy*, 40 Mo. App. 234; *Fitzgerald v. Beers*, 31 Mo. App. 356.

3. *Chicago, etc., R. Co. v. Price*, 138 U. S. 185. In this case a contract to grade a railroad provided that the work was to be done under the supervision of the chief engineer and his assistant, whose estimate of quantities was to be "final and conclusive upon the parties," and that the contractor should receive monthly payments on the certificate of the engineer "for work done," and

in the "progress certificates" may be corrected and adjusted in the final certificate.¹ The superintendent, however, should not be interested in keeping down the cost of the work.²

(8) *As Distinguished from Award.*—Provision making payment for the work subject to a certificate of approval or estimate of the architect, engineer, or superintendent, is not a submission to arbitration,³ and the authority to certify cannot be revoked by one of the parties before the decision is rendered,⁴ but in so far as the contract refers all matters in dispute to the decision of the superintendent, it is a submission to arbitration.⁵

It was held that the railroad company could not, after accepting the work and the last monthly estimate of the engineer, have the work reestimated by another subordinate engineer, the previous monthly estimates, and the acceptance of the entire work with the last monthly one, being conclusive, in the absence of proof of fraud or bad faith on the part of the engineers making them, and mere mistakes, incompetency, or negligence not being grounds for going behind them.

1. Where payments made to a contractor, in accordance with the opinion of the engineer that he was entitled to compensation for excavating outside of the exterior line of the brickwork, were made on a mistaken basis, it was held that the mistake could be corrected on the measurement for the final certificate. *O'Brien v. New York*, 139 N. Y. 543; 142 N. Y. 671. And see *supra*, this title, *Progress Certificates*.

2. Where a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for his work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a specified amount, although he refused to guaranty that amount, the court did not consider that the decision of the architect made under such a bias was binding, but gave directions so as to ascertain under the authority of the court how much remained justly due to the builder. *Kemp v. Rose*, 1 Giff. 258.

And a clause conferring power and authority on an engineer over a contractor will not be considered fraudulent or void because the engineer is a shareholder in the company on whose behalf the contract is entered into. *Ranger v. Great Western R. Co.*, 3 Rallw. Cas. 298.

But the engineer of a railway com-

pany is not disqualified from certifying the payments due a contractor on account of his having become the lessee of the railway, at a rent depending on the amount so certified for. *Hill v. South Staffordshire R. Co.*, 11 Jur. N. S. 192; 12 L. T. N. S. 63—L. J.

3. *Wadsworth v. Smith*, L. R., 6 Q. B. 332. Blackburn, J., in this case, said: "Where, by an agreement, the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award; but where there is an agreement that any dispute about a particular thing shall be inquired of and determined by a person named, that may amount to a submission to arbitration, and the determination, though in the form of a certificate, be an award."

But the duties of the superintendent in such case are very analogous to the duties of an arbitrator, and he cannot be held liable for errors in his estimates or for refusing to reconsider them. *Stevenson v. Watson*, 4 C. P. Div. 148; 48 L. J. C. P. Div. 318.

4. *Northampton Gaslight Co. v. Parnell*, 15 C. B. 630; 80 E. C. L. 630; 24 L. J. C. P. 60; *Mills v. Bayley*, 2 H. & C. 36.

5. *Mills v. Bayley*, 2 H. & C. 36. In this case an agreement was entered into in writing by which the plaintiff was to take the emptying of the defendant's mill pool, upon the terms that the defendant should pay the plaintiff five pence for every cubic yard of mud taken out of the pool; the admeasurement of the mud removed to be settled by N., and if any dispute arose, it was to be referred to N. to be by him decided. It was held that the agreement to refer consisted of two distinct parts, the admeasurement of the mud and the settlement of disputes, and that the

8. Deviations and Alterations.—The parties may agree by parol to deviate from the original contract.¹ Slight deviations, as has been seen, will not bar a recovery by the contractor; a substantial performance is all the law requires.² Where the deviations and alterations are made by agreement of the parties, the employer is liable for any increased cost resulting, the provisions of

latter part was a submission to arbitration and revokable, although the former was not. And see *Wadsworth v. Smith*, L. R., 6 Q. B. 332, opinion of Blackburn, J.

1. *Greene v. Paul*, 155 Pa. St. 126; *West Haven Water Co. v. Redfield*, 58 Conn. 39; *Onderdonk v. Gray*, 19 N. J. Eq. 65.

Parties to a building contract may by their acts waive a provision that subsequent alterations in the building shall be specified in writing; and, in an action by the builder to recover for such alterations, the referee erred in excluding evidence of a verbal request by the owner for additions to the building, and verbal promises to pay therefor. *Porter v. Swan* (Brooklyn City Ct.), 17 N. Y. Supp. 351.

But the contractor is not liable for defects resulting from deviations made with the assent of the employer. *Clark v. Pope*, 70 Ill. 128.

If deviations are ordered by the superintendent, the contractor must show an authority in him to order them. *Rex v. Peto*, 1 Y. & J. 37; *Cooper v. Langdon*, 9 M. & W. 60; 1 D. N. S. 392.

A clause in building specifications, that "it is understood that the owner of this building, and the architect, shall have the right and power to make any alterations, additions, or omissions of work or materials herein specified, or shown on the drawings, that they may find necessary, during the progress of the building," authorized the construction of an additional stairway from the kitchen to a bedroom, as well as the use of bronze hardware in the place of No. 1 hardware as specified, and a change in the location of the cistern. *Dorsey v. McGee*, 30 Neb. 657.

But a clause in a contract for a public work, which reserves to the employer the right to make alterations in the form and dimensions of the work, does not authorize him to stop the work in an unfinished state, and thus annul the agreement. *Clark v. New York*, 4 N. Y. 338.

Where Writing Necessary.—Where a contract for the construction of a rail-

road provides that measurements, classification, and estimates shall be made in determining the price to be paid, but that no alteration of the contract will be allowed unless in writing, signed by the parties, a promise of the arbitrator, during the progress of the work, to classify a certain part as solid rock, rather than loose rock, does not modify the contract. *O'Donnell v. Forrest*, 44 La. Ann. 845.

Right to Order—Reasonable Time.—On October 9, 1849, the plaintiff agreed, in writing, to do the mason work and furnish the materials for a building for the defendant, which was to be completed, except a portion of the plastering, before the 20th of November, which time was subsequently extended ten days. The building was to be three stories in height, the defendant reserving the right to put on a fourth story by paying a specified sum for the brick laid in the walls. It was held that the defendant's right of election in regard to the fourth story must be exercised while a reasonable time remained for adding another story and finishing the work, with the addition, by the time specified in the contract, or as extended; and that unless exercised within that time it was lost. *Lauer v. Brown*, 30 Barb. (N. Y.) 416.

Right to Order—Limitation of Right.—A provision in a contract that "should the owner at any time during the progress of said building request any alteration, deviations, additions or omissions from this contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but it will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation," was construed to mean that the "omissions" were to be limited to things which, upon the conditions specified, might be entirely left out of the building, and extended to nothing which the owner might elect to take off the contractor's hands and finish himself. *Shaver v. Murdock*, 36 Cal. 293.

2. See *supra*, this title, *Substantial Performance*.

the special contract governing as far as applicable;¹ and it is sometimes provided that where the deviations lessen the cost of the work, the contractor's charges shall be decreased proportionately.² If the original contract has been deviated from to such an extent as to be hardly recognizable, it may be treated as abandoned, and the contractor recover the reasonable value of his work.³

1. *Goldsmith v. Hand*, 26 Ohio St. 101; *McKinney v. Springer*, 3 Ind. 59; 54 Am. Dec. 470; *De Boom v. Priestly*, 1 Cal. 206; *Andre v. Bodman*, 13 Md. 241; 71 Am. Dec. 628.

The mode of payment will be the same as in the original contract. *Boody v. Rutland, etc.*, R. Co., 24 Vt. 660.

Where work is done under a special contract and for estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is the rule of payment so far as the special contract can be traced; and for any excess beyond it, the party is entitled to his *quantum meruit*. *Robson v. Godfrey*, Holt. 236; 1 Stark. 275; 2 E. C. L. 110.

Where the superintendent's certificate is required to settle the price of the alterations, it is a condition precedent to a right of recovery. *Morgan v. Birnie*, 3 M. & S. 76; 9 Bing. 672; 23 E. C. L. 414. And see *supra*, this title, *Certificates of Approval*.

In *Goodwin v. McCormick* (Brooklyn City Ct.), 6 N. Y. Supp. 662, the plaintiff contracted with the defendant to build certain houses, according to prescribed plans and specifications. During the construction a number of deviations were made from the original plan, with the consent of both parties, but all conditions in the original contract as to times and amounts of payments, as the work progressed, were strictly complied with, and the money received and receipted for by the contractor without objection, no new express contract being entered into. It was held that the deviation from the original contract did not justify the contractor in setting up a claim of *quantum meruit*, except as to extra work done, and extra materials furnished.

A contract for the construction of three curves on the defendant's cable railroad was awarded to the plaintiff at a specified price per lineal foot. These curves were to be solid curves, composed of heavy boxes, bolted end

to end. Subsequently, the defendant changed its plans so as to lengthen the three curves into one; and, instead of placing the boxes end to end, they were placed four and one-half feet apart, with filling pieces between. In assumpsit for the price of the work, it was held proper to instruct that the plaintiff was not confined to the actual value of the filling pieces, but was entitled to the contract price therefor, if there was an agreement, express or implied, when the change in the contract was made, that the filling pieces should be regarded as part of the curved work, to be paid for at the contract price. *Marshall Foundry, etc., Co. v. Pittsburgh Traction Co.*, 138 Pa. St. 266.

2. *Turner v. Diaper*, 2 M. & G. 241; 40 E. C. L. 351.

3. *Pepper v. Burland*, Peake 103; *Austin v. Keating*, 3 W. R. 288; *Ford v. Smith*, 25 Ga. 675.

When parties subsequently vary their written contract for the building of a house, so as to require more work and materials, and an alteration in the structure, and a longer time for its completion, the workman is not obliged to sue on the original contract, but may recover on a *quantum meruit*; and the written contract is admissible in evidence to show what the parties had agreed on as reasonable for that portion of work embraced in it. *Hutchinson v. Cullum*, 23 Ala. 622. But the contract should still be used to determine the value of the work so far as it can be followed. *Norton v. Browne*, 89 Ind. 333.

Where a written contract for increasing the height of a railroad tunnel contemplates the taking of rock from the bottom, the question is for the jury whether a subsequent parol modification by which the contractors were to remove the rock from the roof, and by which the matter for excavating for approaches was also changed, was such a material alteration of the written contract as to reduce it entirely to

9. Nuisances.—All building operations, and the performance of working contracts generally, must be carried on without creating a nuisance.¹ Thus, if one blockades a street with building materials, rendering passage dangerous and inconvenient,² or obstructs the free and convenient access to neighboring property,³ or leaves excavations unguarded,⁴ or fails to put up proper signals,⁵ he creates a nuisance which may be abated, and he is liable in damages to the party injured;⁶ also, if he erects a building extending over an adjoining lot,⁷ or over the street,⁸ or so that water drips from the roof upon the adjoining lot to the injury of the owner,⁹

parol, and a finding in favor of the contractors will not be disturbed where their evidence shows that the cost of the work was greatly increased by the change. *Malone v. Philadelphia, etc., Co.*, 157 Pa. St. 430.

But the abrogation of a building contract is not to be inferred from deviations from the original plan, permitted by the contract to be made. *Bozarth v. Dudley*, 44 N. J. L. 304; 43 Am. Rep. 373. And the omission, by consent of the parties thereto, of some of the items in a building contract, does not amount to an abandonment of the entire contract, the residue of which will remain in full force. *Menne v. Neumeister*, 25 Mo. App. 300.

1. See *NUISANCES*, vol. 16, p. 922. A fence or screen maliciously erected for the purpose of shutting out the light and air from a neighbor's windows has been held a nuisance; but the court was evenly divided, and hence the decision of the court below was affirmed. *Burke v. Smith*, 69 Mich. 380. And see *EASEMENTS*, vol. 6, p. 152.

An unsightly structure is not a nuisance, though it may be used in such a manner as to become one. Parties have a right to maintain such buildings on their own premises as they may deem necessary for their comfort and convenience. *Trulock v. Merte*, 72 Iowa 510.

Right of Support.—See *LATERAL AND SUBJACENT SUPPORT*, vol. 12, p. 933.

2. See *STREETS*, vol. 24, p. 108 *et seq.*; *HIGHWAY*, vol. 9, p. 412 *et seq.* Objects in the highway, naturally calculated to frighten horses, may constitute a nuisance. *Foshay v. Glen Haven*, 25 Wis. 288; 3 Am. Rep. 73; *Cook v. Charlestown*, 98 Mass. 80.

3. *Knox v. New York*, 55 Barb. (N. Y.) 404.

The right of a landowner to use a public highway for the purpose of bring-

ing building materials on his land, must be exercised reasonably, and where the right of an adjoining owner to the free access to his house is interfered with by an unreasonable use of the highway, he is entitled to damages, on the ground that he has suffered a particular injury from a public nuisance. *Fritz v. Hobson*, 14 Ch. Div. 542.

4. *Portland v. Richardson*, 54 Me. 46; 89 Am. Dec. 720. If one excavates an area in front of his house and suffers it to remain uncovered and unguarded, he is guilty of creating a nuisance, and is liable in damages to any one falling therein. *Robbins v. Chicago*, 4 Wall. (U. S.) 657.

5. This applies as well to a city making repairs upon its streets, as to an individual. *Kimball v. Bath*, 38 Me. 219.

6. *Barclay v. Com.*, 25 Pa. St. 503; 64 Am. Dec. 715; *HIGHWAY*, vol. 9, p. 413.

The remedy by action for damages is not barred by the act of abating the nuisance. *Pierce v. Dart*, 7 Cow. (N. Y.) 609.

7. *Meyer v. Metzler*, 51 Cal. 142.

8. The cornice of a building which projects over a sidewalk, and which is being constructed in such a manner as to be dangerous to persons using the sidewalk, is a nuisance. *Grove v. Ft. Wayne*, 45 Ind. 429; 15 Am. Rep. 262.

9. *Bellows v. Sackett*, 15 Barb. (N. Y.) 96; *Jackson v. Peaked*, 1 M. & S. 234. Where two buildings are so situated that the water from the roof of one can only be prevented from flowing against and injuring the other by an eaves trough attached to both, though the consent and co-operation of the owner of the building receiving the injury may be necessary, yet the duty of affirmative action is on the owner of the other building, and he may not stand by and see the water from his roof destroy his neighbor's wall, and rely for

or so that snow and ice collecting upon the roof will naturally and probably fall upon the adjoining highway.¹ A building extending into the street and obstructing the view of the neighboring house is a nuisance,² and if one fails to provide safeguards to prevent bricks falling upon the passers-by, he is liable for any injuries resulting therefrom.³

Where a city has been compelled to pay damages for injuries resulting from nuisances in highways created by individuals, it may recover the amount of such judgment from the one responsible for the nuisance.⁴

Where the nuisance is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the employer is not liable; but where the nuisance results directly from the acts which the contractor agrees and is authorized to do, the employer is equally liable to the party injured.⁵

10. Liability for Negligence—*a*. LIABILITY OF EMPLOYER.—The employer is not liable for injuries resulting from the negligence of workmen if the work is undertaken by an independent contractor, employing his own labor and having entire control of the work,⁶ unless the work is necessarily

his protection upon the passiveness of his neighbor. *Underwood v. Waldron*, 33 Mich. 232.

But twenty years acquiescence, by the owner of the adjacent lot, in such encroachment, is sufficient to lay the foundation for presuming a grant of the right to so use it. *Cherry v. Stein*, 11 Md. 1.

1. *Shibley v. Fifty Associates*, 106 Mass. 194; 8 Am. Rep. 318; *Smethurst v. Independent Cong. Church*, 148 Mass. 261; 12 Am. St. Rep. 550; *Garland v. Towne*, 55 N. H. 55; 20 Am. Rep. 164; *Hannem v. Pence*, 40 Minn. 127.

2. *Stetson v. Faxon*, 19 Pick. (Mass.) 147; 31 Am. Dec. 123.

3. *Jager v. Adams*, 123 Mass. 26; 25 Am. Rep. 7.

4. *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Portland v. Richardson*, 54 Me. 46; 89 Am. Dec. 720.

5. *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Storrs v. Utica*, 17 N. Y. 104; 72 Am. Dec. 437; *Lowell v. Boston*, etc., R. Co., 23 Pick. (Mass.) 24; 34 Am. Dec. 33; *Gray v. Pullen*, 11 L. T. N. S. 569; *Brownlow v. Metropolitan Board of Works*, 16 C. B. N. S. 546; 111 E. C. L. 546; *Wilson v. Peto*, 6 Moore 49; *Hole v. Sittingbourne*, etc., R. Co., 6 H. & N. 497; *Ellis v. Sheffield Gas Consumers Co.*, 2 El. & Bl. 767; 75 E.

C. L. 767; *Newton v. Ellis*, 5 El. & Bl. 115; 85 E. C. L. 115; *MASTER AND SERVANT*, vol. 14, p. 832.

In *Scammon v. Chicago*, 25 Ill. 424; 69 Am. Dec. 334, *Walker, J.*, said: "The true rule in cases of this character is, if the nuisance necessarily occurs, in the ordinary mode of doing the work, the occupant or owner is liable, but if it is from the negligence of the contractor, or his servants, that he should alone be responsible."

6. *Hale v. Johnson*, 80 Ill. 185; *Scammon v. Chicago*, 25 Ill. 424; *Long v. Moon*, 107 Mo. 334; *Allen v. Willard*, 57 Pa. St. 374; *Carbin v. American Mills*, 27 Conn. 274; 71 Am. Dec. 63; *Lawrence v. Shipman*, 39 Conn. 586; *Booth v. Rome*, etc., R. Co., 63 Hun (N. Y.) 624; *Gilbert v. Beach*, 5 Bosw. (N. Y.) 445; *Fulton County St. R. Co. v. McConnell*, 87 Ga. 756; *Hackett v. Western Union Tel. Co.*, 80 Wis. 187; *Charlebois v. Gogebic*, etc., R. Co., 91 Mich. 59; *Vincennes Water Supply Co. v. White*, 124 Ind. 376; *Wilson v. Greensboro*, 54 Vt. 533; *Bibb v. Norfolk*, etc., R. Co., 87 Va. 711; *Davie v. Levy*, 39 La. Ann. 551; 4 Am. St. Rep. 225; *Doran v. Flood*, 47 Fed. Rep. 543; *Rourke v. White Moss Colliery Co.*, 1 C. P. Div. 556. And this although the work is being done under the supervision of the

dangerous.¹ But this rule does not apply where the employer has control and direction of the work,² and, where the work is split up into different contracts, the employer undertaking to supply the materials, and no provision is made for the supervision of the work or the maintenance of guards, the duty is upon the employer to protect the public.³ If injury results

employer's engineer. *Eaton v. European, etc., R. Co.*, 59 Me. 520; 8 Am. Rep. 430; *Steel v. South Eastern R. Co.*, 16 C. B. 550; 81 E. C. L. 550; *Fitzpatrick v. Chicago, etc., R. Co.*, 31 Ill. App. 649. But see *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234; *Campbell v. Lunsford*, 83 Ala. 512.

The employer is not liable for an injury resulting from boards deposited in front of the land by a teamster in the employ of the contractor, *Hilliard v. Richardson*, 3 Gray (Mass.) 349; 63 Am. Dec. 743; nor for injury resulting from the dropping of bricks through the negligence of the contractor. *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234.

In an action against a lot owner for damages caused by blasting done on his lot under a contract, it is error to leave the jury to determine whether the defendant had, under the contract, any control over the work as to the manner of its execution, since the interpretation even of oral contracts is for the court. *Brannock v. Elmore*, 114 Mo. 55.

Contractors with a railroad company were to build a bridge, and upon completion to remove all piles, timber, etc., used in the construction. After the piles were driven, the company dismissed the contractors from further performance, and they thereupon cut off the piles just below the surface so that a vessel ran on them and was injured. It was held that upon such dismissal, before completion, it became the duty of the railroad company, and not of the contractors, to remove the obstructions, and therefore they were liable. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Steam Towboat Co.*, 23 How. (U. S.) 209.

1. *Clark v. Fry*, 8 Ohio St. 358; 72 Am. Dec. 590; *Bower v. Peate*, 1 Q. B. Div. 321; *Dalton v. Angus*, L. R., 6 App. Cas. 740; *Hughes v. Percival*, L. R., 8 App. Cas. 443. Such as blasting rock in a street for a sewer. *Joliet v. Harwood*, 86 Ill. 110; 29 Am. Rep. 17. And see MASTER AND SERVANT, vol.

14, pp. 829-837, where this subject is fully treated.

But the erection of a building adjacent to a highway, with the usual and necessary excavations, and the consequent obstruction to sidewalk and street, is not within such exception. *Moline v. McKinnie*, 30 Ill. App. 419.

A contract for constructing a sewer, stipulating that all damage arising out of the nature of the work, or from an unusual obstruction, etc., should be sustained by the contractor, renders him liable for damages to gas pipes. *Matter of Houghton*, 20 Hun (N. Y.) 395.

2. *Mumby v. Bowden*, 25 Fla. 454; *Campbell v. Lunsford*, 83 Ala. 512; *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234. And the employer may render himself liable by interfering with the work. *Bower v. Peate*, 1 Q. B. Div. 321; 45 L. J. Q. B. Div. 446; *Hughes v. Percival*, L. R., 8 App. Cas. 444.

Where C. had contracted with a town to widen a highway by removing the rocks from a ledge therein, for a certain sum of money and the stone, and afterward contracted with A. to build a dam for him with the stone, for which he was to receive a certain price per day while at work upon the dam and in blasting the rocks, A. furnishing the powder for the blasting, and superintending the building of the dam, but having no control of the blasting; and in blasting, a rock was thrown upon the building of S., causing injury for which C. was subjected in damages, it was held that the relation of master and servant did not exist between A. and C., and that A. was not liable to indemnify C. for the damages which he had been compelled to pay. *Corbin v. American Mills*, 27 Conn. 274; 71 Am. Dec. 63.

3. In *Haman v. Stanley*, 66 Pa. St. 464; 5 Am. Rep. 389, where an owner, who was about to build, contracted with one to dig a cellar, who employed his own assistants, horses and carts; with another to do the masonry, the owner finding the materials; with a

from defective plans and specifications, the employer is liable.¹

b. LIABILITY OF CONTRACTOR.—The contractor is liable for injuries to persons or property resulting from the negligence of himself, or of his servants² acting within the scope of their employment.³ He is bound to use reasonable care in the selection

third to put up the superstructure—the owner was held liable to a person injured by falling into the hole through its being insufficiently guarded.

1. *Lancaster v. Connecticut Mut. L. Ins. Co.*, 92 Mo. 460; 1 Am. St. Rep. 739; *MASTER AND SERVANT*, vol. 14, p. 835. And see *Wilkinson v. Detroit Steel, etc., Works*, 73 Mich. 405.

Where a contract requires a contractor to pursue a course which is not always proper, and in this case resulting in injury, as where it required the "sheath piling" to be removed upon the completion of a sewer, it was held that the contractor, having followed the requirements of the contract and advised a different course, was not responsible, but that the principle of *respondet superior* applied. *Lockwood v. New York*, 2 Hilt. (N. Y.) 66.

2. *Greer v. Darrow*, 61 Conn. 220; *Scammon v. Chicago*, 25 Ill. 424; 69 Am. Dec. 334. See *MASTER AND SERVANT*, vol. 14, p. 804; *NEGLIGENCE*, vol. 16, p. 386.

A contractor erecting a wall is liable to a passer-by injured by a falling brick, where he fails to provide safeguards or barriers. *Jager v. Adams*, 123 Mass. 26; 25 Am. Rep. 7. The law implies that it is the duty of a contractor to so construct his platforms, the same being over a thoroughfare, as to prevent injury through falling objects to persons passing thereunder, and it would seem that the reason for such an implication would be as strong in cases of interior construction, in case of notice that others would be employed under such platforms, in another department of the same work. *Angus v. Lee*, 40 Ill. App. 304. And see *Tomle v. Hampton*, 129 Ill. 379; *Pye v. Faxon*, 156 Mass. 471.

But under ordinary circumstances, when a lawful act is performed in a careful, skillful and proper manner, the party performing it is not liable for mere incidental consequences injuriously resulting from it to another's property. *People v. Albany*, 5 Lans. (N. Y.) 524.

A contractor, for the erection of a

building, put on the roof without making any provision for carrying off the water that would necessarily fall on it in the event of a rainstorm. A rainstorm, such as was usual at that time of the year, took place, and the rain falling from the roof, uniting with that coming from the street, flooded the adjoining premises and injured a stock of goods there. The contractor was held liable for the damage to the goods. *Slater v. Mersereau*, 5 Daly (N. Y.) 445.

Negligence of Subcontractor.—In *Bast v. Leonard*, 15 Minn. 304, the defendant, who had entered into a contract to erect a building, the materials to be of the best quality, and the work to be done in a workmanlike manner, sublet the excavation and the brick and stone work, together with the furnishing of the materials therefor. When the walls were nearly completed, they fell, thereby injuring the adjoining premises of the plaintiff. In a suit against the principal contractor for damages, it was held that the defendant's duty was to see that the materials used by the subcontractor were of the best quality, and that the work was done in a workmanlike manner; that if the materials furnished, or the work done, by the subcontractor, were of such a character that the walls were unsafe and unfit for the purposes for which they were intended, and the defendant knew such fact, or might have known it in the exercise of reasonable care and diligence, and went on and made use of the walls, and incorporated his own work with them, and made payments to the subcontractor, and accepted the work as it proceeded, and in consequence of the unsafe and imperfect character of the materials so furnished, and the work so done, by the subcontractor, the building fell upon and injured the premises and property of the plaintiffs, the defendant was chargeable with negligence for the damage resulting.

3. See *MASTER AND SERVANT*, vol. 14, pp. 807 *et seq.*, 815, 859. The contractor cannot be held liable for the negligent acts of his servant, unless

of his workmen and to provide them with suitable materials, and is liable for any injury to his servants resulting from his failure in this respect.¹ But the workman voluntarily assumes the ordinary risks incidental to his employment,² nor can he hold the contractor liable for injuries resulting from the negligence of his fellow servants,³ nor where his own negligence has contributed to the injury.⁴

11. Property in Materials.—Unless the contractor acts as the agent of the owner in purchasing the materials,⁵ the property in them does not pass to the latter until they have been definitely and finally appropriated to his use. This, where the work is performed upon realty, such as the erection of a building upon the land of another, is when the materials have been finally affixed to the freehold and worked into the structure.⁶ Where

done within the scope of his employment. *Howe v. Newmarch*, 12 Allen (Mass.) 49.

1. The contractor is liable for an injury to a workman resulting from a defective scaffolding. *Connolly v. Poillon*, 41 Barb. (N. Y.) 366. But after providing materials ample in quantity and quality for the construction of a scaffolding, the contractor is not liable for an error in judgment on the part of the foreman in selecting a defective piece. *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160. And where the scaffolding has been erected by the owner for the convenience of the contractor, the former is liable for an injury to a workman resulting from a defect therein. *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; 15 Am. Rep. 387.

The contractor is liable for injuries to his servants, resulting from his own negligence. *MASTER AND SERVANT*, vol. 14, p. 873 *et seq.*

2. See *MASTER AND SERVANT*, vol. 14, p. 842 *et seq.*

3. See *FELLOW SERVANTS*, vol. 7, p. 821.

4. See *MASTER AND SERVANT*, vol. 14, p. 861 *et seq.*; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 15.

5. *Johnson v. Hunt*, 11 Wend. (N. Y.) 137.

Where the materials are furnished on the credit of the building, the contractor may be considered the owner's agent in purchasing them, and hence they are the property of the owner, and cannot be levied on and sold under execution as the property of the contractor. *White v. Miller*, 18 Pa. St. 52.

6. The fact that the materials are intended for the owner's house does not change the property. When purchased

by the contractor they become his own, and he may sell them again and procure other materials for the intended building. *Johnson v. Hunt*, 11 Wend. (N. Y.) 135. In this case a contractor, after putting up and inclosing a house, worked up in the house plank preparatory to erecting columns for a piazza, and removed the same, as a mere matter of convenience, to an adjoining house, where they were levied on as the property of the builder. It was held that although the employer had made advances on the work as it progressed, the materials were personal property, and did not pass to him until delivery, or until affixed to the freehold.

A mere tentative affixture is not sufficient. In *Manchester Mills v. Rundlett*, 23 N. H. 271, it was held that where a contractor had procured blinds and fitted them to the windows of a house, and then taken them off to paint them in accordance with his contract, the blinds, while in his hands for the purpose of being painted and finished, were his property and liable to be taken for his debts. *Perley, J.*, in this case, said: "The contract required Brandon (the contractor) to paint the blinds, and they were in his hands unfinished; the plaintiffs had no possession nor any right of possession; the fitting of the blinds to the windows did not complete the work to be done on them; it was not a surrender of the possession and control of them to the plaintiff; it did not annex them to the house and make them a part of it. The fitting of the blinds was done by way of trial in the progress of the manufacture of the blinds, and cannot be regarded as having any more effect to transfer the possession and property

the work is performed upon a chattel which remains in the custody and under the control of the contractor, the act of working in the materials cannot be considered the best test of a final appropriation, and no property passes until the completion and delivery of the article.¹

It is sometimes provided in the contract that all building and other materials shall become the property of the landowner when brought upon the land,² or upon some default of the

to the plaintiffs than a measurement which would have answered the same purpose."

In *Tripp v. Armitage*, 4 M. & W. 687, where sash frames were sent to the building for the approval of the owner, and then returned to the shop and fitted with pulleys belonging to the owner, it was held that the final affixture had not taken place, and that, notwithstanding the approval by the owner and act of appropriation, they were still the property of the contractor.

By an agreement made between the plaintiff company and the defendant, a contractor, for the construction of a railway, it was provided that, once a month, the company's engineer should certify the amount payable to the contractor in respect of the value of the materials delivered, and that such certificates should be paid by the company seven days after presentation. It was held that the property in the materials delivered, upon their being certified for by the engineer, passed to the company, though the materials were not fixed. *Banbury, etc., Direct R. Co. v. Daniel*, 54 L. J. Ch. Div. 265; 33 W. R. 321, Pearson, J.

The circumstances of each case must be determined. *Allis v. Voigt*, 90 Mich. 125. And where a mill was built upon the land of another under an express contract, by which it was to be the sole property of the builder until a judgment which was a lien upon the land should be paid by the owner, it was held that the builder had a right to remove the mill after a sale of the land, on an execution issued upon such judgment. *Yater v. Mullen*, 24 Ind. 277.

1. *Merritt v. Johnson*, 7 Johns. (N. Y.) 473; 5 Am. Dec. 289; *Wilkins v. Bromhead*, 6 M. & G. 963; 46 E. C. L. 963; *Bellamy v. Davey* (1891), 3 Ch. 540.

The general rule is that, under a contract for the building of a vessel or other thing, no property passes to the

one for whom it is built until it is finished and delivered, and the rule is the same where specified portions of the contract price are agreed to be, and are, paid to the builder at specified stages of the work. *Andrews v. Durant*, 11 N. Y. 35; 62 Am. Dec. 55; *Briggs v. A Light Boat*, 7 Allen (Mass.) 387; *Clarkson v. Stevens*, 106 U. S. 505.

Where a contract for building a ship for M. provided that "all payments made by" M. "shall be considered as constituting ownership so far as advanced," it was held that this referred to payments in advance of delivery, and did not relate to the vessel, nor transfer the ownership so far as the structure was completed. *Assigned Estate of the Reany Engineers, etc., Works*, 9 Phila. (Pa.) 620.

But in *England*, the payment of installments dependent upon the progress of the vessel is held to be an indication of an intention to vest the property as it is building. *Wood v. Bell*, 5 El. & Bl. 772; 85 E. C. L. 772; *Seath v. Moore*, L. R., 11 App. Cas. 350. And see *M'Eldery v. Flannagan*, 1 Har. & G. (Md.) 308.

No property passes in the loose materials intended to be used in the manufacture of the chattel. *Seath v. Moore*, L. R., 11 App. Cas. 350; *Wood v. Bell*, 6 El. & Bl. 355; *Baker v. Gray*, 17 C. B. 462; 84 E. C. L. 462; 25 L. J. C. P. 161; 2 Jur. N. S. 400.

2. *Reeves v. Barlow*, 12 Q. B. Div. 436. And in such case materials brought upon the land vest in the owner of the freehold, and are not liable for the debts of the builder. *Blake v. Izard*, 16 W. R. 108.

By a building contract between A, the landowner, and B, the builder, A was to grant leases on the erection of the buildings and to assist the building operations by making advances to B, according to the progress of the buildings. The seventh clause of the contract stated that all materials

contractor,¹ but this does not make them so absolutely the property of the owner as to be subject to seizure under an execution

and other things brought on the premises by B for the purpose of erecting the buildings were to be considered as immediately attached to, and belonging to, the premises, and were not to be removed therefrom without the consent of A. The eighth clause empowered A to enter upon and take possession of the land, with all buildings and other materials standing thereon, in case B should fail to proceed with the completion of the buildings. It was held that the eighth clause did not qualify the seventh clause, the effect of which was to give A such an equitable interest in the materials for the buildings brought afterward on the land by B that they could not be taken in execution by a judgment creditor of B. *Brown v. Bateman, L. R.*, 2 C. P. 272; 36 L. J. C. P. 134; 15 L. T. N. S. 658; 15 W. R. 359.

Contractor's Plant.—A contract for executing sewage works, made between a contractor and improvement commissioners, provided that the plant brought by the contractor on to the works should be deemed to be the property of the commissioners, and should not be removed during the progress of the work without the written order of their engineer; and in case of suspension of the works by the engineer for any default of the contractor, or of the work being taken out of the contractor's hands, the same should be subject to be used as should be ordered by the engineer in and about the completion of the works. The engineer suspended the works, and the commissioners took possession of the plant and completed the works. The contractor having become bankrupt, and a sum of £2,876 7s. 5d. having been certified to be due to the commissioners from him for default under the contract, the commissioners claimed to retain the plant, which was sold by consent for £685, but it was held that the contract gave the commissioners no property in the plant, only a right of user. *In re Winter*, 8 Ch. Div. 225; 47 L. J. Bank. 52; 38 L. T. 362; 26 W. R. 512.

A contract for the construction of a railway provided that if the contractor should make default the company might enter and complete the works, and make use of the contractor's wagons, machinery and plant, and

also have a lien on the same, with power of sale to reimburse themselves any loss or damage they might sustain by reason of such default. The contractor having become embarrassed, the company made a second contract with him, which provided they should take to and complete the works, and for that purpose should be allowed ten thousand pounds, and the use of all the contractor's plant, etc., which, on the completion of the works, should be restored to the contractor in whatever state it might then be. This second contract provided that, if it should then be found that anything was due to or from the company from or to the contractor, the amount should be paid by the one to the other within three months after the engineer should have certified the amount that should be due. It also provided that, in all other respects, the original contract should stand, except so far as it was altered by, or should be inconsistent with, the second contract. The contractor had made no default down to the date of the second contract. The company completed the works, and the engineer certified that a large sum was due to them from the contractor. The company thereupon refused to deliver up the plant to the contractor, and claimed power to sell the plant, and to reimburse themselves out of the proceeds; but it was held that they were not so entitled, for the provisions of the second contract were in substitution of the corresponding provisions in the first contract; the two instruments were not to be read as one, nor were the clauses of the first, conferring the lien and power of sale, to be taken as incorporated into the second contract. *Hunt v. South Eastern R. Co.*, 45 L. J. C. P. Div. 87.

1. A builder contracted with a building club to erect houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner, to the satisfaction of the architect of the club, or become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete

against him,¹ nor will such provisions be allowed to operate as a fraud upon the bankrupt laws.²

the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements, provided that the contractor should have drawn money on account of his contract. The contractor commenced the works and carried them on for some time, receiving a considerable sum from the club. On the second of May he filed a liquidation petition. On the second of June the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, they, on the expiration of two days, should employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works, and on the expiration of this notice the club took possession of the materials, implements and plant. It was held that the club was entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being a protected transaction within the Bankruptcy Act (1869), § 94. *In re Waugh*, 4 Ch. Div. 524; 46 L. J. Bank. 26; 35 L. T. 769; 25 W. R. 258.

Under a clause in a building agreement, under which rent had not been paid (and not amounting to a demise), that in case of default in not completing the buildings, at successive periods, the owner should be at liberty to re-enter and seize the materials there, and successive defaults having been made and several periods of indulgence granted, but there being no waiver of the last default, and no alteration of the builder's position to his prejudice, and no default on the part of the owner, it was held that the owner was entitled to re-enter and seize the materials. *Stevens v. Taylor*, 2 F. & F. 419.

An agreement between a railway company and a contractor provided that, in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the company might take the execution of the works out of his hand, and might use all or any of his plant, materials, or implements, and that, in addition to all rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his contract, toward satisfaction of all losses

or expenses occasioned to the company by the delay; and that all the materials, plant, and implements which at the time of such delay or default should be in or about the site of the works, should thereupon become the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys (if any) recoverable from him by the company. The company took the execution of the works out of the contractor's hand under this clause. The contractor brought an action for breach of contract, which, with all matters in difference between the parties, was referred to arbitration. It was held that the plant and materials did not become the absolute property of the company, unless loss or expense had been occasioned to it; and an interlocutory injunction was awarded to restrain them from moving and selling the plant and materials pending the arbitration. *Garrett v. Salisbury, etc.*, R. Co., L. R., 2 Eq. 358; 14 W. R. 816.

1. A contractor supplied materials to a railway company for the purpose of carrying out his contract. By the terms of the contract it was provided that the materials brought upon the railway should become immediately the absolute property of the company, except that they were to remain under the dominion of the contractor; that, if he should duly complete his contract, the company would give to the contractor, as part of his payment, the unconsumed materials; and that if, instead of the contractor, the company should use the materials, the company should compensate him in respect of them. It was held that the materials were not, by the terms of the contract, so absolutely the property of the company as to be seizable by the sheriff under an execution upon a judgment against the company. *Beeston v. Marriott*, 4 Giff. 436; 9 Jur. N. S. 960; 8 L. T. N. S. 690; 11 W. R. 856.

2. *In re Harrison*, 14 Ch. Div. 19; *In re Walker*, 26 Ch. Div. 510; *In re Winter*, 8 Ch. Div. 225; 47 L. J. Bank. 52; 38 L. T. 362; 26 W. R. 512; *Tripp v. Armitage*, 4 M. & W. 687; 1 H. & H. 442; 3 Jur. 249.

"But the operation of lien laws has made such clauses of little avail for

their prime object—the protection of the landowner against the claims of mechanics and material men—and they are of little importance at present to American jurisprudence.” Lloyd’s Law of Building (2d ed.), § 73.

A agreed to build a ship for B within a certain period, B paying installments of the price from time to time; and it was provided that if A should fail to complete the ship as stipulated, it should be lawful for B to enter upon and take possession of the ship (which from the payment of the first installment was to be the property of B) and to cause the works to be completed by any persons whom he should employ, using such of the materials of A as should be applicable to the purpose. A failed to complete the ship, and B took possession of it. A committed an act of bankruptcy, and B proceeded to finish the ship, using applicable materials which were in the yard at the time of the act of bankruptcy, but were not then incorporated with the ship, nor had been specifically appropriated by A for the ship. Some of the materials had been selected by B before the bankruptcy, and some were piled within the ship, and the rest in a shed adjoining, but none had been actually used before the bankruptcy. It was held that B was not entitled to the materials under the agreement, as they had never been used, and therefore that the property in them passed to the assignees of A. *Baker v. Gray*, 17 C. B. 462; 84 E. C. L. 462; 25 L. J. C. P. 161; 2 Jur. N. S. 400.

A contract by a trader to do certain works contained a clause that if he should become bankrupt, or delay proceedings with the works, his employer should have power, after seven days’ notice to him to proceed, to employ others to do the work, that the advances made to the trader before his default should be taken as full payment, and that all tools and materials used upon the works should become the property of the employer. The trader, having delayed to proceed with the works, was served, on the eleventh of April, by his employer, with notice to proceed. On the seventeenth of April, the trader committed an act of bankruptcy; on the nineteenth of April, the notice to proceed not having been complied with, his employer took possession of the tools and materials. In June a fiat was issued against the trader. In trover by his assignees in bankruptcy against the

employer for tools and materials left upon the works by the bankrupt, it was held that they did not become the property of his employer at the expiration of the seven days’ notice, because they had vested in his assignees by relation on the seventeenth of April, before the notice had expired. *Rouch v. Great Western R. Co.*, 2 Railw. Cas. 505; 5 Jur. 826.

A railway company entered into a contract (dated December 27, 1836) with certain builders for building a bridge, all necessary implements and materials to be found by the builders, with power to the company, if, in the opinion of its architect, the contractors should not proceed with sufficient expedition, to employ other or additional workmen to complete the works, on giving them seven days’ notice, and in such case to use the cranes, machines, implements, and materials used on or about the works by the contractors, who were to defray the extra expenses incurred. The contract provided that the company should have a lien upon such machines, implements, and materials as should, for the time being, be in and upon the land, as a security for a completion of the bridge. On the twenty-sixth of July, 1837, the contractors committed an act of bankruptcy, and a fiat was issued on the thirty-first. Divers goods, timbers, etc., for building the bridge had been previously deposited by them on it and the land adjoining. These consisted of four kinds: First. Those actually on the land of the railway. Second. Those upon land adjoining the line (not the property of the company, but inclosed and taken possession of by them under the act). Third. Those deposited upon the lands of a temporary railway made by the bankrupts, over land not belonging to the company, for the convenience of conveying materials. Fourth. A crane erected by the contractors at the end of the temporary railway. On the thirty-first of July the company took possession of all these goods. On the first of August it gave the seven days’ notice that other workmen would be employed, and on the second they took upon themselves the completion of the bridge, using some of the goods, and retaining the remainder. In trover brought by the assignees of these goods, it was held that the company had a lien upon the first and second classes, but not upon the third and fourth, which, nevertheless, at the

Where the contract is silent as to old structures standing upon the land, and makes no reference to the materials in them, it has been held that they become the property of the contractor upon taking possession and removing them.¹

12. Erections in Violation of Law.—A contractor who knowingly erects a building in violation of law, as, for instance, in violation of building regulations, may not recover therefore.² There is some conflict of authority upon the question whether there can be a recovery when the contractor builds a house knowing that it is to be used for illegal or immoral purposes.³

13. Penalties and Liquidated Damages.—As a general rule, where the actual damage can be ascertained from the contract itself, the courts are inclined to disregard its language in so far as it fixes the damage, and particularly in cases where a strict construction of the language used would result in oppression to the party against whom the claim is asserted;⁴ but if the actual

expiration of the notice, it had a right to retain and use about the work, for the agreement was lawful, not being made in contemplation of bankruptcy, and that these rights of the company were not invalidated by the possession of the bankrupt, under 6 Geo. IV., ch. 16, § 72, he being the true owner; nor by other implements and materials so used having been removed without any objection from the company's authority, the lien being a shifting one, and attaching to such articles as were brought from time to time, and ceasing to such only as were removed; nor by the implements and materials not being scheduled. *Hawthorn v. Newcastle-upon-Tyne, etc.*, R. Co., 2 Railw. Cas. 288.

1. *Morgan v. Stevens*, 6 Abb. N. Cas. (N. Y. C. Pl.) 356. In *Cooper v. Kane*, 19 Wend. (N. Y.) 386; 32 Am. Dec. 512, where an excavation contract was silent as to whom the sand or material taken from the lots should belong to, it was held that a custom by which the earth removed in making excavations belongs to the excavator and not to the owner of the land, could be shown as evidence of the contract of the parties.

But the right given a lessee to make alterations, does not entitle him to claim the materials taken out of the building in making the alterations. *Agate v. Lowenbein*, 57 N. Y. 604.

2. A contract to build a house in violation of the building regulations of a city is unlawful, and no action will lie for its breach. *Burger v. Roelsch* (Supreme Ct.), 28 N. Y. Supp. 460; 8

Misc. Rep. (N. Y.) 319; *Stevens v. Gourley*, 7 C. B. N. S. 99; 97 E. C. L. 99.

In *Brinkman v. Eisler* (City Ct.), 16 N. Y. Supp. 154, where the plaintiff erected an awning in front of the defendant's premises, such erection being forbidden by a city ordinance, it was held that the plaintiff was not entitled to recover on a *quantum meruit* for the work, labor, and materials furnished.

3. In *Spurgeon v. McElwain*, 6 Ohio 442, it was held that where the keeping of a ninepin alley was unlawful, the builder of such an alley could not recover therefor.

But in *Michael v. Bacon*, 49 Mo. 474; 8 Am. Rep. 138, it was held that the fact that a builder knows, at the time that he erects a house, that it is to be used for gambling purposes, does not prevent his recovering for work done and material furnished in fitting up the structure. And see generally *CONTRACT*, vol. 3, pp. 869, 872, 886; *MUNICIPAL CORPORATIONS*, vol. 15, p. 1176.

4. *Hahn v. Horstman*, 12 Bush (Ky.) 249; *Eva v. McMahon*, 77 Cal. 467.

A stipulation to pay the owner a specified amount, as liquidated damages, for each day's delay in completing the building, is not sufficient of itself, in the absence of other evidence showing the impracticability or extreme difficulty of fixing the actual damage caused by the delay, to entitle the owner to recover the amount stipulated for. *Patent Brick Co. v. Moore*, 75 Cal. 205.

Although a building contract may

damage sustained cannot be reached by any known rule of law, then the courts are disposed to look alone to the measure of damages fixed by the contract.¹

provide for a penalty of twenty dollars per day for every day's delay in completing a house, still, in the absence of proof that the owner is damaged by the delay, nominal damages only can be recovered. *Wilens v. Kling*, 87 Ill. 107.

Where a building contract contains many and various conditions, a breach of some of which would be easily and fully compensated by damages readily proven, and where a breach of others would not necessarily involve more than trifling damages, a provision for the forfeiture of five hundred dollars, in case of any failure to perform on either side, will not be enforced by way of liquidated damages, though such be the expressed intent. *First Orthodox Cong. Church v. Walrath*, 27 Mich. 232.

Where the damages can be assessed easily and accurately, and they are fixed by the contract itself at an unconscionable sum, it is the plain duty of the court to relieve against such injustice and to treat the sum named as a penalty merely, and hence, where a contract to build a house, the rental value of which was about twenty-five dollars a month, provided for the payment of one hundred and fifty dollars a week damages for delay in completion after the contract time, it was treated as a penalty and not as stipulated damages. *Clements v. Schuykill*, etc., R. Co., 132 Pa. St. 445.

Wherever there is a sum mentioned at the end of a contract as damages for the non-performance of any of a great number of stipulations therein, it must be treated as a penalty. *In re Newman*, 4 Ch. Div. 724; *Wallis v. Smith*, 21 Ch. Div. 243.

Where the cost of performing the contract would not exceed one hundred dollars, and the parties stipulate for damages in case of a breach, fixing the amount at five hundred dollars, they cannot have in contemplation actual compensatory damages, and the sum stipulated will be treated as a penalty. *Condon v. Kemper*, 47 Kan. 126.

Where a construction contract provided for the reservation of fifteen per cent. of the monthly estimates until the completion and acceptance of the work, it was held that the reserve was not

liquidated damages, and that the contractor might recover the reserve less the employer's actual damages from his breach of the contract. *Dullaghan v. Fitch*, 42 Wis. 679.

In an action for the price of labor done and materials furnished under a contract, where it is found that the defendant should be relieved from the obligation of the contract because the plaintiff failed to complete the work, it is error to allow the defendant the stipulated daily penalty for delay, from the time of the plaintiff's abandonment of the contract until the defendant had the work finished. *Lennon v. Smith*, 124 N. Y. 578, reversing (C. Pl.) 1 N. Y. Supp. 97.

1. *Hahn v. Horstman*, 12 Bush (Ky.) 249; *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230; *Crux v. Aldred*, 14 W. R. 656; *Wallis v. Smith*, 21 Ch. Div. 243; 52 L. J. Ch. Div. 145; *Ranger v. Great Western R. Co.*, 3 Railw. Cas. 298. See DAMAGES, vol. 5, p. 24.

When it is difficult or impossible to ascertain the damages for the breach by any fixed rule, there is a reason why the parties should liquidate them in advance, as stipulated damages, and why the courts should afterward hold them to such liquidation. *Clements v. Schuykill*, etc., R. Co., 132 Pa. St. 445.

The parties may agree upon any amount of compensation as liquidated damages, for a breach of the contract, which does not manifestly exceed the amount of injury suffered; and the party in default will be required to pay this fixed sum as an equivalent for the loss sustained. *Hahn v. Horstman*, 12 Bush (Ky.) 249; *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Rep. 102; *Bagley v. Peddie*, 16 N. Y. 469; 60 Am. Dec. 713; *Mott v. Mott*, 11 Barb. (N. Y.) 127.

A stipulation for the payment of fifty dollars for each day the contractor was in default, was considered, on breach, as liquidated damages, where the damages were uncertain and incapable of being ascertained by any satisfactory rule. *Malone v. Philadelphia*, 147 Pa. St. 416.

Where a contractor undertakes to do certain work within a given time or pay certain fixed sums, the fact that a bond with a penalty has been given to

Where liquidated damages are agreed upon in the contract, the plaintiff will be limited in his recovery to the amount specified.¹

The use of the terms "penalty," "forfeit," or "liquidated damages," in describing the sum to be paid, is not controlling upon the question of construction.²

14. Forfeitures.—A stipulation is inserted frequently in the contract, that the contractor shall forfeit his rights thereunder for certain breaches, such, for instance, as failing to prosecute the work to the satisfaction of the superintendent, or to complete it within the specified time, in which case the employer is empowered to take the work out of his hands and employ other contractors to complete it.³ Such a provision is similar in its nature to a penalty, and the same rules generally apply to both,⁴ but it

secure the payment of them is in itself strong evidence to show that they are liquidated damages. *Ranger v. Great Western R. Co.*, 5 H. L. Cas. 72.

Where the sum agreed upon is a reasonable one and such as the parties might well have fixed as a fair indemnity for a failure to substantially finish the work within the period fixed by the contract, the courts are inclined to uphold it; hence, where an agreement to repair certain houses for fifteen hundred dollars, provided that the contractor should "forfeit five dollars" for each and every day's delay in the completion of the work beyond the time specified, it was construed as fixing the amount of liquidated damages, and not as a penalty. *Hall v. Crowley*, 5 Allen (Mass.) 304; 81 Am. Dec. 745. For instances where a stipulation was held to be for liquidated damages, see *DeGraff v. Wickham* (Iowa, 1892), 52 N. W. Rep. 503; *Lincoln v. Little Rock Granite Co.*, 56 Ark. 405.

1. *Welch v. McDonald*, 85 Va. 500.

2. *Hall v. Crowley*, 5 Allen (Mass.) 304; 81 Am. Dec. 745; *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230.

But in *Salters v. Ralph*, 15 Abb. Pr. (N. Y. Supreme Ct.) 273, it was held that a provision that a party shall "forfeit" a fixed sum, implies a penalty.

3. *Walker v. London, etc., R. Co.*, 1 C. P. Div. 518; *Ex p. Newitt*, 16 Ch. Div. 522; *Charlton v. Scoville*, 68 Hun (N. Y.) 348; *Geiger v. Western Maryland R. Co.*, 41 Md. 4; *Langdon v. Northfield*, 42 Minn. 464; *Jackson v. Cleveland*, 15 Wis. 107; 90 Am. Dec. 266.

A person who employs another on the understanding that the work is to

be done in a workmanlike manner, may terminate the contract if the work be not so done, without regard to the intention of the contractor. *Feinberg v. Weiher* (C. Pl.), 19 N. Y. Supp. 215.

The incapacity of the contractor to do the work properly, arising from his ignorance and dissipation, and the incompetency and dissipation of his workmen, justifies the owner in terminating the contract. *Rector v. McDermott* (Ark. 1890), 13 S. W. Rep. 334.

Where the plaintiff contracted to execute certain works for the defendants, the agreement containing a proviso "that if the works did not proceed as satisfactorily as required by the defendants, they should have power to enter thereupon, pay whatever number of men should be left unpaid by the plaintiff, and set to work whatever number of men they might consider necessary, the amount so paid, and the cost of the men so set to work, to be deducted from whatever moneys might be due to the plaintiff," it was held that the intention of the parties was that the defendants, if dissatisfied with the progress of the work, should be at liberty to avail themselves of the terms of the proviso, and deduct from the money due to the plaintiff such sums as had been expended in pursuance thereof. *Stadhard v. Lee*, 3 B. & S. 364; 113 E. C. L. 364; 32 L. J. Q. B. 75; 9 Jur. N. S. 908; 7 L. T. N. S. 850; 11 W. R. 361.

4. *Salters v. Ralph*, 15 Abb. Pr. (N. Y. Supreme Ct.) 273; *Lloyd's Law of Buildings* (2d ed.), § 61. See *supra*, this title, *Penalties and Liquidated Damages*.

A provision requiring the architect

is often of the greatest importance to the employer to have the work completed within a given time, and a condition in the contract allowing him to take the work out of the contractor's hands on certain contingencies will be enforced,¹ and the latter

to certify the contractor's failure must be complied with. *O'Keefe v. St. Francis Church*, 59 Conn. 551.

1. *Hammond v. Miller*, 2 Mackey (D. C.) 145; *Culbertson v. Ellis*, 6 McLean (U. S.) 248; *Hewlett v. Alexander*, 87 Ala. 193; *Lara v. Greeley*, 20 Fla. 926; *Grassman v. Bonn*, 32 N. J. Eq. 43; *Stadhard v. Lee*, 3 B. & S. 364; 113 E. C. L. 364; 32 L. J. Q. B. 75; *Ranger v. Great Western R. Co.*, 3 Railw. Cas. 298; *Mohan v. Dundalk, etc., R. Co.*, L. R., 6 Ir. 477; *Davies v. Swansea*, 8 Exch. 808; 22 L. J. Exch. 297.

A building contract, entered into by a burial board, contained a clause that it should be lawful for the burial board, in case the contractor should fail in the due performance of any part of his undertaking, or should become bankrupt, or should not, in the opinion and according to the determination of the architect, exercise due diligence and make such progress as would enable the works to be effectually and efficiently completed at the time and in the manner therein mentioned, to determine the contract by a notice in writing under the hand of the clerk of the burial board, and to enter upon and take possession of the works, and of the plant, tools, and materials of the contractors, and use or sell, or use and sell, the same as the absolute property of the burial board. The architect having given a certificate that the contractor was not exercising due diligence, the burial board gave the notice required to determine the contract, and took possession of the works. The certificate was given *bona fide*, but the delay was in fact occasioned by the act of the board in ordering extra works and otherwise. It was held that the board was, notwithstanding, entitled to act as they did, their right to enter on the works being, by the terms of the contract, dependent on the opinion and judgment of the architect, and not upon the contractor's failure to exercise due diligence, in fact. *Roberts v. Bury Imp. Com'rs*, L. R., 4 C. P. 755; 38 L. J. C. P. 367.

But where the forfeiture is to be upon the judgment of two architects named,

the contractor cannot be stopped from proceeding with the work, where the judgment of one architect is based solely on information derived from the other, and not on personal examination. *Benson v. Miller* (Minn. 1894), 57 N. W. Rep. 943.

Where a bill was filed by a contractor alleging unfair conduct on the part of an architect whose decision was by the terms of the contract made final, and who ousted the contractor and finished the buildings, the court, on proof of such unfair conduct, decreed payment of the balance due on the contract, and relieved the contractor from penalties, declared the architect's decision not binding, and ordered both the architect and the contracting party to pay the costs of the suit. *Pawley v. Turnbull*, 3 Giff. 70; 7 Jur. N. S. 792; 4 L. T. N. S. 672.

Where a contract, by which the plaintiffs agreed to mine iron ore from the defendant's mine by the carving system, gave the defendant the right of terminating the contract whenever it should decide that such system of mining was "prejudicial to the future welfare and development of said mine," it was held that this gave the defendant no right to arbitrarily terminate the contract, and, having stopped the plaintiffs from continuing the work, without even pretending to have determined that the system would be prejudicial, it was liable in damages for breach of the contract. *Anvil Min. Co. v. Humble*, 153 U. S. 540.

Not Entitled to Equitable Relief.—A contractor agreeing to execute the public works of a company, and binding himself for the due performance of his contract by forfeitures subjecting himself to the arbitrary decision of a person nominated by the company as to his liability thereto, is not entitled to relief in equity against the forfeiture. *Ranger v. Great Western R. Co.*, 2 Jur. 787; 5 H. L. Cas. 72.

Failure of Contractor.—A builder contracted with a building club to erect houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in

restrained from interfering with the prosecution of the work.¹ The contractor cannot restrain the employer from taking possession.²

a proper manner to the satisfaction of the architect of the club, or become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have the power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, plant, and implements; provided that the contractor should have drawn money on account of his contract. The contractor commenced the works, and carried them on for some time, receiving a considerable sum from the club. On the thirtieth of May he filed a liquidation petition. On the second of June the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, he should, on the expiration of two days, employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works, and on the expiration of this notice, the club took possession of the materials, implements, and plant. It was held that the club was entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being a protected transaction within the Bankruptcy Act (1869), § 94. *In re Waugh*, 4 Ch. Div. 524; 25 W. R. 258; 35 L. T. N. S. 769; 46 L. J. Bank. 26.

Delay in Awarding Amount Due Contractor.—A contract for the performance of works contained a provision that if the contractor should not, according to the determination of the employers' engineer, exercise such due diligence as would enable the works to be completed according to the contract, the employers might put an end to the contract, and that the contractor should be paid such sum as the engineer should determine to have been reasonably earned for the work actually done. The contract having been put an end to under this provision, the contractor filed a bill against the employers and the engineer, complaining of undue delay on the part of the latter in awarding the amount earned by the contractor, and seeking the payment of what was due upon the contract, but did not establish any case of fraud or collusion against the engineer. It was held that the bill was properly dis-

missed with costs. *Scott v. Liverpool*, 3 De G. & J. 334.

Forfeiture in Lieu of Damages.—No action lies against a contractor for failure to comply with a contract which provides that in case of non-compliance the owner may annul such contract and forfeit the unpaid part of the work. *O'Connor v. Henderson Bridge Co.* (Ky. 1894), 27 S. W. Rep. 251.

1. Disputes having arisen between a railway company and a contractor employed in making the railway, the company insisted upon a right under the contract, owing to the alleged default of the contractor, to discharge him, take possession of the line of materials, and complete the works itself. The contractor resisted such claim, imputing the backward state of the works to the acts of the company, and held forcible possession. Collisions occurring between the workmen of the two parties, each being charged with impeding the operations of the other, and the completion and opening of the railway for traffic being in the meantime delayed, the court, on the application of the company, restrained the contractor from continuing on the line, or interfering with the operations of the company, and directed an account of what was due the contractor for works and materials done and provided, without regard to the formal certificates of the company's engineer, and without an issue to try whether the company, at the time it proceeded to enter upon the works and remove the contractor, was lawfully justified in doing so, reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial and the report. *East Lancashire R. Co. v. Hattersley*, 8 Hare 86.

2. The contract is one where, if the employer is wrong, the contractor can be amply compensated in damages, whereas, if the contractor were allowed to resume work, the court could not enforce specific performance of the contract in order to compel its completion. *Garrett v. Banstead, etc., R. Co.*, 4 De G. J. & S. 462; 11 Jur. N. S. 654. And see *Jennings v. Brighton Intercepting, etc., Board*, 4 De G. J. & S. 735, note.

Such provisions are often inserted in contracts with subcontractors.¹

Forfeitures are not favored in law, however,² and must be declared at the time the cause therefor occurs,³ and if, after the time for forfeiture has passed, the employer treats the agreement as still subsisting, he will be held to have waived the forfeiture.⁴

A contractor agreed to execute the works of a railway within a certain time, and, on being paid in a certain manner, and under a condition that if he failed to proceed with the works as required by the engineer of the company, the contract should be void, and the implements and materials belonging to the contractor should be forfeited. The contractor did not satisfy the engineer of the company, and the company proceeded to take possession of the works. The contractor alleged that the proper payments had been made to him; and it was held that the court would not restrain the company by interlocutory injunction until the questions between the company and the contractor were decided. *Munro v. Wivenhoe, etc., R. Co.*, 11 Jur. N. S. 612; 13 W. R. 880; 12 L. T. N. S. 655; 4 De G. J. & S. 723.

1. *Maloney v. Malcolm*, 31 Mo. 45. A contract for the excavation of a harbor was sublet under an agreement that the work would be performed "within the time fixed by said contract and the extensions thereof, granted or to be granted," and that the original contractor should have the right to proceed with the completion of the work if there should be a failure to perform the contract so as to endanger a forfeiture. The time fixed by the contract for the performance of the work was extended from December thirty-first to June thirtieth, and thereafter to July thirty-first and finally to December thirty-first. Pending this final extension the original contractor resumed possession of the work, and it was held that whether the danger of forfeiture was so great as to justify resumption of the work by the original contractor, was for the jury to determine. *Mundy v. Stevens*, 61 Fed. Rep. 77; 9 C. C. A. 366.

2. An arbitrary forfeiture is not justified. *Chicago v. Sexton*, 115 Ill. 230; *White v. Harrigan*, 41 Minn. 414. And see *Hatch v. Fogerty*, 33 N. Y. Super. Ct. 166; *Louisville, etc., R. Co. v. Donnegan*, 111 Ind. 179.

A contract with a city to construct

and operate waterworks provided that, in case of the contractor's failure to do so, "the rights and franchises granted to him shall cease and determine." Time was not made of the essence of the contract, and although the works, as at first constructed, were not what they should have been, this was partly the fault of the city, and, moreover, the city used the water for some purposes. It was held that the city could not, by *ex parte* action, without judicial proceedings, annul the contract, and that, under the circumstances, the contractor was entitled to a reasonably further time in which to perfect the works, if possible. *Foster v. Joliet*, 27 Fed. Rep. 899.

Pay for Work Performed.—Where a contract was annulled by the city of New Orleans on account of the failure of the contractor to complete the work within the time prescribed, it was held that his right to recover pay for work already performed depended on whether the failure was through his fault. If overpowering force—such as an unusual high water—occurred to interfere with the operations of the contractor, he would be entitled to recover pay for what work he had actually performed, although the contract was forfeited. *Bietry v. New Orleans*, 22 La. Ann. 149.

3. The failure of the employer to declare a forfeiture at the time the cause therefor occurs, is a waiver thereof. *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23.

A provision that if the work is not progressing to the satisfaction of the superintendent, the employer may take it out of the hands of the contractor and employ others to complete it, can only be enforced before the time originally fixed for the completion of the work has expired. *Walker v. London, etc., R. Co.*, 1 C. P. Div. 518; 45 L. J. C. P. Div. 787.

4. *Ex p. Newitt*, 16 Ch. Div. 522. And see *Arterial Drainage Co. v. Rathangan, etc., L. R.*, 6 Ir. 515; *Murphy v. Buckman*, 66 N. Y. 297.

A contractor did not perform a

Notice usually is required to be given the contractor, of the intention of the employer to take charge of the work,¹ but the service of such notice does not of itself terminate the contract and relieve the contractor from responsibility for the proper execution of the work done.² If there has been delay—and this is

building contract according to its terms, and the owner of the building stopped him. The defects were then agreed upon, and the contractor agreed to remedy them, and to complete the work. It was held a waiver of forfeiture, and that as the owner again stopped the work without a failure on the contractor's part to perform as last agreed, the latter had a right of action. *Fallon v. Lawler*, 102 N. Y. 228.

A was a contractor for the grading of a railroad. B was a subcontractor under a contract stipulating that A might retain fifteen per cent. of the amount of the monthly estimates as security for B's execution of his contract. The contract provided that if B failed to carry on the work, A might carry it on at B's expense, or declare the contract forfeited and re-let the work, holding B liable for damages. B left the work. A declared a forfeiture, but neither re-let nor did further work, and by agreement with the railroad company abandoned the work, receiving full pay for what had been done. It was held that the amount retained by A from the monthly estimates belonged to B. *Winters v. Fleece*, 4 Lea (Tenn.) 546.

1. See *Benson v. Miller*, 56 Minn. 410; *Rodemer v. Gonder*, 9 Gill (Md.) 288.

Where a contract authorizes the government, in case of non-performance, to complete the work at the contractor's cost, "after eight days' notice in writing," the giving of such notice is a prerequisite to annulling the contract. *Williams v. U. S.*, 26 Ct. of Cl. 132.

A notice to the contractor to "supply all proper and sufficient materials and labor for the due prosecution of said work, and with due expedition to proceed therewith," is sufficiently specific. *Pauling v. Dover*, 24 L. J. Exch. 128; 10 Exch. 753.

In *Maloney v. Malcolm*, 31 Mo. 45, an express declaration of forfeiture was held unnecessary.

A contractor agreed with a subcontractor to do certain work on a railroad, during certain months, and, upon ten days' notice, the former to have the right, upon written notice to the latter

from the engineer of the railroad company, to declare the contract forfeited, or to assume control and carry it on himself, in case the work should not be completed rapidly enough. It was held that the contractor had no power to compel the engineer to give such written notice, but might give it himself with equal effect, when it should become necessary. *Hendrie v. Canadian Bank of Commerce*, 49 Mich. 401.

The plaintiff contracted with the defendant company to construct a bridge, it being stipulated that for any reason deemed sufficient to the company, it was to have the privilege, by giving the plaintiff one month's notice, to annul the contract, to discontinue the work, or continue it in such manner as it might choose, the contractor to be entitled to payment in full for all material delivered and work done, the company to take the working plant at a fair valuation, to be determined by an arbitrator. "In case the contract shall not well and truly . . . comply with and perform all the terms herein stipulated, or in case it should appear to the engineer of the (defendant) company that the work does not progress with sufficient speed or in a proper manner," the defendant could annul the contract, if he saw fit, and the unpaid part of the value of the work done could be forfeited. It was held that the right of the company to annul the contract whenever it appeared to its engineer that the work was not progressing with sufficient speed or in a proper manner, was to be exercised without question by, or previous notice to, the contractor. *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303.

2. *Washburn v. Dettinger*, 76 Hun (N. Y.) 141.

The owner of a building notified the contractor that if he did not complete it he (the owner) would, at the expiration of the three days, complete it himself. The contractor informed the owner that he would proceed as soon as he could obtain certain materials. Afterward he notified the owner that he could not secure the materials, but that

occasioned by the default of the employer, he cannot enforce a forfeiture.¹

VIII. EXTRA WORK—1. Who May Order.—It is stipulated usually in working contracts that no alterations or extra work shall be made without the assent of the owner.² In any case, in order to charge him for the extras, they must be ordered by his duly authorized agent,³ and the architect, or engineer employed merely to superintend the construction of the work, has no such authority.⁴ Where the contract requires the extra work to be ordered

if the owner could get them elsewhere, he would send some men to finish the building. It was held that the contractor remained in charge of the building and was responsible for its proper construction. *Washburn v. Dettinger* (Supreme Ct.), 27 N. Y. Supp. 540; 76 Hun (N. Y.) 141.

1. *Haughery v. Thiberge*, 24 La. Ann. 442; *McAndrews v. Tippet*, 39 N. J. L. 105; *Standard Gas-Light Co. v. Wood*, 61 Fed. Rep. 74; 9 C. C. A. 362.

The right to annul a contract for non-performance of its terms by the contractors is lost, where the employers are in default by failure to estimate and pay for the work done and materials furnished by the contractors. *O'Connor v. Henderson Bridge Co.* (Ky. 1894), 27 S. W. Rep. 251. And see *supra*, this title, *Time of Performance*.

The superintendent cannot bind the contractor by his decision that the delay is not caused by the default of the employer. *Roberts v. Bury Imp. Com'rs*, L. R., 5 C. P. 310; 39 L. J. C. P. 129; 22 L. T. N. S. 132; 18 W. R. 702.

Where the plaintiff contracted to do work for the defendant, and to complete it "by November 15th, under a penalty of \$100 per day, provided you have foundation ready by June 15th," it was held that the completion of the foundation was a condition precedent, in default of which the defendant could not claim the penalty as liquidated damages for the plaintiff's delay. *Standard Gas-Light Co. v. Wood*, 61 Fed. Rep. 74; 9 C. C. A. 362.

2. *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202; *Franklin v. Darke*, 3 F. & F. 65.

3. *Gillison v. Wanamaker*, 140 Pa. St. 358. In *Russell v. Sa Da Bandeira*, 13 C. B. N. S. 149; 106 E. C. L. 149; 2 L. J. C. P. 68; 7 L. T. N. S. 804, they were allowed to be ordered by a duly authorized agent; and in *Myers v. Sarl*,

3 El. & El. 306; 107 E. C. L. 306, by the direction of the architect, in writing.

Implied Authority.—In *Wallis v. Robinson*, 3 F. & F. 307, extra work was ordered by the architect with the knowledge of the employer. This was held sufficient evidence of an implied authority and new contract to pay for them.

Contractor and Subcontractor.—A contractor is not liable to a subcontractor for extra work done by the latter which was ordered on behalf of the owner and not on behalf of the contractor, of which fact the subcontractor had notice. *Wendt v. Vogel*, 87 Wis. 462.

4. *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202; *Starkweather v. Goodman*, 48 Conn. 101; 40 Am. Rep. 152; *Sexton v. Cook County*, 114 Ill. 174; *Sharpe v. San Paulo Brazilian R. Co.*, L. R., 8 Ch. 605, note; 27 L. T. N. S. 699; *Reg. v. Starrs*, 17 Can. Supreme Ct. 118. See *Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137.

Where the extras in question were ordered by the superintendent under a power to inspect and reject work, and the contractor gave no notice at the time that he should regard it as extra work, it was held that no claim for extras could be made. *Bowe v. U. S.*, 42 Fed. Rep. 761.

The fact that, when a statement of the extra work and materials was handed the employer, he made no objection, does not estop him from making the objection afterward. *Starkweather v. Goodman*, 48 Conn. 101; 40 Am. Rep. 152.

A supervising engineer cannot, in a contract for clearing a roadbed, direct work outside of the roadbed and bind the company to pay for it. *Alexander v. Robertson*, 86 Tex. 511.

In *Sexton v. Cook County*, 114 Ill. 174, it was held that the county board

by a building committee, an order by a minority only of such committee is insufficient.¹

2. **Special Stipulations**—*a*. GENERALLY.—Special stipulations in regard to the ordering of alterations and extras are inserted frequently in working contracts,² and must be complied with always in order to charge the employer with the additional expense.³ Such, for instance, as requiring the expense to be agreed upon at the time the extras are ordered,⁴ and the order to be in writing,⁵ and a claim made in writing within a specified time after the work is performed.⁶ But special provisions for determining as to extras may be waived always by the parties, who may agree to alterations by parol.⁷

alone had authority to bind the county and that it could not be held liable for extras ordered by its building committee and supervising architect. See, to the same effect, *Benton County v. Patrick*, 54 Miss. 240. But in *Gibson County v. Motherwell Iron, etc., Co.*, 123 Ind. 364, it was held that where the board of county commissioners employed an architect, and intrusted him with the full supervision of the construction of a public work, ordering alterations and extras, and the commissioners accepted the work after completion, the county was liable for such extra work.

Where persons who have agreed to put glazing in certain houses are told by the architect, who has no authority to make any contracts, that bent glass would be an extra, no contract by the owner to pay for such extra will be implied. *McKey v. Nelson*, 43 Ill. App. 456.

Where, in the progress of building, work done under a contract, some process more expensive than contracted for was ordered by the architect, with the knowledge of the employer, and the builder's subcontractor was told it was to be paid extra for, it was held that there was evidence of a contract to pay extra for it, and of authority in the architect to make such a contract with him. *Wallis v. Robinson*, 3 F. & F. 307.

But a subcontractor cannot recover from the contractor for extras done on the order of the superintendent, given to his knowledge, on behalf of the owner, and not of the contractor. *Wendt v. Vogel*, 87 Wis. 462.

It is not competent to show a ratification by the board of commissioners of extra work done, under a contract for building a jail, by proof that the disputed items were omitted by mis-

take in the architect's report to the board of extra work, the board having approved some and rejected others of the items so reported. *Eigemann v. Posey County*, 82 Ind. 413.

1. *Sexton v. Cook County*, 114 Ill. 174. And subcontractors are chargeable with notice of such provision. *Shaw v. First Baptist Church*, 44 Minn. 22.

2. "It will, however, be generally advisable to see that there is a condition in the contract regulating this subject, and particularly that no extras whatever shall be incurred unless consented to by the owner in writing." *Lloyd's Law of Building* (2d ed.), § 53.

3. *Bentley v. Davidson*, 74 Wis. 420; *Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137. Where the contract is with a municipal corporation, any statutory provisions for binding the city for extra work must be complied with. *O'Brien v. New York*, 139 N. Y. 543.

4. *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202; *Miller v. McCaffrey*, 9 Pa. St. 245.

5. See *infra*, this title, *Written Orders*.

6. *O'Keefe v. St. Francis' Church*, 59 Conn. 551.

7. *McFadden v. O'Donnell*, 18 Cal. 160; *Badders v. Davis*, 88 Ala. 367; *McLeod v. Genius*, 31 Neb. 1; *Bartlett v. Stanchfield*, 148 Mass. 394.

Where the parties proceed without regard to such provisions, they will be held to have waived them. *Meyer v. Berlandi*, 53 Minn. 59.

And evidence of a promise to pay for the extras is admissible as tending to show a waiver. *O'Keefe v. St. Francis' Church*, 59 Conn. 551.

But a waiver of such provisions will not be implied from the fact that one

b. WRITTEN ORDERS.—The contract frequently provides that no extras or alterations shall be made except upon a written order of the employer or superintendent.¹ Where such is the case, nothing but a written order will suffice, and the contractor performing extra work without an order in writing cannot recover therefor,² and this has been held even though the work be

member of a building committee approved of an alteration—that sometimes all of the committee, at others a less number, attended while the work was going on—that in the opinion of the witness they must have known of the work, and that they talked of it often without expressing any displeasure at the alteration. *Miller v. McCaffrey*, 9 Pa. St. 245.

And where the superintendent, when verbally ordering the extra work to be done, promises to pay a certain amount for it, the waiver of the requirement in the contract that the claim for extra work shall be made by the contractor to the architect in writing, applies only to that particular piece of extra work. *O'Keefe v. St. Francis' Church*, 59 Conn. 551.

In *Ford v. U. S.*, 17 Ct. of Cl. 60, it was held that the parties to a written building contract are not bound by a clause that no claim shall be made for extra work unless first agreed on in writing; it will not avoid a transaction implying a verbal agreement for extra work. Such provision was inserted in government contracts merely to limit the power of architects and superintendents.

1. *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635, where the contract provided that "no extra charges to be made unless a written agreement be made and attached to the contract." *Russell v. Sa Da Bandeira*, 13 C. B. N. S. 149; 106 E. C. L. 149; 32 L. J. C. P. 68; 7 L. T. N. S. 804, where "additions made by order in writing" of the defendant's agent were to be paid for at a price previously agreed upon. *Myers v. Sarl*, 3 El. & El. 306; 107 E. C. L. 306; where extras were to be ordered in writing under the hand of the architect, and a weekly account of the work done thereunder delivered to the architect or clerk of the works every Monday next ensuing the performance of such work; and the delivery of such account was made a condition precedent to the right of the contractor to recover payment for such extras.

In *Thames Iron Works, etc., Co. v. Royal Mail Steam-Packet Co.*, 13 C. B. N. S. 358; 106 E. C. L. 358, the contract provided that alterations should not be made by the contractor unless on the authority of a letter signed by the secretary of the defendant company, stating that the board of directors had directed such alterations to be made, and specifying the precise amount they would allow for the same. Such a provision is reasonable. *Howard v. Pensacola, etc., R. Co.*, 24 Fla. 560.

Under a contract "to construct seven rock culverts, more or less, as directed by the engineer," none of the specifications containing a particular description of the structures or their parts, but one providing that "no claim for extra work, or for work not provided for in the contract, will be made or allowed," unless on written order of the engineer, it was held that no work done in the construction of the culverts under the direction of the engineer was extra work. *Houston, etc., R. Co. v. Trentem*, 63 Tex. 442.

2. *Sutherland v. Morris*, 45 Hun (N. Y.) 259; *Woodruff v. Rochester, etc., R. Co.*, 108 N. Y. 39; *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Illinois Institution, etc. v. Platt*, 5 Ill. App. 567; *Duncan v. Miami County*, 19 Ind. 154; *Bentley v. Davidson*, 74 Wis. 420; *Russell v. Sa Da Bandeira*, 13 C. B. N. S. 149; 106 E. C. L. 149; 32 L. J. C. P. 68; 7 L. T. N. S. 804; *Myers v. Sarl*, 3 El. & El. 306; 107 E. C. L. 306; *Thames Iron Works, etc., Co. v. Royal Mail Steam-Packet Co.*, 13 C. B. N. S. 358; 106 E. C. L. 358; *Franklin v. Darke*, 3 F. & F. 65; 6 L. T. N. S. 291; *Nixon v. Taff Vale R. Co.*, 7 Hare 136; *Taff Vale R. Co. v. Nixon*, 1 H. L. Cas. 111.

If a contract with a railroad company for constructing its road provides that the contractor shall not deviate from the contract, nor receive any pay for extra work, unless a written order for the same is made and signed by the engineer, the contractor cannot recover for extra work done on the verbal

ordered verbally by the owner himself,¹ unless a waiver of such

order of the engineer, even if there is another clause in the contract which provides that the engineer may direct alterations in, and additions to, the work. *White v. San Rafael, etc., R. Co.*, 50 Cal. 417.

Where the contract provides that all extras and alterations must be agreed upon beforehand and the price indorsed upon the contract, the builder cannot recover therefor unless the price is so agreed upon and indorsed. *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202.

And a contractor cannot recover for extra work which was, in effect, additions and alterations, where none of such additions and alterations have been specified in writing as required by the contract. *Condon v. Jersey City*, 43 N. J. L. 452.

But where, after work was commenced on a church under a contract providing that no extras should be paid for unless agreed to in writing signed by the parties, city building inspectors ordered changes, a sketch of which was prepared by the architect, and the contractor was directed to make such changes, it was held that though there was no express contract for the extras made necessary by the order, it was the duty of the church corporation to see that the order was obeyed, from which arose an obligation to pay for the work necessary therefor, done with the consent of the corporation, under the direction of its architect. *Cunningham v. Fourth Baptist Church*, 159 Pa. St. 620.

Though a subcontractor's contract provides that all extra work shall be first agreed on in writing by the superintendent and the contractor, he will be entitled to compensation for extra work made necessary by a change of plans and dimensions not known to him until after the work was done, the principal contractor having absconded, and the superintendent refusing to give any writing. *Fitzgerald v. Beers*, 31 Mo. App. 356.

Mere sketches of the manner in which the extra work is to be done, prepared, and furnished to the contractor by the architect, but not signed by him, are not directions in writing under the hand of the architect. *Myers v. Sarl*, 3 El. & El. 306; 107 E. C. L. 306.

Progress certificates issued by the superintendent, ordering payments on the work done, do not amount to written orders. *Lamprell v. Billericay Union*, 18 L. J. Exch. 282. Thus, in *Tharsis Sulphur, etc., Co. v. M'Elroy, L. R.*, 3 App. Cas. 1040, during the execution of a contract for the construction of large iron buildings, the contractors alleged that it was impossible to cast certain iron trough girders of a specified weight, and subsequently they were allowed to erect girders of a much heavier weight, and the actual weights were entered in the engineer's certificates issued from time to time authorizing the interim payments. On the completion of the work, the contractor claimed a considerable amount in excess of the contract price for the extra weight of metal supplied, and it was held that the certificates were not written orders, and the claim was therefore excluded. See *Goodyear v. Weymouth*, 1 H. & R. 67; 35 L. J. C. P. 12.

Where a building contract contained a clause that no extras should be paid for unless ordered in writing and the weekly bills delivered for the same, and this had not been done, though extra work had been executed, it was held that the fact that the architect's certificate for the final balance awarded a certain sum in respect of extras, did not entitle the builder to recover beyond the certified sum for extras in respect of which written orders had not been given nor weekly bills delivered. *Brunsdon v. Staines Local Board*, 1 C. & E. 272.

1. It was said to make no difference that the extra work was ordered by the owner. The contractor may refuse to do it, or may assent under the protection offered by the contract; but if he does extra work without such protection, he waives his right to additional compensation. *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635. But see *Baum v. Covert*, 62 Miss. 113, where it was held that, notwithstanding a building contract provided that no extra work should be allowed or paid for unless authorized by a previous agreement in writing, if the contracting party ordered the builder to do extra work, which was done, he would be liable therefor. And see *infra*, note 7.

Where a building contract provided

requirement is shown;¹ and the rule is the same in equity as in law.² But a written contract may be altered or modified by parole, and if the owner orders extra work and promises to pay therefor, the contractor can recover,³ and the verbal

that no claim should be made for additional work unless the same should be done pursuant to a written order from the architects, and that written notice of all claims should be given the architects within three days of the beginning of such work, it was held that, in the absence of an agreement modifying the original contract, the builder was not liable for extra work unless it was done on a written order; and the court erred in an instruction that the contractor could recover for extra work if it was done "at the request, or with the knowledge and consent, express or implied," of the builder "or his agent," without charging the jury concerning the effect of a waiver by the builder of a written order, or of his independent promise to pay for the work. *Wortman v. Kleinschmidt*, 12 Mont. 316.

1. *Illinois Institution, etc. v. Platt*, 5 Ill. App. 567; *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202; *Ahern v. Boyce*, 19 Mo. App. 552.

The parties may waive the provision and make changes in the original contract by parol. *Erskine v. Johnson*, 23 Neb. 261; *McLeod v. Genius*, 31 Neb. 1. But the superintendent has no authority to waive it. *Ahern v. Boyce*, 19 Mo. App. 552.

In *Gibson Co. v. Motherwell Iron, etc., Co.*, 123 Ind. 364, it was held that where the extras were ordered by the superintending architect, and the work accepted by the county commissioners, and it did not appear that they, or any one acting for them, ever requested an agreement as to the price of the extra work, or that the contract therefor be reduced to writing, the county was liable.

The provision in a building contract that no extra work shall be paid for or allowed, unless done on the written order of the engineer in charge, and that all claims for such work must be made to the engineer in writing before payment of the next succeeding estimate after the work is performed, or be considered as abandoned, is waived by the engineer's ordering extra work without putting his orders in writing. *Elgin v. Joslyn*, 136 Ill. 525, *aff'd* 36 Ill. App. 301.

2. *Kirk v. Bromley Union*, 17 L. J. Ch. N. S. 127; 2 Ph. 640.

The parties are presumed to have understood the import of their contract. *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635.

3. Under a written contract, by which the plaintiffs undertook to build a house for the defendant, according to certain specifications and at a specified price, containing a stipulation that "no new work done on the premises shall be considered as extra unless a separate estimate in writing for the same, before its commencement, shall have been submitted by the contractor to the proprietor, and his signature obtained thereto," the parties may, by mutual assent given orally, make changes and alterations in the plans as the work progresses; and if there is no agreement as to the cost of the alterations, the presumption is that no increase of cost is contemplated, and the contractor is entitled to recover on the contract as if the omitted work had been done instead of that substituted for it; but if the new agreement fixes a higher price for the alterations or substituted work and materials, he is entitled to recover the difference, although no written estimate was submitted and signed. *Badders v. Davis*, 88 Ala. 367. *Stone, C. J.*, in delivering the opinion in this case, said: "We hold that, if the defendant promised to pay for extra work done at his request, and if such work was worth more, considering both materials and workmanship, than the omitted parts for which it was substituted, then the plaintiffs are entitled to recover the difference. If he made no promise to pay, then the presumption arises that the alterations were agreed to be made, and were made, without extra charge." And see *Erskine v. Johnson*, 23 Neb. 261.

A building contract which provides that no work shall be considered as extra unless a separate estimate in writing shall be submitted by the contractor to the architect and the owner, and their signatures obtained thereto, does not preclude a recovery for extra work done under a parol agreement between the contractor and the owner.

order of the owner will be evidence of a waiver of the requirement.¹

c. ESTIMATE AND CERTIFICATE OF SUPERINTENDENT. — Where the contract provides that no claim for extra work shall be allowed except upon the estimate and certificate of the superintendent, there can be no recovery unless such estimate has been made and certificate given.² Such a stipulation gives the superintendent implied authority to determine what are extras,³ and his certificate is conclusive upon the parties.⁴

Lewis v. Yagel (Supreme Ct.), 28 N. Y. Supp. 833; 77 Hun (N. Y.) 337.

1. Where the contractor did certain work at the oral request of the owner, and upon his promise to pay for it, and other work upon his oral request only, it was held that there was evidence of a waiver of the requirement as to writing and a substitution of an oral contract therefor, resting upon sufficient consideration. Bartlett v. Stanchfield, 148 Mass. 394. And see Elgin v. Joslyn, 36 Ill. App. 301; McLeod v. Genius, 31 Neb. 1.

A departure from the original plan with the consent of the owner, or notice by the owner to the contractor, at the expiration of the time, to go on and complete the work, has been held sufficient waiver. Close v. Clark (C. Pl.), 9 N. Y. Supp. 538. And see Hogan v. Burton (Supreme Ct.), 7 N. Y. Supp. 722.

2. Shaw v. First Baptist Church, 44 Minn. 22. And see Rude v. Mitchell, 97 Mo. 365.

The certificate must be provided or a good reason for not procuring it shown. Mills v. Weeks, 21 Ill. 561.

Until the value of the work has been ascertained by the superintendent, no action for its value is maintainable. Westwood v. Secretary of State for India, 7 L. T. N. S. 736; 11 W. R. 261.

In an action for services rendered, the issue was whether the work was extra, or was part of the work called for by a contract between the parties. It was held that, where the contract called for a certificate from the defendant's engineer that the work was fully completed, absence of evidence on that point would not affect the plaintiff's claim for extra work, where the defendant denied any liability therefor. Ohio, etc., R. Co. v. Crumbo, 4 Ind. App. 456.

Where a contract provides that the value of extra work should be ascer-

tained by persons mutually chosen, if such valuation has not been actually made, the plaintiff, in an action upon a *quantum meruit*, may give other evidence of the value of the work. Baker v. Herty, 1 Cranch (C. C.) 249. But a provision in a building contract that disputes with respect to the value of extra work, or of work omitted by direction of the owner, should be determined by arbitrators, is no bar to an action by the contractor for damages for a breach of contract by the owner in refusing to allow the contractor to do the work contracted for and letting the work to another. Boyd v. Meighan, 48 N. J. L. 404.

3. Richards v. May, 10 Q. B. Div. 400; 52 L. J. Q. B. 272; 31 W. R. 708.

4. Richards v. May, 10 Q. B. Div. 400; 52 L. J. Q. B. 272; 31 W. R. 708; Lepthorne v. St. Aubyn, 1 C. & E. 486; Goodyear v. Weymouth, 1 H. & R. 67; 35 L. J. C. P. 12; Swift v. State, 89 N. Y. 52. But see Dubois v. Delaware, etc., Canal Co., 12 Wend. (N. Y.) 334.

The plaintiffs contracted to execute for the defendants specified works, and also all such additional works as should be deemed necessary by the defendants' principal or resident engineer. The contract deed provided that no extra works should be made without an order in writing, signed by the principal engineers or engineer, or by the resident engineer; that such extra works should be valued by such engineers or engineer, having regard to the schedule of prices in the specification, and that the decision of such engineers or engineer should be final as to the value of such extra works; that if any extra works should be ordered, the contractors should send in accounts thereof within one month; and that in default of their doing so, the defendants should not be bound to pay for them. That the defendants

3. Where Independent of Contract. — A contractor, agreeing to perform certain work for a specified sum, cannot recover for increased cost as extra work, upon discovering that he has made a mistake in his estimate, or that the work will be more expensive than he has anticipated. The hazards of the undertaking are assumed voluntarily by him.¹ No recovery can be had for extra

should not be bound to pay for any works, except upon the production of a certificate signed by some principal or resident engineer, and that the principal engineers or engineer for the time being should be the exclusive judges of the execution of the works and of everything connected with the contract; and that the certificates under their or his hands or hand should be binding and conclusive on both parties. It was held that the engineers having given a certificate for the extra works, the defendants were precluded from setting up, as defenses to the action for the price of the extra works, that the extra works had not been ordered in writing, and that no accounts had been sent in for them, as required by the deed. *Connor v. Belfast Water Com'rs*, 5 Ir. R. C. L. 55.

On a building contract, whereby additions and alterations were not to avoid it, but to be allowed for at amounts to be named by the employer's surveyor, the contract being made up of a tender framed on quantities calculated by the surveyor, and specifications referred to them, and signed by the builder alone, it was held that the builder, having completed the work and claimed payment under the contract, could not claim for work as excess of the quantities on which it was based, nor for any additions or alterations beyond the amount allowed by the surveyor. *Coker v. Young*, 2 F. & F. 98.

Where a city lets a contract for the erection of a building, containing a provision that, in case of any dispute between the architect and the contractor as to the meaning of the plans and specifications, or as to what is extra work, the same shall be decided by the architect, and his decision shall be final; but afterward, on disputes arising, the city makes a supplemental contract, which, though making the architect the final interpreter of the plans and specifications, provides that, in the event of a difference between him and the contractor, the latter shall

"under protest" complete the work under the architect's interpretation, leaving the contractor's rights as to such work done under protest open without impairment until after the full completion of the contract—the contractor, in an action, based on the supplemental contract, for extra work done and material furnished, is not bound by the architect's decision that such work and material were required by the plans and specifications. *Galveston v. Devlin* (Tex. 1892), 19 S.W. Rep. 395.

Where a building contract provides that the work shall be done to the satisfaction of the architect, and that any dispute as to claims for extra work shall be referred to him, it is error, in an action by the builder on the contract, to refer to the jury such questions as to extra work and the performance of the contract, in the absence of evidence of fraud, or if the question of fraud is not submitted to the jury. *Guthat v. Gow*, 95 Mich. 527.

Where a building contract provides that all estimates of extra material and labor furnished and performed by the contractor shall be estimated by the architect, and that the estimate shall be binding on the parties, it is a fraud on the contractor if the architect does not make a fair allowance for the extra work and material, and makes an estimate for which there is no substantial basis, and in such case the contractor is not bound by the estimate. *Anderson v. Imhoff*, 34 Neb. 335.

But where the architect has, unknown to the contractor, guaranteed the owner that the cost of the building should not exceed a certain sum, his decision as to what are extras is not binding on the contractor. *Kimberley v. Dick*, 25 L. T. N. S. 476; 20 W. R. 49; 41 L. J. Ch. 38; L. R., 13 Eq. 1. And see *Kemp v. Rose*, 4 Jur. N. S. 919.

1. *Cannon v. Wildman*, 28 Conn. 472; *Boyle v. Agawam Canal Co.*, 22 Pick. (Mass.) 381; 33 Am. Dec. 749; *Ambler v. Phillips*, 132 Pa. St. 167. And see *Devlin v. New York*, 4 Duer (N. Y.) 337; *Shipman v. District of*

Columbia, 18 Ct. of Cl. 291. In *Love-lock v. King*, 1 M. & Rob. 60, Lord Tenterden said: "The person intending to make alterations generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking, and it will very frequently depend on this estimate whether he proceeds or not. It is therefore a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow and assents to them. In many cases he will be completely ignorant whether the particular alterations suggested will produce an increase of labor and expenditure, and I do not think that the mere fact of assenting to them ought to deprive him of the protection of his contract."

Under a contract to excavate "solid rock" at so much a foot, no extra charge can be made for flint rock, though it costs four or five times more to excavate than limestone, there being no evidence of usage attaching to the terms used in any other than their ordinary sense. *Fruin v. Crystal R. Co.*, 89 Mo. 397. And where the contractor undertook "to furnish at his own expense all necessary material and labor, and excavate and build" a certain sewer, and the specifications provided that he should make all necessary excavations in such directions and of such width and depth as should be necessary, it was held that the fact that part of the excavation was through rock would not entitle him to extra compensation, though neither party contemplated that rock would be met, and parol evidence of that fact was inadmissible. *McCauley v. Des Moines*, 83 Iowa 212.

In an action for the price of cut stone furnished for a depot, it appeared that the plaintiffs had agreed to furnish stone for the depot, "agreeable to drawings and specifications bearing same date herewith," drawn and prepared by E., architect, and signed by the contracting parties. There was a drawing, stamped with the name of the architect and signed by the plaintiffs, showing the tower of the depot, the stone for which, they claimed, was extra. It was held that the burden was on plaintiffs to show that such stone was extra. *Chicago, etc., R. Co. v. Thomlinson*, 33 Ill. App. 388.

An act empowered a corporation to scour an inland harbor, and they did so by taking up the mud in barges, and

letting it out at the mouth of the harbor, so as to be carried down the river. The corporation employed the plaintiff to excavate and remove certain estimated quantities of earth down the river at certain prices, the contract (not noticing the scouring process) providing only for extra work ordered by the engineer of the plaintiff in writing. In consequence of the cleansing, which was continued while the plaintiff was engaged in the work, the quantity of soil he had to remove was vastly increased by great deposits of mud. The plaintiff applied for and was refused any additional remuneration, and after the work was completed sued the corporation for compensation, but the case of the plaintiff, as stated at the trial, did not show that the mode of cleansing adopted by the corporation was unusual or unreasonable, and, on the contrary, it appeared rather to be a proper mode of carrying out the powers of the act. It was held that, as it did not appear that the process was unlawful or wrongful, it was no cause of action. *Rigby v. Bristol*, 29 L. J. Exch. 359.

A agreed to build a house for B, who prepared a specification, which contained particulars of the different portions of the work. Under the head of "Carpenter and joiner," there were specified the scantling of the joists for the different floors, the rafters, ridge and wall, but no mention was made of the flooring. The specification stated that "the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor." At the foot of the specification, A signed a memorandum, whereby he agreed with B "to do all the works of every kind mentioned and contained in the foregoing particulars, according, in every respect, to the drawings furnished, or to be furnished, for £1,100. The house to be completed, and fit for occupation, by the 1st of August, 1858." A prepared the flooring boards, brought them to the premises, and planed and fitted them to the several rooms, but refused to lay them down without extra payment, because the flooring was not mentioned in the specification, whereupon B put an end to the contract, took possession of the works, and, proceeding to complete the building, used the flooring boards so prepared and fitted by B. It was held, first, that A was not entitled to recover

work voluntarily done without consulting the owner.¹ If extra work is done, however, independent of the original contract, and is ordered and accepted by the employer, the contractor can recover therefor, upon a *quantum meruit*,² but where the changes

for the flooring as an extra, because it was included in the contract, though not mentioned in the specification. *Williams v. Fitzmaurice*, 3 H. & N. 844.

Under a contract for construction of a ditch at sixteen cents "per cubic yard of earth or gravel necessarily moved," except a portion between certain points, which is to be at eighteen cents per cubic yard, extra compensation cannot be recovered on the ground that "cement gravel" or hard pan was found between those points, and was not contemplated by the parties in fixing the price. *Wilkin v. Ellensburg Water Co.*, 1 Wash. 236.

1. *Hort v. Norton*, 1 McCord (S. Car.) 22; *Murphy v. U. S.*, 13 Ct. of Cl. 372.

Where extra work and material are voluntarily furnished by contractors, with knowledge that the payment therefor must depend upon the action of Congress, they cannot recover, though the extra work may embellish and improve a government building. *Merchants' Exchange Co. v. U. S.*, 15 Ct. of Cl. 270.

2. *Dubois v. Delaware, etc., Canal Co.*, 12 Wend. (N. Y.) 334; *McCormick v. Connolly*, 2 Bay (S. Car.) 401; *Mowry v. Starbuck*, 4 Cal. 274; *De-Boom v. Priestly*, 1 Cal. 206; *Escott v. White*, 10 Bush (Ky.) 169; *Hasbrouck v. Milwaukee*, 21 Wis. 217; *Andrews v. Lawrence*, 19 C. B. N. S. 768; 115 E. C. L. 768. And see *Hellwig v. Blumenberg* (Supreme Ct.), 7 N. Y. Supp. 746.

The employer will be liable for the reasonable worth of extra work ordered by him. *Donlin v. Daegling*, 80 Ill. 608. But not if the extra work results in the work being done, not better than the contract calls for, but better than it otherwise would have been done. *Kinsley v. Charnley*, 33 Ill. App. 553.

Where, by reason of failure to complete a building, a balance of the money to be paid for its construction is not recoverable, the contractor may still recover the reasonable value of any extra work. *Griffin v. Miner*, 54 N. Y. Super. Ct. 46.

The claim for extras is not defeated by a clause in the contract binding the contractor to "furnish all materials and

labor," where the plans are altered by the owner; and the fact that, but for extra plumbing ordered by the owner, the building would not have been well plumbed, will not defeat the claim. *Cassidy v. Fontham* (C. Pl.), 14 N. Y. Supp. 151.

A subcontractor suing an employer for work extra to the original contract, must put in that contract, if in writing, and also prove a separate and distinct contract with the employer to do the work sued for. *Eccles v. Southern*, 3 F. & F. 142.

A subcontractor cannot recover from the owners of the building for work and labor performed in replacing work rejected by the architect, where the original contract provided that all defective work should be replaced, and there was no promise to pay for such work. *Fire Proof Bldg. Co. v. First Nat. Bank*, 54 N. Y. Super. Ct. 511.

In an action to recover for extra work in erecting a building, where the evidence is conflicting, the court on appeal will not disturb the judgment. *Thurber v. Anderson*, 35 Ill. App. 628.

A contract for the construction of a building by the plaintiff for the defendant did not refer to any plans as having been drawn or prepared at the date of the contract, and the plaintiff claimed that the contract contemplated the erection of a two-story building instead of the three-story one actually built, and that he was consequently entitled to additional compensation. It was held, on the defendant's denying such claim, that evidence was admissible of the facts existing at the time of the contract, and the circumstances of the parties, and of the building. *Doane College v. Lanham*, 26 Neb. 421.

In *Muckle v. Moore*, 134 Pa. St. 608, the question was said to be one for the jury.

A contractor agreed with an incorporated company to do certain works, the contract being under seal. In this contract there was a stipulation that if the company should think proper at any time to make any addition to the original work, the company should be at liberty to do so on giving the contractor written instructions for that

are proposed by the contractor, he should notify the employer if they will be attended with any increased cost, and if this is not done, the employer has a right to infer that there will be no increase in the expense.¹ The original contract should be offered in evidence to show that the work was not included therein.²

4. When Impliedly Authorized.—Extra work may be impliedly authorized, as where it is done under the eye of the owner, and to such an extent that he must perceive necessarily that it cannot be done possibly at the contract price,³ but, in order to make him liable on the ground of such approval or assent, he must be

purpose, signed by the principal or assistant engineer. A verbal arrangement was afterward made by the principal engineer for the execution of certain extension works, allowing for a variance in the prices, but stipulating that, with the exception of that variance, all the provisions of the contract should be considered as applicable to the extension works. This work was executed by the contractor under this arrangement. It was held that he could not afterward reject the terms of the contract and claim remuneration for the work as upon a *quantum meruit*, nor could he ask in equity for accounts to be taken, independently of the contract. *Ranger v. Great Western R. Co.*, 5 H. L. Cas. 72.

Where it is impossible to determine what are the rights of the parties to a building contract, or whether the work performed by the contractor came within, or was in excess of, the obligations of his contract, the presumption of law is that it was required by the contract. *Crocker v. U. S.*, 21 Ct. of Cl. 255.

1. *Jones v. Woodbury*, 11 B. Mon. (Ky.) 167.

One contracting for the building of a house will not be liable to pay additional compensation for extra work, merely on proof that he ordered it, that it was done, and that he accepted the work when completed, *Collyer v. Collins*, 17 Abb. Pr. (N. Y. Supreme Ct.) 467; unless he be informed, or must be aware, necessarily, from the nature of the work, that the alteration will increase the expense. *Lovelock v. King*, 1 M. & Rob. 60. And see *Simpson v. New York, etc., R. Co.*, 51 N. Y. Super. Ct. 419.

Where a change in contract work is ordered amid circumstances which imply or warrant the belief that no additional expense will result from the

change, it is the duty of the contractor to notify the other party that he cannot make the substitution for the contract price. But where a change is ordered which must necessarily cause increased expense, no such notice is necessary. *Gibbons v. U. S.*, 15 Ct. of Cl. 174.

A person who contracted to construct a canal cannot recover as for extra work on account of changes in the specifications and mode of construction, where he made no protest or claim for extra compensation at the time such changes were made. *Price v. Kearney Canal, etc., Co.*, 29 Neb. 33.

Where it was stipulated between A and B that a house should not cost more than four hundred dollars, and, after the work was commenced, A made a calculation, and proposed to B to put extra work upon the house, which would make the whole building cost not over five or six hundred dollars, it was held that this amounted to an agreement that if B would permit the extra work to be put on the house, A would not charge more than six hundred dollars for the entire work. *Britney v. Bolding*, 28 Miss. 53.

2. *Eccles v. Southern*, 3 F. & F. 142. In *Cook County v. Harms*, 10 Ill. App. 24, the plaintiff began work under a building contract containing a provision for pay for extra work caused by a change of plan. After the work was begun another plan was adopted, in accordance with which the work was finished. Upon a suit, the question was as to whether the original contract was rescinded. It was held that this was a question for the jury; that the contract should have been produced at the trial; and that it was error to allow the plaintiff to state what work was within its terms.

3. *Lovelock v. King*, 1 M. & Rob. 60; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; 11 Am. Dec. 237.

apprised from the nature of the work that it will be attended with increased cost.¹

5. Necessary Extra Work.—Where the extra work is absolutely necessary to the prosecution of the undertaking,² or is rendered necessary by the failure of the employer to perform his portion of the agreement,³ or results from an error of the superintendent under whose direction the work is being done,⁴

A party cannot recover for extra work or better materials than those specified in his contract, if he had not the authority of the other party therefor. But in a suit against the government, such authority will be implied where the officers of the quartermaster department, charged with the supervision of the work, saw and knew of the extra work in time to object and stop it, but, instead of doing so, received and accepted the benefit of it for the government; and where charges ordered by them necessarily imply an increased price, the contractor may recover therefor. *Cooper v. U. S.*, 8 Ct. of Cl. 199.

1. *Jones v. Woodbury*, 11 B. Mon. (Ky.) 172.

2. As where, in the construction of a tunnel, rock should fall from the roof, or it should become necessary to remove dangerous rock outside the lines of the tunnel. *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396. See *Voorhis v. New York*, 62 N. Y. 498.

Extra excavations for foundations, caused by peculiarities in the soil, unknown to either the plaintiff or defendant at the time the contract was signed, constitute extra work. *Anderson v. Meislahn*, 12 Daly (N. Y.) 149. Compare *Gustavson v. McGay*, 12 Daly (N. Y.) 423.

Where a contractor, under a contract made with a city for grading and paving an avenue, finds it necessary, in order to so grade and pave the street, to do certain extra work and to furnish extra materials not expressed in his contract, he can recover from the city for the value of such work. *Riley v. Brooklyn*, 56 Barb. (N. Y.) 559.

In an action upon a contract for building a bridge, the plaintiff sought to recover for extra expenditure occasioned by the necessity for the use of cofferdams, not contemplated by either of the parties to the contract at the time it was entered into. It was held that the rights of the parties should be determined by the contract, and that

equity would not afford relief therefrom. *Owens v. Butler County*, 40 Iowa 190.

3. For any additional expense incurred in consequence of the party being obliged to do the work under disadvantageous circumstances, occasioned by the opposite party, he is entitled to an allowance. *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285.

Where the defendant, in a contract by the plaintiff to build for him an extension to a water tower, agreed to maintain the water at any height desired for the convenience of the workmen, but failed to do so, whereby it became necessary for the plaintiff either to erect scaffolding or to abandon the work, the plaintiff might erect the scaffolding, even against defendant's will, and recover therefor as for extra work. *Nason Mfg. Co. v. Stephens* (Supreme Ct.), 3 N. Y. Supp. 303.

Where extra work in laying the foundations of a building was made necessary by the failure of the employer to properly grade the location as required by the contract, the contractor will be entitled to recover from the owner for such extra work. *Becker v. National Prohibition Park Co.*, 69 Hun (N. Y.) 55.

4. The superintendent is the special agent of the employer, and if measurements and calculations made by him are not correct, and extra and unnecessary work and expenditure should result, the loss should not fall on the contractor, but on the employer. *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396.

Where a government contract provides that the work done and the materials furnished shall be subject to the inspection of a certain officer, who shall have full power to reject any work or materials which in his opinion do not conform to the plans and specifications of the contract, the contractor can have no extra claim against the government for work done and materials furnished under the requirements of such officer, or for delay in the work

or from a change in the plans, the contractor may recover therefor.¹

6. Effect on Contract.—Additions and alterations do not amount to a waiver of the contract, unless it be abandoned so entirely that it is impossible to trace it and say to what part of the work it shall be applied.²

7. Rate of Remuneration.—The rate of charge for the extra work should be governed by the prices fixed in the original contract, in so far, at least, as they can be made to apply;³ but if the extra work is of such a character that its value cannot be fixed by the prices agreed to be paid in the contract, a different rule will prevail, and the recovery will be according to its value.⁴

caused by such requirements, where the officer made his requirements in good faith, in order to compel the execution of the contract as he understood it, and the contractor failed to make, at the time, any claim for extra compensation for work or material which he now insists were outside of the contract. *Bowe v. U. S.*, 42 Fed. Rep. 761.

Defective Plans.—The owner is liable for alterations rendered necessary by defective plans. *Erskine v. Johnson*, 23 Neb. 261.

1. *Wood v. Ft. Wayne*, 119 U. S. 312.

2. It is held still to exist, and to be binding on the parties as far as it can be followed. *McKinney v. Springer*, 3 Ind. 59; 54 Am. Dec. 470. And see *Pattison v. Luckley*, L. R., 10 Exch. 330; 44 L. J. Exch. 180; 33 L. T. 360; 24 W. R. 224.

3. *Jones v. Woodbury*, 11 B. Mon. (Ky.) 167; *White v. Oliver*, 36 Me. 92; *Sullivan v. Sing Sing*, 122 N. Y. 389; *Clark v. New York*, 4 N. Y. 338; *Chicago, etc., R. Co. v. Vosburgh*, 45 Ill. 311. And see *McKinney v. Springer*, 3 Ind. 59; 54 Am. Dec. 470.

The measure of compensation should be graduated by the terms of the contract so far as the work can be traced under it. *DeBoom v. Priestly*, 1 Cal. 206.

Where work is done under a special contract, at estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is to be the rule of payment as far as the special contract can be traced, and, for the extra labor, the party is entitled to his *quantum meruit*. *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285.

In *McSorley v. Prague*, 137 N. Y. 546, the plaintiff contracted to do cer-

tain plumbing for a certain sum, no mention being made of double plumbing, but the contract providing that the defendant might require any alteration in, or addition to, the contract, the reasonable valuation thereof to be added or deducted, as the case might be. The parties had made another contract previously, which had been surrendered, by which the plaintiff was to have three hundred dollars extra for every house in which double plumbing should be ordered. It was held that the plaintiff could recover an extra sum for double plumbing ordered by the defendant, and, in the absence of other proof, the reasonable value of such extra work might be taken to be the amount fixed by the parties in their former agreement.

Where by the terms of a building contract extra work is to be estimated in proportion to the contract price of the entire work, evidence of the reasonable value of the extra work is not admissible. *Eigemann v. Posey County*, 82 Ind. 413.

In *McCormick v. Connolly*, 2 Bay (S. Car.) 401, it was held that extras should be paid for at a reasonable valuation. And see *Elgin v. Joslyn*, 136 Ill. 525, where it was held that although a contract provides that extra work is to be paid for according to a schedule of prices fixed therein for extra work of a different character from that specified, the contractor will be entitled to be paid what it is shown to be reasonably worth.

4. *Chicago, etc., R. Co. v. Vosburgh*, 45 Ill. 311.

Where a contractor was directed to sink the foundations of a certain building three feet deeper than the depth agreed on in the contract between himself and the *United States*, and, in

IX. ARBITRATION.—Where the parties to a working contract agree to submit all matters in dispute to the architect or engineer and to be bound by his decision, the general rules applicable to arbitration apply,¹ and his decision, in the absence of fraud, is final.² But the arbitrator must be disinterested, and where an architect, to whom it is agreed to submit all disputes as to the

answer to the letter of the defendant's agent, replied that the additional costs would be \$1,350, but the extra work was actually done at a cost of \$160, it was held that he was entitled to recover only the actual expense and a reasonable profit of ten per cent. *Murphy v. U. S.*, 13 Ct. of Cl. 372.

Where a contract authorizes a superintendent to order alterations and additions to the building, provided that he agree beforehand upon the price, and he orders some, for which he makes an estimate, but the contractors refuse to make them for that price, offering, however, to make them for their actual cost, if he allows them to proceed in that understanding, they may recover therefor. *Merchants' Exchange Co. v. U. S.*, 15 Ct. of Cl. 270.

1. See ARBITRATION, vol. 1, p. 646; *O'Reilly v. Kerns*, 52 Pa. St. 214; *Reynolds v. Caldwell*, 51 Pa. St. 298; *Oakwood Retreat Assoc. v. Rathborne*, 65 Wis. 177.

Where there is an agreement to refer a question of amount due for work to an engineer, and to exclude the jurisdiction of the ordinary tribunals till an award shall be made by him, it will be valid. *Scott v. Liverpool Corp.*, 4 Jur. N. S. 402; 27 L. J. Ch. 641.

A clause in a building contract providing that the valuations, certificates, orders, and awards of the arbitrator appointed thereunder should be final and binding, and should not be set aside for any pretense, charge, suggestion, or insinuation of fraud, collusion, or confederacy, is not obnoxious to public policy, for, in the absence of fraud on the part of the parties to the contract, it was competent to them to agree not to raise any question in the arbitrator. *Tullis v. Jacson* (1892), 3 Ch. 441.

Where the plaintiff agreed with the defendant to build him a house, and that after it should be built, they should disagree as to the plaintiff's bill, and two workmen should be selected to value the work, and they were selected and did value it, the court refused to instruct the jury that the action ought to

have been brought on the special agreement. *Mudd v. Mudd*, 3 Har. & J. (Md.) 438.

2. *St. Paul, etc., R. Co. v. Bradbury*, 42 Minn. 222; *Langdon v. Northfield*, 42 Minn. 464; *Smith v. Boston, etc., R. Co.*, 36 N. H. 458; *Snell v. Brow*, 71 Ill. 134; *Sweet v. Morrison*, 116 N. Y. 19; *Wright v. Meyer* (Tex. Civ. App. 1894), 25 S. W. Rep. 1122; *Blakenship v. Adkins*, 12 Tex. 536; *Price v. Chicago, etc., R. Co.*, 38 Fed. Rep. 304; *Wood v. Chicago, etc., R. Co.*, 39 Fed. Rep. 52; *Lewis v. Chicago, etc., R. Co.*, 49 Fed. Rep. 708; *O'Donnell v. Forrest*, 44 La. Ann. 845; *Ross v. McArthur*, 85 Iowa 203; *Hot Springs R. Co. v. Maher*, 48 Ark. 522; *Guilbault v. McGreevy*, 18 Can. Supreme Ct. 609; *Stevenson v. Watson*, 4 C. P. Div. 148; *Tullis v. Jacson* (1892), 3 Ch. 441.

The architect or superintendent, in granting or refusing the certificates of approval, or in estimating and classifying the work, acts as an arbitrator, and his decision, in the absence of fraud or gross error, is conclusive. See *supra*, this title, *Certificates of Approval*, and *infra*, this title, *Payment Upon Estimate or Classification of Engineer*.

Where the parties to a contract for the construction of a railroad agreed to submit to a civil engineer, in charge, disputes as to the meaning of the contract, or the sufficiency of work done under it, or the price to be paid, they are bound by the decision of such engineer. *O'Donnell v. Henry*, 44 La. Ann. 845. And where by contract an award of the architect is final, and is made fairly and impartially, the court will not relieve against it, however severe it may be in its effect; but where the arbitrator is found guilty of unfairness or partiality, the court will relieve against his award. *Ormes v. Beadel*, 2 Giff. 166; *affirmed* 30 L. J. Ch. 1; 9 W. R. 25; 3 L. T. N. S. 344.

Under a contract for railroad construction work, making the decision of the chief engineer conclusive as to any dispute between the parties, and providing that such decision shall be in

value of work, has guarantied the owner, unknown to the contractor, that the total cost shall not exceed a specified sum, the contractor is not bound by the submission.¹ Where the contract is so framed as to make the reference of disputes to arbitration a condition precedent to recovery, no action will lie by a contractor upon a claim which he refuses to so submit;² but the employer

the nature of an award, it is not necessary that the engineer's written decision be signed by him also before it becomes binding on the parties. *Malone v. Philadelphia, etc., R. Co.*, 157 Pa. St. 430.

The contract under which the defendant undertook to erect a building provided that any disagreement or difference between the owners and the contractor, as to the kind or quality of the work required, should be determined by the engineers and architects, whose decision should be final and conclusive. The defendant let the plastering of the building to the plaintiff, under a contract which adopted, as between them, all the terms and requirements of the original contract. It was held that the arbitration clause was likewise adopted, and the plaintiff thereby waived any right to an action arising out of disputes as to the quality of the plastering, except his action on the architect's award. *Brown v. Decker*, 142 Pa. St. 640.

But the decision of the arbitrator is only final as to those matters agreed to be submitted to him. Thus, where, by the contract, it was provided that if any dispute or difference should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several contractors relating to the proposed building, such dispute, difference, or question should be settled by the architect, whose decision should be absolute and final, the condition was held to apply only to disputes as to the mode of carrying on the several works, and not to differences between the contractors and their employers as to their claim for extras. *Pashby v. Birmingham*, 18 C. B. 2; 86 E. C. L. 2.

The provision of a railroad contract that the decision of the engineer shall be final and conclusive in any dispute which may rise between the parties relative to the same, does not include within its terms of submission damages happening to the plaintiff from a rescission of the contract. *McGovern v. Bockius*, 10 Phila. (Pa.) 438.

Though a building contract provided that any dispute as to the construction of the specifications should be decided by the architect, his letter to the contractor, at a time when there had been no dispute as to the specifications in regard to the mixing of the plaster, complaining of the manner in which the work was being done, and directing him to follow the superintendent's instructions, does not authorize him to follow the instructions of the superintendent directing a mixture of plaster inferior to that fixed by the specifications. *Fitzgerald v. Moran*, 141 N. Y. 419.

Parol Alteration of Contract.—Where a written contract for railroad construction work has been modified materially by a subsequent parol agreement, a decision of the chief engineer, made by the written contract the final arbiter of disputes between the parties, cannot stand if he entirely ignores the parol agreement. *Malone v. Philadelphia, etc., R. Co.*, 157 Pa. St. 430.

1. A building contract contained a clause appointing the architect arbitrator in respect of extra works; the architect had guarantied to his employer, unknown to the builder, that the total cost should not exceed a specified sum, and it was held that the guaranty was a material fact tending to influence the architect's decision, and, as it was not disclosed to the builder, he was not bound by the submission to the architect's arbitration, and the court would perform the part of arbitrator in the matter. *Kimberley v. Dick*, L. R., 13 Eq. 1; 41 L. J. Ch. 38; 25 L. T. N. S. 476; 20 W. R. 49.

But the fact that an engineer, to whose decision matters in dispute are referred, is a stockholder in the railroad, is immaterial. *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463.

2. *Ball v. Doud* (Oregon, 1894), 37 Pac. Rep. 70. And see *Mayers v. Soady*, L. R., 18 Ir. 499.

An agreement to refer does not bar a suit in law or equity, unless the contract is so framed as to make the

may waive his right to insist upon an arbitration by defending upon other grounds.¹

X. SURETIES.—The rules of law governing sureties generally apply to sureties in working contracts,² and any material altera-

reference a condition precedent. In such case a reference must be alleged in the declaration, or an excuse for the want of it. *Smith v. Boston, etc., R. Co.*, 36 N. H. 458.

In *Fulton v. Peters*, 137 Pa. St. 613, it was held that where the contract provided for the submission of all disputes as to the quality or quantity of the work to the superintendent, whose decision should be final, the contractor could not recover a disputed claim which he refused to submit to the superintendent.

If the parties to a contract provide that any dispute which may arise between them, in reference to the subject-matter of the contract, shall be determined by a person therein named, whose decision shall be final, no action can be sustained at law in reference to matters embraced in the prospective submission. But in order to oust the courts of their jurisdiction, it must appear clearly that the subject-matter of the controversy was within the prospective submission. The right of trial by jury is not to be taken away by implication. *Lauman v. Young*, 31 Pa. St. 306.

But see *Cole Mfg. Co. v. Collier*, 91 Tenn. 525, where the fact that the parties to the contract had provided that all differences arising between them "as to the quality of work or material, or other questions arising under the contract, should be settled by arbitration," was held to constitute no bar to a suit brought upon the original contract by a party who had failed or refused to make an effort for settlement by arbitration.

Where extras are furnished under a building contract providing that the value of such extras, if disputed, should be ascertained by arbitration, and that the last installment of the contract price should be retained by the owner for thirty-five days after the completion of the building, to cover liens, etc., the last installment cannot be recovered till its amount is fixed by arbitration. *Ball v. Doud* (Oregon, 1894), 37 Pac. Rep. 70. But a provision for arbitration does not apply where the owner refuses to pay for the work on the ground that the contract

has not been substantially performed. *Oberlies v. Bullinger* (Supreme Ct.), 27 N. Y. Supp. 19; 75 Hun (N. Y.) 248; *Gallagher v. Sharpless*, 134 Pa. St. 134.

The contractor may sue for the value of the work in the absence of evidence that the employer took steps for the selection of arbitrators. *Williams v. Shields* (C. Pl.), 9 N. Y. Supp. 502.

When a building contract provides that all disputes as to the construction of the work shall be settled by the architect, and all disputes as to the value of extra work and omitted work shall be settled by arbitration, and the owner refuses to allow the contractor to proceed with the work, such provision ceases to be operative, and the contractor may bring an action for the value of the work done and materials furnished. *Velsor v. Eaton* (Supreme Ct.), 14 N. Y. Supp. 467.

1. A clause in a building contract provided that, should the contractors and a building committee named disagree as to the quality of material, or the proper construction of any part of the building to be erected, then the architect should decide the issue. In a proceeding to enforce a lien claimed by the contractors, the defendants failed to set up said clause in abatement of the action, but interposed pleas involving a consideration before the jury of the entire merits of the controversy, and proceeded to trial on the issues presented without insisting on the decision of the architect, and without raising any objection to the plaintiffs' testimony. It was held that the right to an adjustment of the differences by the architect was waived. *Summerlin v. Thompson*, 31 Fla. 369.

2. See SURETYSHIP, vol. 24, p. 714; GUARANTY, vol. 9, p. 67. And see *Blossom v. Farnham*, Clarke's Ch. (N. Y.) 158; *Andrews v. Lawrence*, 19 C. B. N. S. 768; 115 E. C. L. 768.

The agreement of suretyship is invalid if entered into after the working contract and without any new consideration. *La Fayette Mut. Bldg. Assoc. v. Kleinhoffer*, 40 Mo. App. 388.

And if a surety promises that the principal shall pay for work, a workman cannot recover from him unless it

tion of the contract without the assent of the surety will discharge him from liability.¹ But the surety in a bond given by the contractor for the benefit of laborers and material men having liens upon the work, is not discharged by any agreement or act of the owner or nominal obligee.²

XI. BANKRUPTCY OF CONTRACTOR.—Upon the bankruptcy of the contractor, his contracts, unless of a nature personal to him and

appears that he knew of the agreement before the performance of the labor. *Ball v. Newton*, 7 Cush. (Mass.) 599.

Consideration.—Where the plaintiff working under a contract was coerced by the defendant, under threats of stopping the work, into giving a guaranty not included in the original contract, failure thereof could not be pleaded to a suit on the original contract, there being no consideration therefor. *McCarty v. Hampton Bldg. Assoc.*, 61 Iowa 287.

1. *Berks County v. Ross*, 3 Binn. (Pa.) 520.

If the owner fails to insure the property as agreed, the surety is discharged. *Watts v. Shuttleworth*, 5 H. & N. 235; 29 L. J. Exch. 229. And so if he makes advances to the builder in excess of those provided for in the contract. *General Steam Nav. Co. v. Rolt*, 6 C. B. N. S. 550; 95 E. C. L. 550; *Gordon v. Rae*, 8 El. & Bl. 1065; 92 E. C. L. 1065; 27 L. J. Q. B. 185; *Simonson v. Grant*, 36 Minn. 439. It is immaterial that the alteration is for the benefit of the surety, *Weir Plow Co. v. Walmsley*, 110 Ind. 242; and he has been held discharged where the contract was altered by increasing the compensation to be paid the contractor. *Warden v. Ryan*, 37 Mo. App. 466.

A contract and bond executed by contractors and their sureties with the commissioners of a county, some of the provisions of which were not in accord with a former order of the county commissioners' court which referred to the contract, cannot be avoided by the contractor and sureties who thus assented to a disregard of the prior order. *Miliken v. Callahan County*, 69 Tex. 205.

Where a contract for the building of a hall provided for changes in the plans, and for extra pay therefor to be either mutually agreed upon or referred to arbitrators before the changes were made, it was held that the owner, in ordering changes but refusing to have the price fixed, waived the provision therefor; and that the change, etc., re-

leased the sureties on the contractor's bond. *Truckee Lodge v. Wood*, 14 Nev. 293.

The surety will be discharged *pro tanto* where payments are made without the engineer's certificates as required by the contract. *Brennan v. Clark*, 29 Neb. 385. Where the contract allows alterations to be made, a surety will not be discharged by alterations. *Hayden v. Cook*, 34 Neb. 670; *McLennan v. Wellington*, 48 Kan. 756; *Moore v. Fountain* (Miss. 1891), 8 So. Rep. 509.

It has been held that the surety was not discharged where the contractor consented to minor changes without binding himself to perform them. *Henricus v. Englert*, 63 Hun (N. Y.) 625. Nor where one of two contractors assigned to the other without notice to the surety. *Abbott v. Morrisette*, 46 Minn. 10. Nor where payments were made before the expiration of the time for filing liens. *Hayden v. Cook*, 34 Neb. 670. Nor where the fronting of a building was changed, the sureties never having seen the original plans. *Dorsey v. McGee*, 30 Neb. 657. The payment of a contractor in full upon the completion of the contract will not discharge a surety. *Duluth v. Heney*, 43 Minn. 155. Nor will the fact that the owner paid the contractor without retaining enough to cover the claims of lien men, though allowed by the contract to do so. *Casey v. Gunn*, 29 Mo. App. 49. Nor is he released by the payment of contractors who have fraudulently concealed defective work. *Kingston-upon-Hull v. Harding* (1892), 2 Q. B. 404.

Where by a contract certain disputes are to be submitted to arbitration, and other matters are afterward included in the submission without the knowledge or assent of the surety, he will not be bound by it. *Cooke v. Odd-fellows' Fraternal Union* (Supreme Ct.), 1 N. Y. Supp. 498.

2. *Conn v. State*, 125 Ind. 514.

The act of the owner extending the

depending upon his peculiar skill and fitness, pass, along with all his property, to the assignee, subject to existing liens.¹

XII. ASSIGNMENT OF CONTRACT.—A beneficial interest in a working contract may be assigned by the party engaging to perform the work and labor, so as to entitle the assignee to recover the contract price upon the fulfillment of the contract by the assignor,² but the employer is not liable to the assignee for money paid under the contract to the original contractor before he is notified of the assignment.³

XIII. RESCISSION.—The rules of law touching the rescission of contracts generally apply to working contracts, which may be

time for the completion of the building does not affect the obligation of such sureties. *Steffes v. Lemke*, 40 Minn. 27.

1. *Avery v. Hackley*, 20 Wall. (U. S.) 407; *Emden v. Carte*, 17 Ch. Div. 768. And see *Taff Vale R. Co. v. Nixon*, 1 H. L. Cas. 111; also *BANKRUPTCY*, vol. 2, p. 67. And, as we have seen, provisions for a forfeiture of the contract will not be allowed to operate in fraud of the bankrupt laws. See *supra*, this title, *Penalties and Forfeitures*.

2. *Bates v. B. B. Richards Lumber Co.*, 56 Minn. 14; *McPhee v. Young*, 13 Colo. 80; *Drew v. Josolyne*, 18 Q. B. Div. 590; 56 L. J. Q. B. 490; *Aspinall v. London, etc., R. Co.*, 11 Hare 325; *Tyner v. Scofield*, 11 Ind. 550; *Smith v. Mayberry*, 13 Nev. 427. But one cannot assign his contract to work for another. Thus, if A agree to work for B, the latter is not obliged to receive the services of another. *Robson v. Drummond*, 2 B. & Ad. 303; 22 E. C. L. 81. An agreement by A to work for B cannot be assigned so as to compel A to work for C, yet a contract to work for B or bearer may be. *Haskell v. Blair*, 3 Cush. (Mass.) 534.

A and B having entered into a joint agreement with a railway company to execute a contract for the construction of a tunnel upon the line, A assigned all his right and interest in the contract to B, and the latter agreed to pay A a given sum on the completion of the contract. After this agreement had been entered into, it became necessary to alter the levels of the line, and B, by agreement with the company, abandoned the contract, and another was entered into between the company and other persons, under which the tunnel at the altered level was completed; and it was held that A was not in a position, upon the completion of the

substituted contract, to maintain an action against B for the payment of the sum stipulated to be paid by his agreement. *Humphreys v. Jones*, 5 Exch. 952; 20 L. J. Exch. 88.

A provision in a building contract that the contractor should not, without the written consent of the owner, assign any of the moneys, payable thereunder, under penalty of forfeiture, etc., is for the benefit and protection of the owner alone, against the dereliction or insolvency of the contractor. If an installment of the moneys not yet due be assigned to material men, and notice thereof given to the owner without his exception, subsequent creditors of the contractor can derive no advantage therefrom. *Burnett v. Jersey City*, 31 N. J. Eq. 341.

A assigned to B a contract to build a railroad, partially performed by A, and B assumed debts therein incurred by A, not exceeding ten thousand dollars. B paid more than this amount, without paying the whole indebtedness, and it was held that the unpaid creditors had no right of action against B; not even C, whose claim B had specifically promised to pay, the promise being without consideration. *Odell v. Mulry*, 9 Daly (N. Y.) 381.

Notice of Assignment.—Where notice of the assignment of a building contract, written in the English language, is given to one who does not read or write English, the notice, in order to be effectual, must be sufficient, precise, and complete enough to put the defendant fully on his guard as to the fact of such assignment and to make him understand it. Whether notice is given or not, and if given whether it is sufficient to put a prudent man on inquiry, is a question of fact. *Renton v. Monnier*, 77 Cal. 449.

3. *Renton v. Monnier*, 77 Cal. 449.

waived, canceled, or rescinded by agreement of the parties,¹ and it is frequently provided that upon default of the contractor the employer may rescind the contract and enter and complete the work.² Upon the mutual rescission of the contract, the workman may recover the value of the work performed upon a *quantum meruit*, if used by the employer and of value to him.³

XIV. PAYMENT—(See PAYMENT, vol. 18, p. 148)—1. **Generally.**—Upon the completion of the work the contractor is entitled to payment therefor at the rate of compensation specified in

1. See RESCISSION, vol. 21, p. 24; *Badders v. Davis*, 88 Ala. 367.

The exercise of a right of election to rescind a building agreement must be signified in an unqualified manner and within a reasonable time, or, at all events, not after the other party to the agreement has gone to expense in the belief of the right of election not being exercised. The party rescinding the contract is not entitled to make entry on the premises, for the purpose of removing the goods, after the date of rescission. *Marsden v. Sambell*, 43 L. T. 120; 28 W. R. 952.

Where A agreed to employ B to superintend a specific work at a specific time, and B, though knowing that the work had been let out to contractors, took no steps under the contract, he was held to have rescinded it. *Wehrli v. Rehwooldt*, 107 Ill. 60.

The plaintiffs, trustees of a school district, contracted with the defendant, in writing, to build for them a school-house, and authorized S., one of the plaintiffs, to superintend the construction. After the work had been partly performed, the defendant abandoned it. To an action by the plaintiffs for damages for breach of the contract, the defendant set up as a defense that he had been discharged from the contract by the said S. It was held that the discharge by S. without the knowledge or consent of his co-trustees rescinded the contract. *Schofield v. McGregor*, 1 Thomp. & C. (N. Y.) 404.

Where it is stipulated in a building contract that, on failure of the contractor to pay for labor and material, the owner may refuse to pay certain installments, otherwise payable, such refusal is no evidence of an abandonment of the contract; nor is it evidence of abandonment that, upon the refusal of the builder to complete the work, the owner has had the work finished. *Casey v. Gunn*, 29 Mo. App. 14.

2. *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303; *Harder v. Marion County*, 97 Ind. 455. And see *supra*, this title, *Forfeitures*; *Lawrence v. Dale*, 3 Johns. Ch. (N. Y.) 23.

If a contractor stipulates to build and finish a house by a certain day, and at the expiration of the time he has not commenced the work, the other party may rescind the contract. *Miller v. Phillips*, 31 Pa. St. 218.

Where one party to a building contract, on demand of the other, made only a qualified refusal to fulfill, it was held that before the latter could insist on a forfeiture, he was bound to give the former an opportunity to comply with the demand, after notice that a failure to do so would be treated as a rescission. *Davison v. Jersey Co. Associates*, 71 N. Y. 333.

Waiver of Right to Rescind.—By accepting an electric light plant constructed for it, before it is entirely completed, and by making use thereof, the company for which it is constructed waives its right to rescind for failure to entirely complete the plant. *Flourance Gas, etc., Power Co. v. Hanby* (Ala. 1893), 13 So. Rep. 343.

3. *Kirkland v. Oates*, 25 Ala. 465; *Prince v. Thomas*, 15 Ark. 378. But see *Curtis v. Smith*, 48 Vt. 116.

Where a contract has been rescinded by one of the parties thereto, after the same has been in part performed by the other party, the former is not entitled to the benefit of any stipulation contained in such contract, as to the method in which the amount of compensation to be paid to the latter is to be determined, so as to prevent the latter from recovering upon a *quantum meruit* for the work done by him previous to the rescission of the contract; but the amount of compensation for the work actually done is to be ascertained by a reference to the prices which the parties themselves have fixed

the contract,¹ or if no rate be specified, then to a reasonable compensation.² The time of payment may be regulated by

in their contract. *Clark v. New York*, 3 Barb. (N. Y.) 288.

1. S. submitted to the State of *New York* proposals to furnish the labor and various materials required to erect a quarantine structure in New York harbor, specifying the prices for specific quantities, etc. Afterward S. contracted with the state to erect the structure for \$252,491, "being the aggregate cost of the construction of the said exterior walls and foundation at the prices specified in the said proposals." It was held that this statement of the cost was intended only as an estimate, and did not conclude either party as to what the actual cost would be, it being intended to pay the specified prices for such materials and labor as should be actually furnished. *Swift v. New York*, 26 Hun (N. Y.) 508; *reversed*, by Court of Appeals, 89 N. Y. 52.

A contracted to build a "rip-rap" wall for B at fifty cents per cubic yard, and, in the absence of proof of any general usage or uniform custom which could control the mode of measurement, it was held that the terms used implied pay by the cubic yard, for the "rip-rap," after the stone was fitted and laid in the wall. *Wood v. Vermont Cent. R. Co.*, 24 Vt. 608.

A contract stipulating for the payment of a certain rate "per square yard" for the removal of dirt, means cubic yard. *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177.

Where the terms of a contract for the payment of money for work are ambiguous, they will be interpreted most strongly against the promisor of the money, the work having been done. *Gantz v. District of Columbia*, 18 Ct. of Cl. 569.

Where a written contract to fill in a trestle on a railroad track provides for compensation by the cubic yard of dirt, the contractor cannot recover for the space occupied by a brick culvert constructed by the company under the trestle. *East Tennessee, etc., R. Co. v. Matthews*, 85 Ga. 457.

In *Smith v. Molleson*, 74 Hun (N. Y.) 606, the plaintiff let a contract to one M. to do the stonework on a building, providing for monthly payments, not to exceed eighty per cent. of the estimated value of "the work performed

on the building." The most expensive part of such work was quarrying and dressing the stone before it was put in the building, and it was held that the contract intended that the payments to M. should be based on the stone prepared for the building, as well as that actually put in.

A building contractor who has arranged with a subcontractor for materials for fireplaces, to be estimated at a certain price for each fireplace, the owner of the building to "have the privilege of selecting all these materials within the above figures," is entitled, in settling with the subcontractor, to a credit for the amount by which such estimated price exceeds the price of fireplace materials selected by the owner and actually used. *Harrison v. Reeves*, 160 Pa. St. 134.

Where a building contract provides that the contractor shall receive as compensation the cost of labor and material used in the building, "and ten per cent. added thereto as profit," the amounts paid by the contractor on subcontracts for various portions of the work, including the customary profits of the subcontractors, will be considered as "the cost of labor and material" in estimating the amount due to the contractor. *Hamilton v. Coogan* (C. Pl.), 28 N. Y. Supp. 21; 7 Misc. Rep. (N. Y.) 677. And see *Ford v. St. Louis, etc., R. Co.*, 54 Iowa 723.

Payment Upon Test of Work.—The last installment under the contract for the construction of a dock was to be paid after a satisfactory test with a vessel to be furnished by the government and approved by the contractors within a specified time. The offer of one vessel approved by the contractors was withdrawn, and others were offered and were not approved, because they were not of the class contemplated by the parties when the contract was made, and no test was made. It was held that the contractors, on making formal tender of the dock after the time for a test had expired, were entitled to such last installment. *International Bow, etc., Dock Co. v. U. S.*, 60 Fed. Rep. 523.

2. *Hughes v. Lenny*, 5 M. & W. 183; 2 H. & H. 13. See *Carll v. Spofford*, 45 N. Y. 61.

On a parol contract with a public

special provisions in the contract.¹ The contractor is frequently required to furnish the employer with satisfactory evidence that no liens have been filed on the work before final payment is to be made.²

board to perform work and labor for whatever "recompense the board might allow as right and proper," an action will lie to recover a reasonable recompense, although the board tenders what they consider right and proper. *Bird v. M'Gahey*, 2 C. & K. 707; 61 E. C. L. 707.

1. Under an agreement to pay a certain sum on the completion of work, and the remainder of the price within sixty days thereafter, without interest, a further provision that, if such remainder is not paid within six months after the work is completed, a specified rate of interest shall be paid thereon, does not prevent the debt from falling due at the end of sixty days. *Cook v. McCabe*, 53 Wis. 250; 40 Am. Rep. 765.

One who agrees to pay for work done on a structure when it shall be sold, is entitled to credit for a reasonable time for selling; after expiration of this, he may be held liable, although no rule has been made. *Williston v. Perkins*, 51 Cal. 554.

Where no time is fixed for payment, the contractor cannot require payment until the completion of the contract. *Boody v. Rutland, etc., R. Co.*, 3 Blatchf. (U. S.) 25.

A stipulation in a building contract, that, on completion of the work, half the price should be paid in the owner's three notes for one, two, and three years respectively, being for the builder's benefit, may be waived by him; and at the end of a period for which a note was to run, and upon non-payment of the corresponding sum, he may maintain an action therefor against the owner or his legal representatives, but no earlier. *Bannister v. Patty*, 35 Wis. 215.

A contract for the construction of waterworks for a village provided that an estimate should be made each month of the value of the labor and materials, and all work completed, up to the first day of the month, and ninety per cent. of the contract price of such completed work paid to the contractor. It was held that the word "completed" did not mean "entirely completed," but the contractor was entitled to an estimate of, and payment for, any work of which

a material and substantial part had been performed. *DeLafield v. Westfield* (Supreme Ct.), 28 N. Y. Supp. 440; 77 Hun (N. Y.) 124.

A stipulation in a contract for building a county courthouse that the county should pay eighty-five per cent. "on the amount of material furnished on the grounds, and the work done on the building, on the first of each month, as the work progressed," does not restrict the payments to be made by the county so that they shall at no time aggregate more than eighty-five per cent. of the amount bearing the same proportion to the total contract price as the amount of the materials then furnished and the work then done might bear to the total amount of the work and materials necessary to complete the contract. *Howard County v. Baker*, 119 Mo. 397.

Bond to Indemnify Against Liens.—Under *Missouri* Rev. Stat., § 3725, allowing specialties to be impeached for want of consideration, where a builder gave a bond, two months after the signing of the building contract, to the owner, to indemnify him against mechanics' liens, it was a mere gratuity, there being no new consideration. *Ring v. Kelly*, 10 Mo. App. 411.

2. See *O'Connor v. Smith*, 84 Tex. 232.

The fact that no claims were filed under the mechanic's lien law within one year after the filing of the contract, which is the limit provided by statute, afforded the required evidence. *Wallis Iron Works v. Monmouth Park Assoc.* (N. J. 1893), 26 Atl. Rep. 140. And see *Mills v. Norfolk, etc., R. Co.* (Va. 1894), 19 S. E. Rep. 171.

A building contract containing an agreement that the contractors would hold G. harmless from liens for labor and materials, was not broken by the mere existence of unpaid claims, for which no proper acts have been performed to perfect a lien. *Simonson v. Grant*, 36 Minn. 439.

Where, by the terms of a building contract, the owner agrees with the contractor to convey to him certain real property on the final completion of the building, but the contractor makes default in payment for materials

2. Medium of Payment.—If the contract is silent as to the medium of payment, a payment in cash is implied,¹ but the parties may of course stipulate for payment in any medium desired.²

used, so that the building becomes incumbered with liens, the owner is not bound to make such conveyance until the liens are discharged, but may hold the property for his security. *Erickson v. Brandt*, 53 Minn. 10.

Where a building contract provided that seventy-five per cent. of the contract price should be paid on weekly estimates of the architect, the remainder to be retained until the building should be completed and accepted, and satisfactory evidence furnished that no claims existed, it was held that such evidence was not required on the weekly payments and only on the final one. *Leavel v. Porter*, 52 Mo. App. 632.

1. See PAYMENT, vol. 18, p. 163.

Where one proposes to do work and furnish material for another at a certain rate gold, or a certain other rate currency, which proposal is accepted, an option as to mode of payment is created. The first right to exercise such option belongs to the party who is to make such payment, provided he makes it before he is in default for such payment, and if he so makes such option he binds both parties to the contract. *Stephens v. Howe*, 34 N. Y. Super. Ct. 133.

2. *Titus v. Cairo, etc., R. Co.*, 46 N. J. L. 393, where payment for the construction of a railroad was to be made in bonds of the company. And see *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879; *Sample v. Pickens*, 1 Smed. & M. Ch. (Miss.) 501, where it was to be in the notes of a particular bank.

Where two men agreed to perform a piece of work on a railroad, upon the same terms of payment as the original contractor, one of whom was to receive twenty per cent. in stock at par, but, a third person being substituted in place of one of them, the other agreed to pay him his share of the above provision, it was held that he was bound to pay in cash, and a tender of half the stock was insufficient. *Knapp v. Levanway*, 27 Vt. 298.

It was competent for the parties to a written building contract providing for payment only in cash, to afterward agree, orally, that the amount of a note made by the builder and held by

the other party should be paid thereon, by delivering up and canceling the note; and thereafter, as soon as work enough is done under the contract to pay such note, the note in the hands of such holder would thereby be satisfied; and, if the note has not become due when the work was completed, the new agreement would operate to extend the time of payment on the building contract until the note matured, and the builder could not, in the meantime, maintain an action for the money due upon the contract; nor could he, by suspending work on his contract, defeat this new agreement to the extent of the money earned. *Roberts v. Wilkinson*, 34 Mich. 129.

Where a building contractor was to receive as part payment an eight per cent. mortgage running six years, an offer to show, in defense to his action, that by reason of his failure to complete the contract in season the employers were compelled to borrow money at a higher rate to complete it themselves, is not sufficiently specific, in the absence of any proposal to show that the current rates for six year loans were higher than eight per cent. to warrant its reception as a basis for estimating damages. *Friedland v. McNeil*, 33 Mich. 40.

A contractor who agrees to take some of the buildings he erects in part payment for his work may sell them before all the work is done. *McPherson v. Walton*, 42 N. J. Eq. 282.

A contractor with a company who, by his contract, is bound at the option of the company to accept payment to a certain amount in shares, cannot, after the company has been ordered to wind up, be called upon to accept payment in shares, the option not having been exercised till after the winding up. *Ex p. Sharon*, 12 Jur. N. S. 482; 14 W. R. 855.

Where a contract for the building of a railroad provided that until five hundred thousand dollars should be realized by subscription or from the sale of the securities, the contractor might make necessary purchases and contracts on the credit of the company, but that he should be paid for his work only in the stock and bonds of the company, it was

3. Payment Upon Estimate or Classification of Engineer.—Where the contract provides that the employer's engineer or superintendent shall measure and classify the several kinds of work done, and that payment shall be made upon his calculations and estimates, the valuation of the superintendent, and his classification of the work, is, in the absence of fraud, gross error, or mistake, conclusive upon the parties,¹ subcontractors

held that the contractor was not entitled to cash from the company to the extent of five hundred thousand dollars to aid in the work, nor to an allowance for the discount at which he should be compelled, for the purpose of raising funds, to dispose of the stock and bonds issued to him. *Wood v. Boney* (N. J. 1891), 21 Atl. Rep. 574.

Payment in Tax Assessments.—A city contractor who agrees to take pay in tax bills, may, if the tax bills prove to be invalid, bring suit to recover the contract price for the work done, without returning the void bills and demanding others. *Fisher v. St. Louis*, 44 Mo. 482.

But where a contractor for the construction of a railroad for the defendant, agreed to collect and receive in part payment a certain sum from a township tax voted by the people of the township, or from certain subscriptions to stock that had been made, to entitle him to recover he must show proper effort and diligence to collect either from the subscription or tax, or some excuse for not doing so. *Arnold v. River R. Constr. Co.*, 35 Iowa 99.

Where a contractor contracts to make payment to one from whom he purchases material, in transferred street assessments to be issued to him by the city for his work, it is no defense to an action for the price of the material furnished him that when the payment became due he was unable to transfer the assessments because of the city's failure to issue them, since he binds himself at his own risk, for the act of the city. *Hughes v. Eschback*, 7 D. C. 66.

1. *Lewis v. Chicago, etc., R. Co.*, 49 Fed. Rep. 708; *Summers v. Chicago, etc., R. Co.*, 49 Fed. Rep. 714; *Martinsburg, etc., R. Co. v. March*, 114 U. S. 549; *Green v. Jackson*, 66 Ga. 250; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 447; *Baltimore, etc., R. Co. v. Lafferty*, 14 Gratt. (Va.) 478; *Oakes v. Moore*, 24 Me. 214; 41 Am. Dec. 379; *Robinson v. Fiske*, 25 Me. 401; *Snell v. Brown*, 71 Ill. 133; *Illinois*,

etc., *Canal v. Lynch*, 10 Ill. 521. See also *Bryan v. Bell* (C. Pl.), 10 N. Y. Supp. 693; *Thurber v. Ryan*, 12 Kan. 453; *Board of Education v. Shaw*, 15 Kan. 33; *Mercer v. Harris*, 4 Neb. 77; *Patterson v. Crowther*, 70 Md. 124. But see *McCoy v. Able*, 131 Ind. 417.

Provisions in a railroad construction contract making the contractor's compensation depend upon the opinion or award of a person in the employ of the company, may, though severe and highly penal, be enforced. *Phelan v. Albany, etc., R. Co.*, 1 Lans. (N. Y.) 258.

The estimate is binding on both parties unless based on wrong views of the contract. *Alton, etc., R. Co. v. Northcott*, 15 Ill. 49. And see *McAvoy v. Long*, 13 Ill. 147.

In *Price v. Chicago, etc., R. Co.*, 38 Fed. Rep. 304, the work was done under the supervision of an assistant engineer, who each month forwarded his estimates to the chief engineer, who paid the plaintiffs, the principal contractors, monthly on the basis of such estimates, and they paid their subcontractors monthly on the same basis. After the completion of the work the chief engineer discovered that the assistant engineer's estimates, without the fault of the plaintiffs or their subcontractors, were largely in excess as to quantities, the result being that the subcontractors had been greatly overpaid. It was held that the defendant must bear the loss; that, notwithstanding the terms of the contract, the defendant was estopped to deny the correctness of the estimates of the assistant engineer whom it had placed in charge of the work.

The measurements and estimates of the engineer may always be impeached for fraud or gross mistake. *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463.

Such a stipulation is binding, since it is a part of the consideration of the contract. *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463.

In *Ricker v. Collins* (Tex. 1891), 17 S. W. Rep. 378, the defendants were

contractors for certain construction on a railroad, and contracted with the plaintiff to do a portion of the work. The plaintiff was to receive twenty-five cents per cubic yard for removing loose rock, and seventy-five cents for solid rock, the classification to be made by the chief engineer of the railroad, or by one appointed by him for that purpose. The plaintiff commenced work, and then notified the local engineer in charge of the work that, unless the job was classified as solid rock, he would abandon it; whereupon the engineer so classified it, and the plaintiff completed his contract. A member of the defendant firm was present during the work, and knew of the classification shortly after it was made, and told the plaintiff that it was all right. It was held that the defendants were liable on such classification.

Where the contract under which the plaintiff performed work for the defendant construction company in building a railroad provided that monthly advances were to be made him on the basis of measurement and classification of the work by the defendant's engineer, and that all disputes as to amount or classification of work were to be referred to the divisional engineer, whose decision thereon should be final, it was held that the plaintiff could maintain an action for the fraud of the defendant's engineer in underestimating and classifying his work, without alleging that reference had been duly made to the divisional engineer, or that he was privy to the fraud, so that the reference would be useless. *Meyers v. Pacific Const. Co.*, 20 Oregon 603.

Where the measurement and estimate were to be by the city engineer, the measurement of the work by his assistant, revised by himself, was held such a performance of his duties as the contract intended. *Palmer v. Clark*, 106 Mass. 373.

In *Price v. Kearney Canal, etc., Co.*, 29 Neb. 33, the plaintiff contracted to construct a canal for the defendant for so many cents a cubic yard. It was shown that the defendant's engineer, in making estimates upon which the plaintiff's pay was based, measured excavations only, and that the plaintiff acquiesced in this method. It was held that the evidence warranted a finding that the plaintiff was not entitled to compensation for earth placed in embankments which had been once paid for in excavation.

Notice of Measurement.—The superintendent need not give notice to the contractor of the time he intends making the measurements and estimate in order that the latter may be present. *Wilson v. York, etc., R. Co.*, 11 Gill & J. (Md.) 58.

By Whom Made.—The plaintiffs contracted to do certain railroad bridge masonry, to be paid for on final estimates of the "engineers in charge" of the railroad. It was held that "engineers in charge" meant the engineers in charge of the entire road, and not one in charge of the specific masonry in question, whose decision was subject to the approval of the engineers in chief. *Reilly v. Lee* (Supreme Ct.), 16 N. Y. Supp. 313; 61 Hun (N. Y.) 627.

Pleading—Evidence.—In an action against a railroad company for work performed under a construction contract which stipulated that the amount of work done should be determined by the measurement of the company's engineer, the first count in the complaint set out the contract, and then alleged that the engineer, though often requested, did not make the measurements as required by the contract, and certify them, and that his failure to do so was fraudulent, and collusive with the defendant. The answer denied this allegation, and set out the final estimate of the engineer. The reply inferentially admitted that there was an estimate made by the engineer, but alleged that it was made in violation of the contract, and was fraudulent. It was held that before the plaintiffs could introduce evidence of the amount and value of the work done by them, they must first show that the engineer had refused to make an estimate as required by the contract, after demand, since that was the issue presented by the pleadings on the first count. *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463.

Refusal of Engineer to Act.—Where a contract for the grading of a railroad provided that the estimates and decision of the engineer should be conclusive and binding on the parties, and both the contractor for whom the work was done and the engineer refused to make the estimates, it was held, in an action to recover for the work performed, that estimates made by another engineer employed by the plaintiff therefor, were, under a proper issue made by the pleadings, admissible in evidence. *Crawford v. Wolf*, 29 Iowa 567.

included,¹ and no payment is due until the estimate is

1. *O'Reilly v. Kerns*, 52 Pa. St. 214.

Where the plaintiff, as subcontractor, agreed to grade land for a railway company, the work to be done under the supervision of the company's chief engineer, whose classification and measurement of the work performed was to be conclusive on all parties, the contract was valid, and the parties were bound by the estimates, unless they were fraudulently made. *Ross v. McArthur*, 85 Iowa 203.

Where the contract with a subcontractor for railroad construction work stipulates that payment shall be made the subcontractor only on an estimate and certificate of the original contractor's engineer, the stipulation is binding on the parties, and the subcontractor, if he recovers at all for his work, can only recover the amount of such estimate. *Gulbault v. McGreevy*, 18 Can. Supreme Ct. 609.

But the engineer's estimates which, by the contract, are to be conclusive, cannot be held binding on subcontractors, on proof that the engineer was under the control of the contractor, and that his final estimates were withheld at the contractor's desire, contrary to his promise to the subcontractors. *St. Louis, etc., R. Co. v. Kerr*, 48 Ill. App. 496.

Under an agreement with a railroad company, that the measurement and classification of work done shall be the same as made by the engineer of the company, a subcontractor cannot recover for "second class masonry;" the estimates and testimony of the engineer showing that he did only certain "third class masonry," for which he was paid. *Clark v. Diffenderfer*, 31 Mo. App. 232.

A contract between the defendants contracting for the construction of a railroad, and the plaintiff, a subcontractor, provided that the defendant should receive three times as much compensation for removing solid rock as for removing loose rock, the classification to be made by the engineer of the railroad. The latter, at the plaintiff's request, classified the job as solid rock. It was held that by accepting the defendants' last payment under a new classification, made when the plaintiff's work was about completed, the plaintiff did not abandon his right under the first classification, when he

accepted the money on condition that it would be applied as a credit on the amount claimed under such first classification, and the defendants' bookkeeper allowed him to so receipt for the money. *Ricker v. Collins*, 81 Tex. 662.

In *Cummings v. Bradford* (Ky. 1893), 22 S. W. Rep. 548, the defendant, having a contract for grading certain sections of railroad, sublet several sections to the plaintiffs, who were to do the work in conformity with the contract between the defendant and the railroad. After payment to the defendant of the amount due according to the estimates of the railway's engineer, and repayment by the defendant to the plaintiffs of the amount estimated on their sections, the defendant had other estimates made, and, finding seventy-seven thousand two hundred and twenty-six dollars additional due, sued for the amount. The amount recovered, however, was only twenty-two thousand nine hundred and ninety-eight dollars, and, as the judgment did not show in relation to which section the mistake in the former estimate had been made, the master proceeded to set off a ratable share to the plaintiffs of the twenty-two thousand nine hundred and ninety-eight dollars, after deducting the costs and attorneys' fees paid in the litigation, which was held the only feasible or just mode of ascertaining the plaintiffs' share, the plaintiffs not being entitled to receive pay for their work beyond what was recovered in the litigation.

A building contract awarded by a city to the plaintiff provided that the plaintiff should not be entitled to any payments until the completion of the work, except that the commissioners might direct payments on estimates made by the architects from time to time, where the value of the work should amount to twenty thousand dollars. The plaintiff's subcontract with M. provided for monthly payments on the estimated value of the work done by him. It was held that, while payments were to be made by the plaintiff to M. on estimates of architects, they were not the estimates provided for in the contract between the plaintiff and the city, which were based only on the work actually performed on the building. *Smith v.*

made.¹ But if the contractor alleges that the estimate is fraudulent and unjust he may prove the nature, extent and value of the work by other evidence,² and the court will always relieve against mistakes in measurements and calculations, clearly proven, or from oversight to measure or estimate any particular part of the work, or from wrong construction put upon the contract by the superintendent.³ The estimate or

Molleson (Supreme Ct.), 26 N. Y. Supp. 653; 74 Hun (N. Y.) 606.

Binding on Creditors of Subcontractor.

—The contract between the contractor and his subcontractor for the construction of a railroad, providing that the estimate of the chief engineer should be final and conclusive as to the amount of work and its value, is binding on the judgment creditors of the subcontractors, on garnishment of the contractor, and no other evidence is admissible. *St. Joseph Iron Co. v. Halverson*, 48 Mo. App. 383.

1. A contract to pay for materials, to be furnished for the erection of a building, in monthly installments, upon the architect's estimates, is not broken by a failure to pay at the end of a month, and before the architect has made his estimates. *Thurber v. Ryan*, 12 Kan. 453.

2. *Byron v. Bell* (C. Pl.), 10 N. Y. Supp. 693. And see *Gulf, etc., R. Co. v. Ricker* (Tex. 1891), 17 S. W. Rep. 382.

Fraud cannot be presumed merely because his estimates for work done pursuant to the contract are less than the measurement of the work actually done, nor because more work was done than is included in the estimate. There must be evidence that such party knowingly and willfully disregarded his duty, and rejected or condemned work which he knew, or at least should have known, fully conformed, in all respects, to the contract. *Snell v. Brown*, 71 Ill. 133.

The report of the engineer cannot be impeached for mistake arising from error in judgment, or in drawing conclusions from evidence and observations. *Palmer v. Clark*, 106 Mass. 373.

But it is error to admit evidence that upon other excavations in other places the engineer had classed as solid rock, material similar to that which he refused to class as solid rock in the excavation in question, it not appearing that the contract under which such classification was made was the same as the contract in the case on trial.

Dorwin v. Westbrook, 86 Hun (N. Y.) 363. And the opinion of a witness that the certificate is erroneous, and as to whether the issuing of such a certificate is evidence of bad faith, is insufficient to show bad faith, fraud or misconduct on the part of the superintendent. *Zimmerman v. German Luth. Church*, 11 Misc. Rep. (N. Y. Super. Ct.) 49.

3. *Galveston, etc., R. Co. v. Henry*, 65 Tex. 685.

The court will relieve against mistakes in measurements and calculations apparent upon the face of the estimates, or clearly proven, though not so apparent, or from oversight to measure or estimate any particular part of the work, or from wrong constructions put upon the provisions of the contract by the engineer; but will not relieve against alleged mistakes in determining the kind of materials found in the several cuts, the parties being bound by the judgment of the engineer selected by them for special skill and attention as the umpire on such questions; nor will it relieve against slight discrepancies in measurements. *Lewis v. Chicago, etc., R. Co.*, 49 Fed. Rep. 708; *Summers v. Chicago, etc., R. Co.*, 49 Fed. Rep. 714. And see *Sherman v. New York*, 1 N. Y. 316, where it was held that other evidence than the engineer's final estimate of the work was competent.

In an action for the price agreed to be paid for removing earth at a given rate per cubic yard, where a witness has testified that he was employed to cross-section the work before the grading was done, and that his measurements are correct, the testimony of another witness that he made estimates from such measurements, and found that a certain number of cubic yards had been removed, is admissible. *Clarke v. Williams*, 29 Neb. 691.

A contract for work and materials to be performed and furnished on the Quebec harbor works provided for the payment of a bulk sum therefor, and the specifications included dredging as

classification, however, is binding only as to matters within the jurisdiction of the superintendent to determine,¹ and if not

one of the items. The contract provided that the engineers of the harbor commissioners should determine all matters in dispute by their final certificate. The engineers, by their final certificate, only granted a balance of \$52,011, as due the contractors, deducting from the bulk sum agreed to be paid a large sum as for a clerical error in computing the amount of dredging to be done. The contractors rejected the engineers' certificate as to the amount due them of the contract price, and it was held that the engineers' certificate was binding on the contractors as to all matters within their jurisdiction to determine, but they had no right to deduct any sum from the bulk contract price on account of error in calculating the amount of dredging to be done, which was stated in the specifications, and the quantity of dredging actually done, and their certificate should be corrected in that respect. *Peters v. Quebec Harbor Com'rs*, 19 Can. Supreme Ct. 685.

The plaintiff agreed to grade land for a railway company, the contract providing that there should be no classification of the material excavated, other than that found in the specifications, which provided that, if the material to be excavated could be plowed with a strong ten-inch grading plow, well handled, behind a good six mule or horse team, it was to be classed as loose earth; but if it required more force than this, and less than solid rock, it was to be classed as loose rock. The engineer was instructed to use his best judgment in making the classifications; where the material was so hard that six horses could plow only half the time, he was instructed to allow a fair portion of loose rock, "say twenty-five per cent.;" where eight horses would be required, he was to call about fifty per cent. loose rock. It was held that though the instructions did not strictly conform to the contract where there was no material error in the engineer's classification, the estimates would not be set aside. *Ross v. McArthur*, 85 Iowa 203.

Where the respective quantities of the different kinds of excavation for which different prices are to be paid are to be determined "by the measurements and calculations" of the engineer,

he need not determine by actual measurement the quantity of each kind of material excavated, but the word "calculations" is to be understood in the sense of "estimate," and, after the measurement of an embankment or cut, he may determine, by reference to the known contents and data, the quantities of the different materials excavated. *Scoville v. Miller*, 40 Ill. App. 237; *Musson v. Musson*, 40 Ill. App. 237.

Burden of Proof.—In an action to recover for excavating, at so much per yard, the number of which it had been agreed was to be ascertained by the certificate of a certain surveyor, where the plaintiff offers such certificate as evidence of the number of yards, and the defendant denies its correctness, the burden is on the defendant of disproving its correctness. *Pucci v. Barney* (City Ct.), 20 N. Y. Supp. 375; 1 Misc. Rep. (N. Y.) 84; *Pucci v. Barney* (C. Pl.), 21 N. Y. Supp. 1099; 2 Misc. Rep. (N. Y.) 354.

Waiver of Right to Object.—Where monthly estimates by an engineer in charge of a work are to be the means for his final account, which is to be conclusive upon the contractors, according to the terms of their agreement, a dispute as to the price allowed in a monthly estimate, followed by the acceptance of payment, and a receipt in full, will estop the contractor from seeking a greater price. *Case v. U. S.*, 11 Ct. of Cl. 712. And see *Henegan v. U. S.*, 17 Ct. of Cl. 273; *Green v. Jackson*, 66 Ga. 250.

1. *Peters v. Quebec Harbor Com'rs*, 19 Can. Supreme Ct. 685.

In *O'Reilly v. Kerns*, 52 Pa. St. 214, it was held not to apply to extra work not contemplated by the contract.

A contract to furnish stone for a building at a certain amount per perch, "architects' measurement in the wall, to be paid as per architects' estimate to the contractors, viz., ninety per cent. monthly," provides no method for the final measurement of the walls, and the determination of the system to be used is properly left to the jury under the evidence. *Fellows v. Snyder*, 50 Kan. 705.

A provision in a contract for excavating, etc., on a railroad, that all questions concerning the quantity and

provided for at all by the contract has no binding force whatever.¹

XV. SUBSCRIPTIONS TO WORK.—Where various parties subscribe to the construction of a work, they will be liable to the extent of their subscriptions in an action by the contractor upon the agreement,² but if the subscription is conditional, the condition must be performed before the subscription can be collected.³ If the

quality of the work, and the amount of money payable therefor, should be submitted to the chief engineer, has no application to an additional compensation promised on the work turning out to be harder than anticipated. *Osborne v. O'Reilly*, 42 N. J. Eq. 467.

1. Where the contract does not provide for estimates by the architect, they are not binding upon the employer. *Schuler v. Eckert*, 90 Mich. 165.

2. See SUBSCRIPTIONS, vol. 24, p. 326; *Southern Hotel Co. v. Chouteau*, 53 Mo. 572; *Jewett v. Siddons*, 9 Ind. 455; *McCrimmin v. Cooper*, 27 Tex. 113.

A subscription paper, stipulating that the sums annexed to the subscriber's names would be paid to any person who would build a free bridge at a designated place, constitutes a valid contract between the subscribers and anyone who afterward builds a bridge in accordance with the tenor of the instrument. Such an instrument is like a note payable to bearer, so far as relates to the payee; and when the bridge is completed the consideration is unimpeachable. *Cooper v. McCrimmin*, 33 Tex. 383; 7 Am. Rep. 268.

In *Culver v. Banning*, 19 Minn. 303, it was held that there was no consideration for the subscription.

In an action upon a contract to grade and pave an alley in which the parties agree to pay "according to their respective ownerships on said alley," the plaintiff need not allege a party to be a fee-simple owner. A lease for a term of years, in connection with such party's signature to the contract, is a sufficient ownership within the meaning of the contract. *Jewett v. Siddons*, 9 Ind. 455.

Where the subscription paper does not import that the work is to be done under the personal supervision of the person to whom the subscription is made, he may assign it and the subscribers will be liable to his assignee. *Southern Hotel Co. v. Chouteau*, 53 Mo. 572.

But a party is only liable to the ex-

tent of his subscription, and where a party was authorized by the defendant and others to contract for certain grading, but, the sum originally subscribed proving insufficient, notice was sent the defendant of a meeting to make a new contract, which meeting he did not attend, he was held liable only on the original contract to which he subscribed. *Berchorman v. Murken*, 2 E. D. Smith (N. Y.) 98.

Where the plaintiff contracted with a committee of citizens to build a schoolhouse on the lands of a corporation, and, to pay the expenses, a subscription list was made, and it was agreed that the plaintiff should get payment for his work from the parties whose names were on the subscription list, it was held that the corporation was not liable for the work done by the plaintiff, and much less so was a new corporation, created long after the work was done for the same purpose as the old one. *Clayton v. Newton Academy*, 95 N. Car. 298.

Where the subscribers plead that they have performed their contract of subscription by paying the same to those authorized to collect, and that it has been properly applied to the payment of obligations for which it was bound, evidence to establish such facts is admissible. *Sullivan v. Miller* (Tex. Civ. App. 1894), 24 S. W. Rep. 819.

3. *Porter v. Raymond*, 53 N. H. 519.

In a suit by a bridge builder against the subscribers to the building of a bridge, it is not competent for the latter to vary or contradict the subscription paper by parol proof that the building of the bridge was to be let out to the lowest bidder, where there is no such provision in the paper itself. *Cooper v. McCrimmin*, 33 Tex. 383; 7 Am. Rep. 268.

Evidence of the unfinished state of improvements in the street is not admissible in defense of a suit upon a subscription paper promising to pay as the work progresses. *McCormack v. Reece*, 3 Greene (Iowa) 591.

enterprise is abandoned and the contractor afterward performs the work without the assent or ratification of the subscribers, relying merely upon their sense of liberality for his compensation, he cannot recover upon the subscription.¹

XVI. MECHANICS' LIENS.—See LIENS, vol. 13, p. 574; MECHANICS' LIENS, vol. 15, p. 1.

WORKMAN—(See also LABORER vol. 12, p. 532).—A workman is one who works, one employed in any labor, especially manual labor.²

WORKMANLIKE MANNER—(See also LOGS AND LUMBER, vol. 13, p. 1030).—See note 3.

1. *McCrimmin v. Cooper*, 27 Tex. 113.

2. Worcester's Dict.; followed in Pennsylvania, etc., *R. Co. v. Leuffer*, 84 Pa. St. 171.

English Employers and Workman Act.—An omnibus conductor or a driver of a tram car is not a workman, as the duties of neither involve labor, and those of the conductor at least could not be regarded as manual. *Morgan v. London General Omnibus Co.*, 13 Q. B. Div. 832; *Cook v. North Metropolitan Tramways Co.*, 18 Q. B. Div. 683.

A designer of patterns is not a workman. *Jackson v. Hill*, 13 Q. B. Div. 618.

But one who has to labor manually is not less a workman because he has to employ other manual laborers to assist him. *Granger v. Ainseley*, 6 Q. B. Div. 182. And so one, a substantial part of whose time is taken up in manual labor, is a workman within the act mentioned, although he is an overlooker of others. *Leech v. Gartside*, 1 Times Rep. 391. So is a miner, working for a "buttyman." *Brown v. Butterley Coal Co.*, 53 L. T. 964.

Civil Engineers.—In Pennsylvania, etc., *R. Co. v. Leuffer*, 84 Pa. St. 168, a civil engineer was held not to be a workman within the Mechanic's Lien Law. The court said: "When we speak of the laboring or working classes, we certainly do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific than in their physical ability. We thereby intend those who are engaged, not in head, but in hand, work, and who depend upon such hand work for their living."

3. A clause in a lease provided that the lessee should cultivate the farm in a "workmanlike manner." This was held to mean in a "farmerlike manner."

The court said: "This expression was undoubtedly intended to mean in a 'farmerlike-manner,' or as good farmers usually do, and so we construe it. If it was required by this test that lime should be spread the autumn before putting in spring crops, as contended for by the defendant below, then the work performed by the plaintiff in spreading the lime hauled upon the ground might and ought to be presumed to have been for the tenant's own benefit, and he should not charge for it. His lease was dated in September preceding the commencement of his term, and there being no obstacle to his entering to spread the lime in the fall, whether he did it or omitted it must enter into the consideration of what would be good husbandry under these circumstances. Of course, if it had been a case in which he could not have entered without being a trespasser, it could not be presumed that it was within the meaning of the clause that he must enter. 'Workmanlike,' 'farmerlike,' and such like expressions, necessarily have relation to the circumstances of the thing to be done as indicated." *Aughinbaugh v. Coppenheffer*, 55 Pa. St. 349.

Contract for Sawing Lumber.—Where a contract provided for the manufacture of lumber "in a good and workmanlike manner," without reference to any particular kind of mill, it was held error to admit testimony "that portable mills were not expected to manufacture as good lumber as stationary ones," and to instruct the jury that, "if plaintiffs used reasonably good machinery, as compared with the machinery generally used in doing similar jobs at that locality, and in the surrounding lumbering country, this would be sufficient as far as machinery was concerned." *Grice v. Noble*, 59 Mich. 516.

WORLDLY LABOR, ETC.—As to the use of this and similar phrases in Sunday laws, see **SUNDAY**, vol. 24, p. 528.

WORN.—See note 1.

WORRYING.—See note 2.

WORSHIP.—(See also **BUILDING**, vol. 2, p. 604; **DISTURBING MEETINGS**, vol. 5, p. 721; **HOUSE**, vol. 9, p. 780; **RELIGION**, vol. 20, p. 769; **RELIGIOUS LIBERTY**, vol. 20, p. 769; **RELIGIOUS PURPOSES**, vol. 20, p. 772; **RELIGIOUS SOCIETIES**, vol. 20, p. 773).—No definition of this word, as used in divine worship, religious worship, place of worship, and similar expressions applicable to all cases, has seemingly been framed by any court. The word has no technical or legal signification; the cases in which its meaning has been the subject of contention have been decided upon their own merits.³

In a suit for payment under a written contract to manufacture logs "in a workmanlike manner" it is error, in the absence of evidence on the subject, to charge that the contract was sufficiently complied with if plaintiff had made as good lumber as he could with the mill and appliances he had. *Button v. Russell*, 55 Mich. 479.

1. **Distinction Between Worn and Carried in Revenue Law.**—In *Richardson v. Lawrence*, 1 Blatchf. (U. S.) 502, the court said: "The evidence in this case shows that a distinction has always been recognized and acted upon, in the collection of the revenue, between articles worn by men, women and children, and those carried. An article worn appears to have been understood, as the term properly imports in a strict philological sense, as intended to designate some article of clothing or raiment—some garment used or worn upon the person, as distinguished from an article carried or used about the person for convenience or ornament. A hat, coat, or shoe, is an article worn, in the proper sense of the word; but a cane, snuffbox, or lady's fan, is, properly speaking, an article not worn but carried."

2. **Worrying Domestic Animals—Dogs.**—Within a statute giving the owner of domestic animals a right to kill a dog for worrying them, worry means to run at, chase, bark at. *Marshall v. Blackshire*, 44 Iowa 478.

Within an act making the owner of a dog liable for damage done by it to sheep, and permitting the killing of the dog, it was held that worrying did not imply tearing with the teeth, and that

if a dog pursues and barks at sheep, it is worrying under the statute. *Campbell v. Brown*, 1 Grant's Cas. (Pa.) 82.

In *Johnson v. McConnell*, 80 Cal. 545, it was held that the dog must be actually worrying the sheep at the time it is killed. In that case, the court said that it was doubtful from the evidence whether the dogs were in fact chasing the sheep, or whether they were merely hunting in the field. The court commented upon the case of *Marshall v. Blackshire*, 44 Iowa 478, cited above, quoting the definition there given, and saying that that case fully sustained their view; but *McFarland, J.*, dissenting, claimed that the facts showed that the dogs were worrying the sheep within the definition given in that case.

3. **And. Law Dict.;** *State v. Norris*, 59 N. H. 536.

Business Meeting.—A prosecution for disturbing a congregation assembled for religious worship will not be sustained by proof that the congregation, though disturbed, were assembled exclusively for business purposes, even though the proceedings were opened with religious exercises. *Wood v. State*, 11 Tex. App. 318. But in *Hollingsworth v. State*, 5 Sneed (Tenn.) 518, it was held that a religious congregation assembled to transact church business were entitled to the protection afforded by the laws against disturbing public worship. Thus, where the church judicature assembled after the religious services were over, for the trial of an offending member, it was held that a disturbance of such an assembly was indictable.

Sunday School.—A Sunday school

WOUND—(See also ASSAULT, vol. 1, p. 812; MAIM, vol. 14, p. 1).—A wound is an injury to the person, by which the skin is broken or cut.¹

was held not to come within the term "divine worship" in an agreement between two congregations to use a church jointly for that purpose. The court said: "These congregations never so understood or acted upon their agreement of union. They built their church for divine worship, by prayer, praise, and the preaching of God's word. Its use was to be congregational worship, not school instruction. Their worship was to be led by pastors who should regulate their appointments in due regard to mutual harmony, and was not to be the instruction of youth, even though part of it were in divine things, led by individual laymen. There are reasons, also, why a chamber or audience room, dedicated to public congregational worship, should not be thrown open to thoughtless, giddy, sometimes vicious, youths, to deface and soil it. We think the court erred in deciding the case according to the general meaning of the words 'divine service,' as testified to by some of the witnesses, instead of confining their signification to the sense in which the congregation understood it when they entered into the agreement, and afterwards practiced upon it." *Gass's Appeal*, 73 Pa. St. 46; 13 Am. Rep. 726.

But in *Martin v. State*, 6 Baxt. (Tenn.) 234, a Sunday school was held to be a "worshiping assembly" in the sense of a statute making the disturbance of public worship indictable.

Camp Meeting—Question of Fact.—In *State v. Norris*, 59 N. H. 536, it was held to be a question of fact whether a temperance camp meeting was an assembly for the purpose of worship. The court said: "The case presents no question of law. The question of fact is, Was the State Temperance Camp Meeting, in this case, a public 'assembly convened for the purpose of religious worship?' G. L., ch. 273, § 9. The term religious worship having no technical meaning in a legal sense, the determination of this question is within the province of a jury." *Compare Summit Grove Camp Meeting Assoc. v. School Dist.*, 12 W. N. C. (Pa.) 103, where it was held that if the camp-meeting grounds belonged to an association, and profit was derived from

them, it was not a place of worship. And see *Com. v. Wagner*, 4 Pa. Co. Ct. Rep. 27.

Christmas Tree Festival.—A "Christmas tree" festival for Sunday school scholars at a schoolhouse is not an assembly for religious worship. *Layne v. State*, 4 Lea (Tenn.) 199. The court said: "It appears that the meeting was held at a schoolhouse, and is described by the witnesses as a 'Sunday school celebration and Christmas tree,' at which no religious service had been appointed, but speeches were made upon the subject of Sunday schools and public morality. On a Christmas tree were hung presents, and singing and music upon violins were the entertainments of the occasion. Two persons were distributing the presents from the tree, calling the names of those for whom they were intended, when plaintiff in error, under the influence of liquor, placed himself on his back on the floor, and kicked the Christmas tree, swearing in a loud voice, to the great annoyance and disgust of the decent people present. He was finally induced to leave. His conduct was very reprehensible, and he might have been indicted, and should have been exemplarily punished for his indecent profanity in the presence of the women and children and other good people there assembled, and we regret that we cannot affirm the judgment against him. But the act under which he is presented is intended to protect 'assemblies met for religious worship.' The meeting disturbed was for the enjoyment of a Christmas festival, and the fact that it was especially intended for Sunday school scholars and their teachers and friends does not change its character nor make it an 'assembly for religious worship.'"

Residence of Priest or Clergyman.—In *St. Joseph's Church v. Assessors*, 12 R. I. 19; 34 Am. Rep. 597, it was held that the residence of a priest or clergyman is not exempt from taxation, "as a building for religious worship," although it contains one room set apart as a chapel for religious worship. See *Gerke v. Purcell*, 25 Ohio St. 229.

1. *Moriarty v. Brooks*, 6 C. & P. 684; 25 E. C. L. 597; *Rex v. Withers*, 4 C. & P. 446; 19 E. C. L. 466.

In *State v. Leonard*, 22 Mo. 449, it is

said: "We may suppose from the evidence that the prosecutrix was wounded in the legal sense of the term, for she says that there is a scar still left made by the wound." *Shaddock v. Alpine Plank-road Co.*, 79 Mich. 11.

A wound is a solution of continuity in the soft parts, suddenly occasioned by external causes, and generally attended at first with hemorrhage. *Rex v. Wood*, 4 C. & P. 381, note; 19 E. C. L. 430.

To wound means to divide the surface of the body, whether it be an internal—e. g., the inside of the mouth—or an external surface. *Stephen's Criminal Law* 171, citing *Reg. v. Leonard*, 8 C. & P. 173; 34 E. C. L. 341.

With the Hand.—Wounding may be done with the hand. *R. v. Bullock*, L. R., 1 C. C. R. 115.

Breaking a Bone.—It seems that to break a bone without breaking the skin is not a wound. *Rex v. Wood*, 4 C. & P. 381; 19 E. C. L. 430; *Rex v. Owens*, 1 M. C. C. 205; *Rex v. Hughes*, 2 C. & P. 420; 12 E. C. L. 200.

Stab, Cut or Wound.—Where these words were used together in a statute, it was held that a wound must be accomplished by an instrument, because wounding is associated with stabbing and cutting, and a stab and cut must be made by an instrument. *Jennings' Case*, 2 Lew. C. C. 130. See also *R. v. Stevens*, 1 Mood. 409; *Rex v. Harris*, 7 C. & P. 446; 32 E. C. L. 578.

Blow Substituted for Wound.—"It remains for us to inquire, whether the substitution of the word 'blow' for the word 'wound,' in the indictment now before us, is such an informality as is cured by the statute. The counsel for the prisoner contends that it is not—that, on the contrary, it is a defect in the substance of the averment of the means whereby the deceased came to his death, and therefore fatal; that the word 'blow' signifies the cause only of the wound, which is the effect of the blow, from which effect the death ensues, and that such wound, being the immediate cause of the death, must be stated, instead of the remote cause, which is the blow. The language of the court in the case of *State v. Martin*, 3 Dev. (N. Car.) 329, to which we have referred particularly in *State v. Tom* (*decided* at the present term, 2 Jones (N. Car.) 414), goes far to support this argument. But it is to be remarked, that the act of 1811 is not at all alluded to in that case, and the

decision seems to have been put upon the strict principles of the common law. We admit the force of the argument, provided the premises be true, that the word 'blow,' in the connection in which it is used, does not convey 'the whole requisite legal idea' of the means whereby the deceased was killed. The charge is that the prisoner, 'with a certain club, which he, the said Alfred W. Noblett, in both his hands then and there had and held, the said John Davis, in and upon the left side of the head, cutting the left ear and mashing the nose and left cheek bone of him, the said John Davis, then and there feloniously, etc., did strike, giving to the said John Davis, then and there, with the club aforesaid, in and upon the left side of the head, cutting the left ear and mashing the nose and left cheek bone of him, the said John Davis, one mortal blow, of which said mortal blow the said John Davis on, etc., instantly died.' Mr. Walker defines the word 'blow' to mean a 'stroke,' and the verb 'to mash,' of which 'mashing' is a participle, to mean 'to beat into a confused mass.' Now it seems to us that a blow or stroke with a club, which has the effect of cutting the left ear and mashing, or beating into a confused mass, the nose and left cheek bone of the deceased, shows to the court, as clearly, the means whereby the deceased was killed, as if the word 'wound' had been used. The case of *State v. Moses*, 2 Dev. (N. Car.) 452, decides that the act of 1811 dispenses with the necessity of stating the dimensions of a wound, and we think that it is equally effectual to dispense with the necessity of using the word 'wound,' when other terms of equivalent meaning are employed." *State v. Noblett*, 2 Jones (N. Car.) 433.

Wound and Bruise.—" 'Wound' is a hurt given by violence, no matter with what kind of weapon. 'Bruise' is a hurt with something blunt and heavy. Wound includes a bruise. As, therefore, the present charge is of wounds with a stick, they must be taken to be such wounds as a stick commonly inflicts. Is it competent for the prisoner to object to the use of a word in one of its proper significations? It is admitted, on his behalf, that if the word 'bruises' had been used in this indictment, instead of the word 'wounds,' no description would be required; but if every wound includes a bruise, why shall that word, in this indictment, be

WRECK.—(See also SALVAGE, vol. 21, pp. 469-512; SEAMEN, vol. 21, p. 915; SHIPS AND SHIPPING, vol. 22, p. 710.)

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I. DEFINITION.—The term "wreck," in its popular sense, means a ship which has received such injuries as to render her innavigable and unable to pursue her voyage without repairs.¹

But according to the purely technical common-law sense, "wreck" applies only to property cast upon the land by the sea. Things are not "wrecks" in their legal sense so long as they remain at sea.²

stripped of its ordinary extent of meaning? The word wound is not a technical word; it is one of common parlance. If this word, *ex vi termini*, imported a separation of the skin, and was confined in its signification to injuries of that character, then it might be alleged that it always differed from a bruise and did not include it. But it is clear, that in common parlance, and also in judicial decisions, wound and bruise are used as synonymous." *State v. Owen*, 1 *Murph.* (N. Car.) 456; 4 *Am. Dec.* 571.

Life Insurance.—Within the meaning of a question of an application for life insurance, viz: "Have you received any wound, hurt, or serious bodily injury?" the words "hurt" and "wound" mean an injury to the body causing an impairment of health or strength, or rendering the person more liable to contract disease, or less liable to resist its effects. A cut on the face, finger or any part of the body, from which blood flows, though healing in a few days, is a hurt or wound, but not within the meaning of the contract under consideration. *Bancroft v. Home Ben. Assoc.* (Ct. App.), 30 N. Y. St. Rep. 175, *reversing* (Super. Ct.), 8 N. Y. St. Rep. 129.

Where the Whole Skin Is Not Separated.—A scratch on the face by rupturing the cuticle only, without separating the whole skin, is not a wound. *Reg. v. M'Loughlin*, 8 C. & P. 635; 34 E. C. L. 561; *Rex v. Wood*, 4 C. & P. 381; 19 E. C. L. 430. *Com. v. Gallagher*, 6 Met. (Mass.) 568; *State v. Leonard*, 22 Mo. 450.

1. 3 *Kent's Com.* 322; *Wood v. Lincoln*, etc., *Ins. Co.*, 6 *Mass.* 479; 4 *Am. Dec.* 163; *Lacaze v. State*, *Add.* (Pa.) 64.

Wreck is the ruins of a ship which has been stranded or dashed to pieces upon a shelf, rock, or seashore by tempestuous weather. *Respublica v. LeCaze*, 1 *Yeates* (Pa.) 59.

2. 1 *Blacks. Com.* 290; 2 *Kent's Com.* 322; *Baker v. Hoag*, 7 N. Y. 555; 59 *Am. Dec.* 431.

Goods cast into the sea to unburden a ship in a storm and never intended as merchandise are wrecks when cast on shore without any shipwreck. *Sheppard v. Gosnold*, *Vaugh.* 168.

"'Wrecke,' or 'Varech' (as the Normans, from whom it came, call it) is where a ship is perished on the sea, and no man escapeth alive out of the same, and the ship, or part of the ship so perished, or the goods of the ship, come to the land of any Lord, the Lord shall have that as a wrecke of the sea. But if a man, or a dog, or a cat escape alive, so that the party to whom the goods belong come within a yeare and a day and prove the goods to be his, he shall have them againe, by provision of the Statute of Westm. 1, ch. 4, made in King Edw. 1 dayes, who therein followed the decree of H. I., before whose dayes, if a ship had been cast on shore torne with tempest, and were not repaired by such as escaped alive within a certain time, that then this was taken for wrecke." *Termes de La Ley*.

"De wreck de mere" (3 *Edw.* 1, ch. 4), — "Wrecke or Shipwrecke, is an English word, in French *Naufnage*, in ancient French *Varech*, in Latine *Naufragium*, legally *Wreccum Maris*, wrecke of the sea in legall understanding, is applied to such goods as after shipwreck at sea are by the sea cast upon the land; and, therefore, the jurisdiction thereof pertaineth not to the lord

II. WHO ENTITLED TO WRECKS.—In *England*, a right to wreck of the sea and to its custody, is vested in the Crown until its owner appears.¹ If the owner does not claim within a year and a day, it vests in the Crown absolutely.² Several of the *United States* bordering on the sea have enacted statutes providing for a similar disposition of such property. They declare that nothing cast by the sea upon the land shall be adjudged a wreck until it has been kept safely for the space of a year for the true owner, to whom the same is to be delivered on his paying reasonable salvage; and if the goods be not claimed within that time, they shall be sold and the proceeds accounted for to the state.³

III. PROTECTION AND DISPOSITION OF WRECKS.—The states have different provisions respecting the protection and disposition of wreck; they are, however, the same in their general features, providing for the appointment of officers, whose duty it shall be

admiral but to the common law. Although this statute speaketh onely of wrecke, yet this statute extendeth to Flotsam, Jetsam, and Lagan." 2 Inst. 167, citing *Constable's Case*, 5 Coke 106a.

Goods contained in a vessel sunk in tide water are not wrecks within the provisions of the Revised Statutes; but are derelict, upon which the salvor by maritime law has a lien for salvage. *Baker v. Hoag*, 7 N. Y. 555; 59 Am. Dec. 431.

Where the owners of goods that have been shipwrecked, or their servants, remain in possession of them, such goods are not in any sense *wreck*, and do not belong to the Crown or its grantee by virtue of its prerogative. *Sutton v. Buck*, 2 Taunt. 302; *Dunwich v. Sterry*, 1 B. & Ad. 831; 20 E. C. L. 492; *McKinney v. Brights*, 16 Pa. St. 399; 55 Am. Dec. 512.

The term cannot be extended to a boat or other property afloat, not appearing to have ever been cast overboard, or lost from a vessel in distress. *Chase v. Corcoran*, 106 Mass. 288, citing *Sheppard v. Gosnold*, Vaugh. 159; *Palmer v. Rouse*, 3 H. & N. 505; *Baker v. Hoag*, 7 N. Y. 555; 59 Am. Dec. 431.

A cargo of a vessel sunk in forty feet of water and abandoned to the underwriters, is not a wreck of the sea. *Murphy v. Dunham*, 38 Fed. Rep. 503.

English Shipping Act.—The second section of the Merchant's Shipping Act 1854 provides that the term wreck shall include jetsam, flotsam and ligam, or derelict found in or on the shores of any sea or tidal water. 17 & 18 Vict., ch. 104; *The Zeta*, 44 L. J. Adm. 22.

Timber found floating at sea, without

any apparent owner, having drifted from its moorings, is not wreck within the meaning of the act. *Palmer v. Rouse*, 3 H. & N. 505; *Legge v. Boyd*, 14 L. C. P. 138; *Barry v. Arnaud*, 10 Ad. & El. 646; 37 E. C. L. 206.

Abandonment.—In *Wood v. Lincoln*, etc., Ins. Co., 6 Mass. 482; 4 Am. Dec. 163, it was held that when a ship becomes a wreck it is generally a total loss, and the owner may abandon it as a wreck. In this sense it is defined as follows: "A ship becomes a wreck [says the court] when, in consequence of the injury she has received, she is rendered absolutely innavigable, or unable to pursue her voyage, without repairs exceeding half her value."

1. 3 Edw. 1, ch. 4; 17 Edw. 2, ch. 11; *Constable's Case*, 5 Coke 107; *Marquis of Breadalbone v. Smith*, 12 Scotch Sess. Cas. (2d ed.) 602; *Woodward v. Fox*, 2 Vent. 188; *Hamilton v. Davis*, 5 Burr. 2732; *The Augusta*, 1 Hagg. 16; *Rex v. Two Casks of Tallow*, 3 Hagg. 204.

2. *The Augusta*, 1 Hagg. 18.

But the owner may claim it within that time. *Murphy v. Dunham*, 38 Fed. Rep. 510; *Proctor v. Adams*, 113 Mass. 376; 18 Am. Rep. 500.

3. *New York Rev. Stat.* 690, § 1, as amended L. 1866, § 493; *Massachusetts Stat.* 1887, ch. 98, § 12 (Supp. Pub. Stat. Mass. p. 480). See *Proctor v. Adams*, 113 Mass. 376; 18 Am. Rep. 500; *Chase v. Corcoran*, 106 Mass. 286.

Owner of Land.—It has been held in *Massachusetts* that the owner of the shore has the title to wreck thrown upon the shore, as against all strangers, and may maintain trespass against

to save and secure such property, appraise its value, and to keep it in a safe place to await the claim of persons who may thereafter appear entitled to it. There are also provisions as to advertising and sale.¹

Congress has also made provisions for the protection and disposition of wreck, requiring a license from vessels engaged in carrying property from a wreck;² and providing punishment for plundering wrecks or for showing false lights.³

IV. RIGHTS AND LIABILITIES OF OWNERS OF WRECKS.—Where a vessel is sunk through an unavoidable accident in navigable water, the owner is not obliged to remove the wreck, nor is he liable for injuries it may cause to others, nor indictable for maintaining a nuisance, although navigation is obstructed.⁴ If, however, instead of abandoning the wreck, he retains possession, he is liable for any injuries arising from his failure to take proper precautions for the public safety.⁵

strangers for taking such wreck. *Barber v. Bates*, 13 Pick. (Mass.) 255; 23 Am. Dec. 678.

1. *New York Rev. Stat.*, 690, § 1, as amended L. 1869, § 493, title "Wrecks;" *North Carolina Rev. Stat.*, ch. 23, title "Wrecks."

2. *United States Rev. Stat.*, § 4240.

3. *United States Rev. Stat.*, § 5358.

This statute has been held constitutional. *U. S. v. Coombs*, 12 Pet. (U. S.) 72.

Under this statute the court was held to have jurisdiction, although the vessel was lying upon the shore, and the property plundered after it had been separated from the vessel. *U. S. v. Pitman*, 1 Sprague (U. S.) 196.

It is not larceny alone which is punishable under this section, but any act of depredation, whether it be of the character that would be piracy if committed upon the high seas, robbery or other forcible taking, theft, trespass, or other malicious mischief, or any fraudulent and criminal breach of trust if committed on land, whether the common or statute law prevail. No specific intent is necessary to constitute the offense. The value of the goods is immaterial. *U. S. v. Stone*, 8 Fed. Rep. 232.

Until goods are removed from the place where landed or thrown ashore from the stranded or wrecked vessel, or cease to be under the charge of the officers or other parties interested, the act will apply if a larceny of them is committed, even though the vessel may in the meantime have gone entirely to pieces and disappeared from

the sea. But the act is not intended to reach cases where the property abandoned by the officers or other parties interested is recovered by third persons. *U. S. v. Smiley*, 6 Sawy. (U. S.) 640.

Indictment.—An indictment which alleged that the defendant "furnished and loaned" a skiff to be used by others in plundering a wrecked vessel, was held good. *U. S. v. Sanche*, 7 Fed. Rep. 715.

The indictment need not distinguish between acts supposed to be characterized as "plundering" and other acts supposed to be properly designated as "stealing" or "destroying," nor between acts of depredation committed on the wreck and such acts committed on property belonging to but separated from it. *U. S. v. Stone*, 8 Fed. Rep. 232.

Jurisdiction of United States Courts.—Where property abandoned by the officers of the vessel lies under the water within 150 feet of the Mexican shore, the federal courts of the *United States* have no jurisdiction. *U. S. v. Smiley*, 6 Sawy. (U. S.) 640.

4. *Winpenny v. Philadelphia*, 65 Pa. St. 138; *The Swan*, 3 Blatchf. (U. S.) 285; *Hancock v. York, etc., R. Co.*, 10 C. B. 348; 70 E. C. L. 348; *Rex v. Watts*, 2 Esp. 675; *Rex v. Tindall*, 6 Ad. & El. 143; 33 E. C. L. 26; *Rex v. Ward*, 4 Ad. & El. 384; 31 E. C. L. 92; *Rex v. Russell*, 9 D. & R. 566; 6 B. & C. 566; 13 E. C. L. 254; *Rex v. Morris*, 1 B. & Ad. 441; 20 E. C. L. 421.

5. *Winpenny v. Philadelphia*, 65 Pa. St. 135; *Brown v. Mallett*, 5 C. B. 599; 57 E. C. L. 599; *White v. Crisp*, 10 Exch. 312; *Hancock v. York, etc., R.*

And if the vessel is sunk by the negligence of the owner, or if he neglects while engaged in raising it to take proper precaution to warn the public, he will be liable for injuries to other vessels resulting from such negligence.¹ The owner of land may free his land from the incumbrance of a wreck.²

WRIT.—(As to specific writs, such as *Mandamus*, *Habeas Corpus*, *Summons*, *Error*, *Certiorari*, *Quo Warranto*, etc., see their respective titles.)

A writ is, in its general meaning, a mandatory precept issued by the authority and in the name of the sovereign or the state, for the purpose of compelling the defendant to do something therein mentioned.³

WRITE—WRITING.—(See also CRIMINAL PROCEDURE, vol. 4, p. 853; FORGERY, vol. 8, p. 510; HANDWRITING, vol. 9, p. 263; LETTER, vol. 13, p. 231; MUNICIPAL CORPORATIONS, vol. 15, p. 1031; OFFER, vol. 17, p. 38).—Writing is the expression of ideas by visible letters. It may be on paper, parchment, wood, stone, or other material.⁴ To write is to express by means of letters, to compose.⁵

Co., 10 C. B. 348; 70 E. C. L. 348; Boston, etc., Steamboat Co. v. Munson, 117 Mass. 34; Sheldon v. Sherman, 42 N. Y. 484; 1 Am. Rep. 569; Eads v. Brazelton, 22 Ark. 499; 79 Am. Dec. 88; The Edith, L. R., 11 Ir. 270; The Modoc, 26 Fed. Rep. 718; Harmond v. Pearson, 1 Campb. 515; The Douglas, 7 Prob. Div. 151; Dormont v. Furness R. Co., 11 Q. B. Div. 496.

1. Boston, etc., Steamboat Co. v. Munson, 117 Mass. 34.

2. Sutton v. Buck, 2 Taunt. 302.

Where a wreck accidentally lodges on the land of another, the owner in removing it from his premises is bound to do it with as little injury as possible. Berry v. Carle, 3 Me. 269.

Trespass.—It has been held that one entering upon the sea beach of another, for the purpose of removing and restoring to its owner a boat cast ashore in a storm and in danger of being carried away by the sea, was not a trespasser. Proctor v. Adams, 113 Mass. 376; 18 Am. Rep. 500.

So one purchasing at a wreck commission sale is not guilty of trespass in hauling the goods from the plaintiff's land, although forbidden to do so, when the goods could not be taken in any other way without great inconvenience to the owner. Hetfield v. Baum, 13 Ired. (N. Car.) 394; 57 Am. Dec. 563.

3. Baird v. Pridmore, 31 How. Pr.

(N. Y. Supreme Ct.) 362, quoting Bouvier's Law Dictionary.

4. Myers v. Vanderbelt, 84 Pa. St. 510; 24 Am. Rep. 227.

5. Walker's Dict. followed in Henshaw v. Foster, 9 Pick. (Mass.) 318.

Lead Pencil.—In State v. Anderson, 45 La. Ann. 651, it was held that it was not necessary that a verdict in a criminal case should be written in ink.

In Myers v. Vanderbelt, 84 Pa. St. 510, it was held that where a statute provided that every will should be in writing, a will written and signed with a lead pencil was valid. *In re Dyer*, 1 Hagg. Ecc. 219; Raymes v. Clarkson, 1 Phil. Ecc. 22; Dickenson v. Dickenson, 2 Phil. Ecc. 173; Main v. Ryder, 84 Pa. St. 217. See also WILLS, p. 118, ante.

So contracts in lead pencil have been held sufficient. Jeffery v. Walton, 1 Stark. 267; 2 E. C. L. 108; Geary v. Physic, 5 B. & C. 234; 11 E. C. L. 213; Merritt v. Clason, 12 Johns. (N. Y.) 102; 7 Am. Dec. 286; Clason v. Bailey, 14 Johns. (N. Y.) 490.

So of promissory notes in lead pencil. Geary v. Physic, 5 B. & C. 234; 11 E. C. L. 213; Closson v. Stearns, 4 Vt. 11; 23 Am. Dec. 245; Partridge v. Davis, 20 Vt. 499; Brown v. Butchers, etc., Bank, 6 Hill (N. Y.) 443; 41 Am. Dec. 755.

So a book account made in pencil was held admissible in evidence as a

book of original entries. *Hill v. Scott*, 12 Pa. St. 169.

Alterations and cancellations in pencil, of a will written in ink, have been held valid. *In re Tomlinson's Estate*, 133 Pa. St. 245; 19 Am. St. Rep. 637.

Print.—A printed business card was held a writing within the statute against false pretenses. *Jones v. State*, 50 Ind. 476.

In *O'Bryan v. State*, 27 Tex. App. 340, it was held that an indictment partly written and partly printed was valid. The court said: "Whilst it is declared by statute that 'an indictment is the written statement of a grand jury accusing a person therein named of some act or omission which by law is declared to be an offense' (Code Crim. Proc., art. 419), still it is no objection to its validity that it is in form partly printed and partly written. The word 'writing' or 'written' under our statutes, civil as well as criminal, includes 'printing' (*Texas Rev. Stats.*, art. 3140, subd. 3; *Texas Penal Code*, art. 30; *Winn v. State*, 5 Tex. App. 621)."

Printed Ballots.—In *Henshaw v. Foster*, 9 Pick. (Mass.) 312, it was held that printed ballots are a compliance with the constitutional requirement that representatives shall be chosen by written votes. To the same effect, see *Temple v. Mead*, 4 Vt. 535. In that case the court said: "The definition of the word writing includes printing; it means no more than conveying our ideas to others by letters or characters visible to the eye. It is so used by all writers, and generally comprehends printing, engraving, etc., in opposition to the mode of conveying them *viva voce*. In all legal writers, and in the statutes which have been enacted in this state and elsewhere, the expression is made use of in the same general and comprehensive sense. Several instances of this were mentioned in the argument. A deed is defined to be a writing, signed, etc.; yet it is always said that it may be printed. The statute says, 'no action shall be maintained on any agreement for the sale of lands,' etc., unless the agreement, etc., be in writing and signed by the parties. Other contracts, to be legally binding, are required to be in writing. It would not be contended that, by these statutes, an agreement wholly in print, signed by the parties, would be ineffectual. Writs are defined to be precepts in writing, yet it is notorious that they are printed. In some states, not only the writs, but

the names of the clerks or prothonotaries, from whose office they issue, are printed. The instances are numerous in which printing is considered essentially the same as writing. The same question has lately been agitated in the State of *Massachusetts* in a case between *Henshaw*, plaintiff, and *Foster* and others, defendants, under a constitution where the expression is similar to ours. Chief Justice Parker, in a very able and elaborate opinion, shows most clearly that the use of printed votes is not contrary to the letter or spirit of the constitution, but is in strict conformity to both, and he was sustained by the decision of the other members of the court. It has been said that the decision of the supreme court of the State of *Maine* is to the same effect."

A Printed Theater Ticket in the usual form and stamped upon its face with an inscription in the style of a seal is a writing subject to forgery. *In re Benson*, 34 Fed. Rep. 649; 10 Crim. L. Mag. 682.

Stamping.—Where a statute provided that tax certificates might be assigned by the proper official writing his name upon the back, it was held that such certificates might be assigned by the officer stamping his name and official character upon them with intent to assign. The court said: "We are clearly of the opinion that such stamping the name is writing the same, within the meaning of the statute; and we are more strongly convinced of the propriety of so holding, from the fact that the same statute declares that the words 'written' and 'in writing' may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters. It is true, this definition does not in express terms define the words 'by writing,' and so it may be said it is not applicable, and has no force in defining the words 'by writing.' We may, however, we think, consider the definition given by the statute to the words 'written' and 'in writing,' as showing the liberal construction which should be given to all words or terms of a like character where used in the statute. It cannot, we think, be doubted that if it were not for the statute which declares that 'when the written signature of any person is required by law, it shall always be the proper handwriting of such person,' etc., the statute which requires him to assign the certificates 'by writ-

ing his name on the back thereof,' would be complied with by placing it on with a stamp, as was done in this case. See *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62; *Schneider v. Norris*, 2 M. & S. 286; *Brown v. Butchers', etc., Bank*, 6 Hill (N. Y.) 443; 41 Am. Dec. 755; *Saunderson v. Jackson*, 2 B. & P. 238; *Hubert v. Turner*, 11 L. J. Rep. (C. P. N. S.) 78; *Johnson v. Dodgson*, 6 L. J. Rep. Exch. (N. S.) 185; *Lobb v. Stanley*, 13 L. J. Q. B. 117. In the case of *Potts v. Cooley*, 56 Wis. 45, an assignment was held sufficient when the official character of the clerk was printed after the written name. All the cases seem to hold that when a party places his name to an instrument in writing with intent to be bound thereby, it is immaterial whether the name be printed, written or stamped; either will answer the purpose, and is a compliance with a statute requiring his subscription or signature. If this be so, then we cannot say that such statute necessarily requires the written signature of the clerk, and so does not come within the provision above quoted. We think the cases of *Scott v. Seaver*, 52 Wis. 184, and *Mezchen v. More*, 54 Wis. 214, cover the point made by the learned counsel for the appellant, and are conclusive that the objection to the assignment is not well taken." *Dreutzer v. Smith*, 56 Wis. 297.

Stenography.—Stenography has been held to be writing within a provision that a witness's oral testimony shall be taken in writing. *Nichols v. Harris*, 32 La. Ann. 646. The court said: "We are of opinion that the notes of the stenographer, taken when the witness gives his oral testimony in court, is a 'taking in writing,' as contemplated by article 602. It is true this shorthand report may be illegible or unintelligible to others than the reporter himself, but it is the writing, the taking down, word for word, of the oral testimony, under the eye and within the hearing of the court, by a sworn officer, and when transcribed is to be filed in the record. It cannot be transcribed unless previously taken down in writing, and when thus transcribed and filed, it is only an intelligible translation of written testimony, taken in shorthand or phonetic characters, into characters generally understood."

Telephone Message.—Where a notice was required to be in writing, a notice by telephone is insufficient. The court said: "Telephone messages cannot be

regarded as anything more than verbal notices." *In re Shier's Estate* (S. Car. 1892), 14 S. E. Rep. 931.

Telegraph.—A telegram from a judge to the clerk of court, ordering an adjournment, was held a written order. The court said: "Contracts may be made by telegram even where it is required they must be in writing, and it has been said it makes no difference if the writing is done with a steel pen an inch long attached to an ordinary penholder, or whether the pen be a copper wire one thousand miles long. *Howley v. Whipple*, 48 N. H. 487; *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 411. The telegraph operator was the agent of the judge, and by means of the wire and instruments attached thereto, and the operator, the judge wrote the telegram which was delivered to the clerk. We think it was a written order within the meaning of the statute." *State v. Holmes*, 56 Iowa 590; 41 Am. Rep. 122.

Paper.—A paper is a writing. *U. S. v. Gaylord*, 17 Fed. Rep. 438.

A writing means anything written, a written paper of any kind. *Thomas v. State*, 103 Ind. 425.

Writing in the Sense of Instrument in Writing—False Pretenses.—"Writing, as used in the statute, must mean some instrument, or at least letter—something in writing, purporting to be the act of another, or certainly of some person; but the paper presented in this case does not answer any such description; it was no writing at all, because it did not purport to be the act of any person. Writing, as used in the statute, cannot mean anything written upon paper, not purporting to be of any force or efficacy, but some instrument in writing, or written paper, purporting to have been signed by some person; and such writing must be false." *People v. Gates*, 13 Wend. (N. Y.) 320.

Copyright Law—Photograph.—In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, it was held to be within the constitutional power of a congress to confer a copyright upon the author, inventor, designer or proprietor of a photograph. The court said: "So, also, no one would now claim that the word 'writing' in this clause of the constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By writings in that clause is meant the

WRITING OBLIGATORY—WRITTEN INSTRUMENTS.

WRITING OBLIGATORY.—(See OBLIGATION, vol. 17, p. 4.)

WRITTEN INSTRUMENTS.—See the following cross-references upon the subjects indicated by their titles. ABBREVIATIONS, vol. 1, p. 15; ACKNOWLEDGMENT, vol. 1, p. 143; ALTERATION OF INSTRUMENTS, vol. 1, p. 497; AMBIGUITY, vol. 1, p. 535; ANCIENT DOCUMENTS, vol. 1, p. 565; ATTESTATION, vol. 1, p. 938; AUTHENTICATION, vol. 1, p. 1020; CONTRACT, vol. 3, p. 823; DATE, vol. 5, p. 77; DEEDS, vol. 5, p. 423; EVIDENCE, vol. 7, p. 42; FRAUDS, STATUTE OF, vol. 8, p. 657; HANDWRITING, vol. 9, p. 263; LETTERS, vol. 13, p. 251; LOST PAPERS, vol. 13, p. 1059; MEMORANDUM, vol. 15, p. 263; MISTAKE, vol. 15, p. 625; NOTICE TO PRODUCE PAPERS, vol. 16, p. 843; PAROL EVI-

literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression. The only reason why photographs were not included in the extended list in the act of 1802 is probably that they did not exist, as photography as an art was then unknown, and the scientific principle on which it rests, and the chemicals and machinery by which it is operated, have all been discovered long since that statute was enacted."

Writing Distinguished from Letter.—A *United States* statute provided that it would be a misdemeanor to deposit any obscene writings in the mails. In *U. S. v. Chase*, 135 U. S. 258, the court said: "The contention on the part of the *United States* is, that the term 'writing,' as used in this statute, is comprehensive enough to include, and does include, the term 'letter,' as used in the indictment; and it is insisted, therefore, that the offense charged is that of unlawfully and knowingly depositing in the mails of the *United States* an obscene, lewd and lascivious 'writing,' etc., etc. We do not concur in this construction of the statute. The word 'writing,' when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptance. Neither in legislative enactments, nor in common intercourse, are the two terms 'letter' and 'writing' equivalent expressions. When, in ordinary intercourse, men speak of mailing a 'letter,' or receiving by mail a 'letter,' they do not say mail a 'writing' or receive by mail a 'writing.' In law

the term 'writing' is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds, notes, etc. In the Statute of Frauds, the word occurs in that sense in nearly every section. And in the many discussions to which this statute has given rise, these instruments are referred to as 'the writing' or 'some writing.' But in its most frequent and most familiar sense the term 'writing' is applied to books, pamphlets and the literary and scientific productions of authors. As, for instance, in that clause in the *United States* constitution which provides that Congress shall have power 'to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries.' In the statute under consideration, the word 'writing' is used as one of a group or class of words—book, pamphlet, picture, paper, writing, print—each of which is ordinarily and *prima facie* understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated. It must, therefore, according to a well defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written."

Written Contract.—A written contract is one which in all its terms is in writing. A contract partly in writing and partly oral is in legal effect an oral contract. Bishop on Contracts, §§ 163, 164. Railway Pass., etc., *Mut. Aid, etc., Assoc. v. Loomis*, 142 Ill. 567.

DENCE, vol. 17, p. 419; PRESUMPTIONS, vol. 19, p. 36; PRODUCTION OF DOCUMENTS, vol. 19, p. 227; RECITALS, vol. 20, p. 456; RECORDING ACTS, vol. 20, p. 527; REFORMATION OF INSTRUMENTS, vol. 20, p. 713; SECONDARY EVIDENCE, vol. 21, p. 984; SPELLING, vol. 23, p. 1; SUBPÆNA, vol. 24, p. 158; SUPPRESSION OF EVIDENCE, vol. 24, p. 707; TITLE (REAL PROPERTY), vol. 26, p. 20; USAGES AND CUSTOMS, vol. 27, p. 700. And see the various kinds of writings constituting independent titles.

WRONG—(*Compare* RIGHT, vol. 21, p. 466; TORTS, vol. 26, p. 72).—Wrong, in its broadest sense, includes every injury to another, independent of the motives causing the injury.¹

WRONGFULLY.—Wrongfully means in a wrong manner, unjustly, in a manner contrary to the moral law or to justice.²

YARD.—See note 3.

1. *Union Pac. R. Co. v. Henry*, 36 Kan. 570. But in that case it was held that, as used in an instruction as to negligence, "it means and could mean nothing but that kind of wrong the court was defining to the jury in defining negligence; that it was the failure to exercise great or extraordinary care, or a want of that care which an ordinarily prudent man would ordinarily exercise, or it is the want of slight diligence; and that the failure to take this kind of care where others are liable to injury, was the wrong as to which the court was charging the jury that an injury caused thereby was a *prima facie* case of compensation made out."

"A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore, the law, in giving redress, has in view the case of the party injured and the extent of his injury, and makes what he suffers the measure of compensation." *Williams v. Hays*, 143 N. Y. 447.

2. *Howard County v. Armstrong*, 91 Ind. 528.

Wrongfully Distinguished from Unlawfully.—The words *wrongfully* and *unlawfully* are not convertible terms. *Louisville, etc., R. Co. v. Payne* (Ind. 1895), 1 West. Rep. 185; *Howard County v. Armstrong*, 91 Ind. 528; *Durham v. Montgomery County*, 95 Ind. 182; *Henry County v. Murphy*, 100 Ind. 570.

Mistake.—An act may be wrongful although done by mistake. *Webber v. Quaw*, 46 Wis. 118.

3. **Cubic Yard**.—A cubic yard is a term well known to everyone. It means twenty-seven cubic feet. *Corcoran v. Chess*, 131 Pa. St. 356. And in that case it was held that where parties used the term in their contracts, they used it in its ordinary and proper meaning, and that, therefore, there was no ambiguity.

Railroad Yard.—"The yard of the company, as the court may know from its general knowledge of the methods and appliances of railroad companies, as well as from the evidence in this case, consists of side tracks upon either side of the main tracks, and adjacent to some principal station or depot grounds where cars are placed for deposit, and where arriving trains are separated and departing trains made up. It is the place where such switching is done as is essential to the proper placing of cars, either for deposit or for departure." *Harley v. Louisville, etc., R. Co.*, 57 Fed. Rep. 145.

In a Yard.—Where an indictment charged the use of abusive and profane language *in a yard*, it was held not to be sustained by proof of the use of such language *near the yard*. *Quin v. State*, 65 Miss. 479.

Courthouse Yard.—A statute prohibited the summoning of jurors within the *courthouse yard*. In a trial for murder, the sheriff summoned the jurors within twenty feet of the courthouse, which was situated in an uninclosed public square used as an open market and public resort. It was held

YEAR—(As to estates for years, or estates from year to year, see *LANDLORD AND TENANT*, vol. 12, p. 658; and as to computation of time, see *TIME*, vol. 26, p. 1).—The period in which the revolution of the earth around the sun, and the accompanying changes in the order of nature, are completed. Generally, when a statute speaks of a year, twelve calendar and not lunar months are intended. The year is either astronomical, ecclesiastical or regular, beginning on the first of January, or the 25th of March, or the day of the sovereign's accession.¹

YEARLING.—See note 2.

that the uninclosed square was not the courthouse yard. *Matthews v. State*, 6 Tex. App. 23.

English Statute.—A yard for bonding foreign timber, in which there were a deal shed and two buildings, with saw pits, is held not to be a yard within the English Commercial Ry. Act (*Stone v. Commercial R. Co.*, 9 Sim. 621).

Conveyance.—The parcels in a conveyance were described by reference to colored parts of a plan. A yard, delineated but not colored in the plan, was held to pass under the general word "yards." *Willis v. Watney*, 51 L. J. Ch. 181.

1. Wharton's Law Dictionary, citing *Bishop of Peterborough v. Catesby*, Cro. Jac. 166.

Whether Year Is Equivalent to Year of Our Lord.—In *Com. v. McLoon*, 5 Gray (Mass.) 91; 66 Am. Dec. 354, it was held that an indictment which stated the year of the commission of the offense in figures only, without prefixing the letters "A. D.," was insufficient.

But this rule has been changed by statute in many states. Thus, in *State v. Bartlett*, 47 Me. 392, it is said: "It is objected that the complaint, which described the offense as having been committed in the year 'eighteen hundred and fifty nine,' is defective, in that it does not state in what era this year occurred. Under the authority cited by the defendant, *Com. v. McLoon*, 5 Gray (Mass.) 91; 66 Am. Dec. 354, this defect would be deemed fatal. But by chapter 1, section 4, clause 11, Rev. Stat., it is provided that the word 'year,' used for a date, means the year of our Lord. This cures that defect." And see 1st Stimson's American Statute Law, p. 139; *Com. v. Doran*, 14 Gray (Mass.) 37; *Com. v. Sullivan*, 14 Gray (Mass.) 97.

Whether Calendar Year.—A year, unless from the context or otherwise a

different intent is gathered, is generally construed to mean a calendar year. *Fretwell v. McLemore*, 52 Ala. 145; *Owen v. Slatter*, 26 Ala. 549; 62 Am. Dec. 745; *Bishop of Peterborough v. Catesby*, Cro. Jac. 166; *Engleman v. State*, 2 Ind. 91; 52 Am. Dec. 494; *U. S. v. Dickson*, 15 Pet. (U. S.) 162.

The meaning of the term, however, must be determined from the connection in which it is used. *Knode v. Baldridge*, 73 Ind. 54; *Thornton v. Boyd*, 25 Miss. 598.

Thus, where there was a contract to sell all fruits which might be raised during a certain year on a certain farm, and a portion of the purchase price was to be paid "when the crop is taken off at the end of the year," it was held that by the end of the year was meant end of the fruit season. *Brown v. Anderson*, 77 Cal. 238. And where applied to matters of revenue there is a presumption in favor of referring the word year to the fiscal year. *Glasgow v. Rouse*, 43 Mo. 479.

And so, where an officer is elected to fill the term of one year, this has been held to mean from the time the officer is chosen until the next election. *Paris v. Hiram*, 12 Mass. 262.

Term of Years.—(See also *LANDLORD AND TENANT*, vol. 12, p. 688).—Where a statute imposes additional punishment upon a second conviction and sentence for a term of years, that expression includes sentences for life. *Com. v. Evans*, 16 Pick. (Mass.) 448.

2. **Indictment**.—A description, in an indictment for larceny, of the property stolen as a "yearling" was held insufficient in *Stollenwerk v. State*, 55 Ala. 142. The court said: "Any animal in the second year of its growth is a 'yearling.' The description in the present indictment is too indefinite. It may include many animals, for the stealing of which the act of February 20, 1875,

YEAS AND NAYS.—See STATUTES, vol. 23, p. 140.

YIELD.—See note 1.

YIELDING AND PAYING.—These are the words used at the beginning of the *reddendum* clause of a lease in reference to the rent payable under the lease. No special form of words is, however, essential.²

YOKE.—See note 3.

YOUTH.—See note 4.

does not provide. If the indictment had charged that the animal stolen, describing it, was 'an animal of the cow kind,' it would have been sufficient. Nor is the indictment a sufficient charge of petit larceny. The animal may have been one which had no recognized money value. The motion in arrest of judgment should have been sustained."

But in *Berryman v. State*, 45 Tex. 1, it was held an indictment for theft of "a bull yearling" is sufficient under the statutes for theft of cattle. The court said: "As understood in common language, a 'yearling' comes under the denomination of cattle, and is so classed in other statutes for the protection of cattle."

1. In *Struthers v. Clark*, 30 Pa. St. 213, it was said that the word *yield* implies a natural accretion from the business of a company.

2. *Abbott's Law Dictionary*.

The words "yielding" and "paying" make an implied covenant only, and the lessee is not liable, therefore, for rent after he has assigned his term. *Kimpton v. Walker*, 9 Vt. 191.

3. **Exemptions.**—In *Mallory v. Berry*, 16 Kan. 294, it was held that an unbroken steer was exempt from execution under a statute exempting one yoke of oxen. The court said: "The expression 'yoke of oxen,' as used in an exemption statute, does not necessarily imply cattle already broke to work. If they are cattle intended by the owner for use as work cattle, and old enough to be so used, it seems to us that they are fairly within the purview of the statute. A 'horse' is exempt; but at what particular age an animal ceases to be a colt and becomes a horse, is not specified in the statute. Is he considered to be a colt, whatever his age, until broke to saddle or harness? Or does he become a horse as soon as broke, no matter how young? One fair test, it would seem, is that he is old enough to be worked, and bought or

raised by the owner therefor. We find several decisions in other states which throw light on this case. In *Carruth v. Grassie*, 11 Gray (Mass.) 211; 71 Am. Dec. 707, under a statute exempting a cow, a heifer only twenty months old, and not giving milk for more than a year thereafter, was held to be exempt, it appearing that the owner was raising it for his family cow. Under a like statute, in *Dow v. Smith*, 7 Vt. 465; 29 Am. Dec. 202, a heifer, forward with calf, was declared exempt; and later, by the same court, in *Freeman v. Carpenter*, 10 Vt. 433; 33 Am. Dec. 210, a heifer not with calf was also adjudged exempt. In *Mundell v. Hammond*, 40 Vt. 641, two calves, less than a year old, were held to be exempt under a statute exempting a yoke of oxen or steers. See also, construing exemption statutes, *Harthouse v. Rikers*, 1 Duer (N. Y.) 606; *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659. Under the ruling of the district court, a poor man, unable to purchase a yoke of oxen already broken and trained to work, who should purchase a couple of young, unbroken cattle, although old enough to be worked, intending to break them himself and thus save that expense, could not hold them exempt, while his more prosperous neighbor, who can afford to pay the added cost of breaking, buys a yoke of cattle already broken, and holds them against his creditors. This does not seem like carrying out the spirit of the exemption law, which was intended for the benefit of the poor man, and should be so construed as to secure protection to those most in need of it." See also *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659; *Bowzey v. Newbegin*, 48 Me. 410.

4. When a fund is left in trust to support a school for "youths," the proceeds may be spent to support a school for both sexes, and the trustees are not bound to carry on the school for boys alone. *Nelson v. Cushing*, 2 Cush. (Mass.) 519.



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